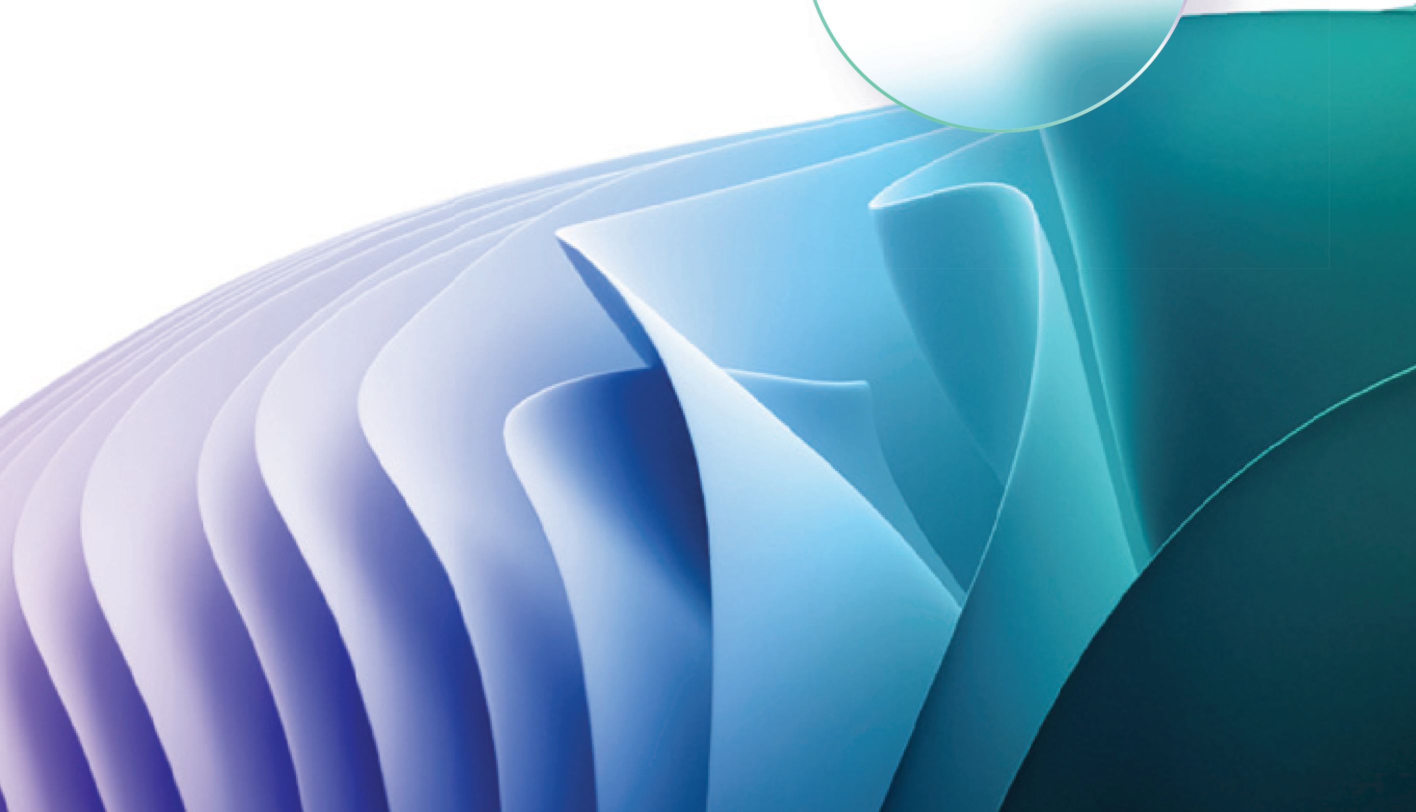
PROXY

SEASON FIELD GUIDE

David M. Lynn - Morrison Foerster

10TH EDITION



THE PROXY SEASON FIELD GUIDE

Acknowledgements: David M. Lynn, Co-Chair of Morrison Foerster's Corporate Finance | Capital Markets Practice, is the author of the Proxy Season Field Guide. Mr. Lynn's practice is focused on advising a wide range of clients on SEC matters, securities transactions and corporate governance. Mr. Lynn previously served as Chief Counsel of the U.S. Securities and Exchange Commission's Division of Corporation Finance. Mr. Lynn co-authored *The Executive Compensation Disclosure Treatise and Reporting Guide* and serves as Senior Editor of *TheCorporateCounsel.net*, *CompensationStandards.com The Corporate Counsel* and *The Corporate Executive*.

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EXECUTIVE SUMMARY

The 2023 proxy season occurs in an environment of heightened shareholder activism and an ever-increasing focus on compensation and corporate governance disclosures. This Proxy Season Field Guide provides you with an overview of recent legislative, regulatory and shareholder developments, and provides guidance on how these developments will impact you in the 2023 proxy season.

The Legislative and Regulatory Developments Shaping the Proxy Season

On July 21, 2010, former President Obama signed into law what was then called the most sweeping set of financial reforms since the Great Depression, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"). While this legislation focused principally on changes to the financial regulatory system, several corporate governance and compensation provisions of the Dodd-Frank Act continue to impact public companies. The corporate governance and compensation provisions include:

- A requirement that public companies solicit an advisory vote on executive compensation ("Say-on-Pay"), an advisory vote on the frequency of Say-on-Pay votes ("Say-on-Frequency") and, in the event of a merger or other extraordinary transaction, an advisory vote on certain "golden parachute" payments ("Say-on-Golden Parachutes");
- Requirements that the Securities and Exchange Commission ("SEC") adopt rules directing the securities exchanges to adopt listing standards with respect to compensation committee independence and the use of consultants;
- Provisions calling for the SEC to adopt expanded disclosure in the annual proxy statement and other filings, particularly in the area of executive compensation, such as disclosure of pay versus performance, the ratio of CEO pay to the pay of a median employee, and policies with regard to hedging transactions conducted by employees and directors; and
- Provisions that require the adoption or revision of certain other policies, such as compensation recovery policies providing for the recovery of executive compensation in the event of a financial restatement.

The SEC and the stock exchanges have adopted new rules and standards to implement the requirements of the Dodd-Frank Act discussed above. Most of the key provisions of the Dodd-Frank Act that are in place for the 2023 proxy season have shaped disclosure and engagement practices over the past dozen years.

In the past few years, the SEC adopted numerous rules and rule amendments that will shape the 2023 proxy season and proxy seasons to come. The changes include:

- Significant amendments to the description of business, risk factors, legal proceedings, Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A") and financial disclosure requirements;
- Provisions addressing the regulation of proxy voting advice provided by proxy advisory firms;
- Amendments to Rule 14a-8, the shareholder proposal rule, which increase submission and resubmission thresholds and introduce certain procedural safeguards;
- Amendments to the proxy rules to mandate the use of a universal proxy card in contested director elections;
- Amendments to Item 402 of Regulation S-K that require disclosure of the relationship between executive compensation actually paid and various measures of performance; and
- A rule directing the national securities exchanges to adopt listing standards that require the recovery of incentive compensation that has been erroneously awarded in the event of a restatement.

Say-on-pay

Say-on-Pay now serves as a cornerstone of the disclosure and engagement efforts that public companies undertake each proxy season. Advocates for Say-on-Pay in the United States hoped that the advisory votes on executive compensation would serve to encourage greater accountability for executive compensation decisions, as well as more focused compensation disclosure in proxy statements and expanded shareholder engagement. In many ways, these objectives have been realized as Say-on-Pay has matured over the past dozen years.

The SEC rules for Say-on-Pay provide:

- Issuers must provide a separate shareholder advisory vote in proxy statements to approve the compensation of executives not less than every three years. Shareholders must vote, on an advisory basis, to approve the compensation of the issuer's named executive officers, as such compensation is disclosed under Item 402 of Regulation S-K, including the Compensation Discussion and Analysis ("CD&A"), the compensation tables, and other narrative executive compensation disclosures required by Item 402. The rule does not require issuers to use any specific language or a specific form of resolution; however, an Instruction to the Rule provides a non-exclusive example of a form of resolution;

- Issuers must provide a separate shareholder advisory vote in proxy statements for annual meetings to determine whether the vote on the compensation of executives will occur every one, two, or three years. This Say-on-Frequency vote is required not less frequently than once every six years;
- Issuers must explain in the proxy statement the general effect of the Say-on-Pay votes (i.e., the vote is non-binding), and also must disclose, when applicable, the current frequency of Say-on-Pay votes and when the next Say-on-Pay vote will occur;
- Say-on-Pay and Say-on-Frequency votes do not trigger the filing of a preliminary proxy statement with the SEC;
- Issuers are able to exclude shareholder proposals that would provide a Say-on-Pay vote, seek future Say-on-Pay votes, or relate to the frequency of Say-on-Pay votes in certain circumstances when, in the most recent Say-on-Frequency vote, a single frequency received a majority of votes cast and the issuer adopted a policy for the frequency of Say-on-Pay votes that is consistent with that choice;
- The CD&A must disclose whether and, if so, how the issuer has considered the results of the most recent shareholder advisory vote on executive compensation in determining compensation policies and decisions and, if so, how that consideration has affected the issuer's compensation decisions and policies; and
- Issuers must report, pursuant to Item 5.07 of Form 8-K, the decision as to how frequently the issuer will conduct its Say-on-Pay votes following each Say-on-Frequency vote. If the information is provided by amendment to the Form 8-K, the amendment is due no later than 150 calendar days after the date of the end of the annual meeting in which the Say-on-Frequency vote occurred, but in no event later than 60 calendar days prior to the deadline for the submission of shareholder proposals for the next annual meeting as disclosed in the proxy materials for the meeting at which the Say-on-Frequency vote occurred.

During the 2022 proxy season, only 3.7 percent of issuers in the Russell 3000 failed to achieve majority shareholder support for mandatory Say-on-Pay resolutions. The relatively high level of shareholder support for Say-on-Pay resolutions during the 2022 proxy season was very similar to the experience for issuers that conducted Say-on-Pay votes since the SEC adopted the Say-on-Pay requirement. In the past dozen years, shareholders have generally provided strong support for Say-on-Pay proposals, except in situations where there are significant concerns with the company's executive compensation programs. Even with the likelihood of shareholder support relatively high for Say-on-Pay resolutions, companies have paid very close attention to the message communicated through their CD&A and other disclosures, while at the same time seeking to engage with key shareholder constituencies.

A key agenda item for the compensation committee remains the consideration of the outcome of the most recent Say-on-Pay vote. This is because a "mandatory" CD&A item requires that an issuer must address whether and, if so, how the issuer has considered the results of the most recent Say-on-Pay vote in determining compensation policies and decisions and, if so, how that consideration has affected the company's executive compensation decisions and policies. An issuer that failed to achieve majority support or that received majority support but less than 70% in support for the Say-on-Pay proposal must provide substantial disclosures regarding the engagement efforts that the issuer undertook to understand the reasons for the lack of support, the consideration by the compensation committee of the vote and the results of the engagement efforts, and the specific steps undertaken with the executive compensation program that responded to shareholders' concerns.

When drafting the proxy statement for 2023, the same focus on transparency and communicating an effective message that characterized the past several proxy seasons should carry through. It remains critically important for the CD&A to reflect the notable aspects of the compensation policies and decisions, while highlighting the pay-for-performance aspects of compensation plans.

Key Disclosure Considerations for Proxy Statements and Annual Reports

The SEC Staff (the "Staff") has come to expect that issuers are aware of the interpretive positions taken by the Staff in comment letters on filings, which often reflect nuanced readings of the rules or require more detailed disclosure than might otherwise be expected. It has become increasingly important that issuers make themselves familiar with Staff comment letters that have been issued to other issuers, so that they can respond to the issues raised in those letters when preparing their own filings.

Over the past several years, the SEC has provided significant guidance with respect to its interpretation of executive compensation disclosure rules, including numerous Staff speeches, interpretations and comments on individual filings. There are a number of significant areas of focus in Staff comments and other interpretive guidance on executive compensation disclosure. For example, the Staff has repeatedly stated that an issuer's CD&A should focus on *how* and *why* the issuer arrived at specific executive compensation decisions and policies and should address why specific compensation decisions were made. Other principal areas of Staff comment in the CD&A have related to the disclosure of incentive plan performance targets, individual performance goals and benchmarking practices or processes.

Areas of frequent Staff comment in annual reports have addressed disclosure of goodwill impairment charges, loss contingency disclosures, liquidity, debt covenants, non-GAAP financial measures, disclosure controls and procedures, risks arising from the COVID-19 pandemic, risks arising from the war in Ukraine, cybersecurity risks, climate change risks, hypothetical risk factors, "little 'r' restatements and many other areas. Over the past several years, the SEC has also provided interpretive guidance outside of the comment process in several key areas relevant to preparing Form 10-Ks and proxy statements, including guidance on non-GAAP financial measures, the disclosure of operating metrics and key performance measures in MD&A, key areas of risk and the confidential treatment of certain information in SEC filings.

Shareholder Activism and Corporate Governance

Continued shareholder concerns over corporate governance and executive compensation issues will shape the outcome of votes in the 2023 proxy season. Issuers will need to continue to focus on voting policies of institutional shareholders and proxy advisory services when making corporate governance and executive compensation decisions. Shareholder proposals in 2022 focused on:

- Board and employee diversity;
- Climate change;
- Other environmental and social matters;
- Compensation-related proposals;
- Majority voting for directors;
- Shareholder ability to call special meetings and take action by written consent;
- Declassified board of directors;
- Proxy access shareholder proposals, including “fix-it” proposals;
- Disclosure, limits, board oversight, and shareholder approval or ratification of political contributions and lobbying; and
- Independent board chair proposals.

Institutional Shareholder Services (“ISS”) and Glass Lewis & Co. (“Glass Lewis”) released 2023 updates to their U.S. proxy voting guidelines, addressing, among other issues, overboarding, board diversity, climate change, oversight of ESG matters, racial equity audits, political expenditures and lobbying, officer indemnification and exculpation, unequal voting rights, adverse governance structures of newly-public issuers, unilateral charter or bylaw amendments, short-term poison pills and compensation decisions. Topics such as board diversity, director compensation and overboarding continue to be of interest to institutional investors.

Conclusion

The 2023 proxy season will continue to present challenges for issuers as they seek to obtain strong support for their Say-on-Pay votes, while at the same time remaining attentive to ongoing shareholder concerns regarding corporate governance, ESG matters and executive compensation. This Proxy Season Field Guide will provide you with the resources necessary to successfully navigate the 2023 proxy season.

CHAPTER 1

THE LEGISLATIVE AND REGULATORY DEVELOPMENTS SHAPING THE PROXY SEASON

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On July 21, 2010, former President Obama signed into law what was called the most sweeping set of financial reforms since the Great Depression, the Dodd-Frank Act. The Dodd-Frank Act focuses principally on changes to the financial regulatory system; however, several corporate governance and compensation provisions of the Dodd-Frank Act target public companies. The corporate governance and compensation provisions include:

- A requirement that public companies solicit a Say-on-Pay vote, a Say-on-Frequency Vote and, in the event of a merger or other extraordinary transaction, a Say-on-Golden Parachute vote;
- Requirements that the SEC adopt rules directing the securities exchanges to adopt listing standards with respect to compensation committee independence and the use of consultants;
- Provisions calling for the SEC to adopt expanded disclosure requirements for the annual proxy statement and other filings, particularly in the area of executive compensation; and
- Provisions that will require the adoption or revision of certain other policies, such as compensation recovery policies providing for the recovery of executive compensation in the event of a financial statement restatement.

To date, almost all of the rules and standards called for by the Dodd-Frank Act have been adopted or fully implemented. In 2022, the SEC adopted amendments to Item 402 of Regulation S-K that require disclosure of the relationship between executive compensation actually paid and various measures of performance, as well as a rule directing the national securities exchanges to adopt listing standards that require the recovery of incentive compensation that has been erroneously awarded in the event of a restatement and related disclosure requirements regarding compensation recovery policies.

Advisory Votes On Executive Compensation

Say-on-Pay and Say-on-Frequency

For larger public issuers, beginning with shareholder meetings occurring on or after January 21, 2011, Section 951 of the Dodd-Frank Act required that issuers include a resolution in their proxy statements asking shareholders to approve, in a non-binding vote, the compensation of their executive officers, as disclosed under Item 402 of Regulation S-K. A separate resolution is also required to determine whether this Say-on-Pay vote takes place every one, two, or three years.

On January 25, 2011, the SEC adopted rules implementing Say-on-Pay and the related advisory vote on executive compensation provisions. The new rules and amendments to existing rules became effective on April 4, 2011, except that the Say-on-Golden Parachute requirements became effective for filings made on or after April 25, 2011, for all issuers.

A complete description of these rules, rule amendments and applicable SEC and Staff interpretations is provided in Chapter 2.

The applicable rules and rule amendments are as follows:

- Rule 14a-21(a) requires that issuers must provide a separate shareholder advisory vote in proxy statements to approve the compensation of executives not less than every three years. In accordance with Section 14A(a)(1) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), shareholders must vote, on an advisory basis, to approve the compensation of the issuer's named executive officers, as such compensation is disclosed under Item 402 of Regulation S-K, including the CD&A, the compensation tables and other narrative executive compensation disclosures required by Item 402. The rule does not require issuers to use any specific language or a specific form of resolution; however, an Instruction to Rule 14a-21 provides a non-exclusive example of a form of resolution. The shareholder vote must relate to all executive compensation disclosure set forth pursuant to Item 402 of Regulation S-K, with the exception of disclosure provided pursuant to paragraph (s) of Item 402 of Regulation S-K and director compensation required by paragraph (k) or (r) of Item 402 of Regulation S-K;
- Rule 14a-21(b) requires that issuers provide a separate shareholder advisory vote in proxy statements for annual meetings to determine whether the vote on the compensation of executives required by Section 14A(a)(1) of the Exchange Act "will occur every 1, 2, or 3 years." This Say-on-Frequency vote is required not less frequently than once every six years;
- Item 24 of Schedule 14A requires disclosure that the issuer is providing the vote pursuant to Section 14A of the Exchange Act, as well as an explanation of the general effect of the Say-on-Pay votes (i.e., the vote is non-binding). Issuers also must disclose, when applicable, the current frequency of Say-on-Pay votes and when the next Say-on-Pay vote will occur;
- Rule 14a-6(a) includes Say-on-Pay and Say-on-Frequency votes in the list of items that do not trigger the filing of a preliminary proxy statement;
- A Note to Rule 14a-8(i)(10) permits the exclusion of a shareholder proposal that would provide a Say-on-Pay vote, seek future Say-on-Pay votes, or relate to the frequency of Say-on-Pay votes in certain circumstances. Such shareholder proposals could be excluded under the Note if, in the most recent Say-on-Frequency vote, a single frequency received a majority of votes cast and the

issuer adopted a policy for the frequency of Say-on-Pay votes that is consistent with that choice. For the purposes of this Note, the SEC states that an abstention would not count as a vote cast;

- An amendment to Item 402(b) of Regulation S-K requires an issuer to address, in the CD&A, whether and, if so, how the issuer has considered the results of the most recent shareholder advisory vote on executive compensation (as required by Exchange Act Section 14A or Exchange Act Rule 14a-20) in determining compensation policies and decisions and, if so, how that consideration has affected the issuer's compensation decisions and policies. This requirement is included among the "mandatory" CD&A disclosure items specified by Item 402(b)(1) of Regulation S-K; and
- An amendment to Item 5.07 of Form 8-K requires that an issuer must disclose its decision as to how frequently the issuer will conduct Say-on-Pay votes following each Say-on-Frequency vote. In order to comply with this requirement, an issuer must disclose the determination in the original Form 8-K or file an amendment to its original Form 8-K filing (or filings) that disclosed the preliminary and final results of the Say-on-Frequency vote. The Form 8-K amendment is due no later than 150 calendar days after the date of the end of the annual meeting in which the Say-on-Frequency vote occurred, but in no event later than 60 calendar days prior to the deadline for the submission of shareholder proposals as disclosed in the proxy materials for the meeting at which the Say-on-Frequency vote occurred. Specifically with respect to Say-on-Frequency votes, an issuer must disclose the number of votes cast for each of the choices, as well as the number of abstentions in Item 5.07 of Form 8-K.

Say-on-Golden Parachutes

Rule 14a-21(c) provides that if a solicitation is made by an issuer for a meeting of shareholders at which the shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all of the assets of the issuer, the issuer must provide a separate shareholder vote to approve any agreements or understandings and compensation disclosed pursuant to Item 402(t) of Regulation S-K. Consistent with Exchange Act Section 14A(b), any agreements or understandings between an acquiring company and the named executive officers of the issuer, where the issuer is not the acquiring company, are not required to be subject to the separate shareholder advisory vote.

If any of the agreements or understandings contemplated in Rule 14a-21(c) previously have been subject to a shareholder advisory vote or the Say-on-Pay vote, then a separate shareholder vote is not required at the time of the vote on the merger or other similar extraordinary transaction. If there are changes to the arrangements after the date of the annual meeting or if new arrangements are adopted that were not subject to a prior Say-on-Pay vote, then a Say-on-Golden Parachutes vote is still required. In that case, the vote is required only with respect to the amended golden parachute payment arrangements.

The SEC adopted Item 402(t) of Regulation S-K, which requires disclosure of named executive officers' golden parachute arrangements in a proxy statement for shareholder approval of a merger, sale of a company's assets, or similar transactions. This disclosure is only required in annual meeting proxy statements when an issuer is seeking to rely on the exception from a separate merger proxy shareholder vote by including the proposed Item 402(t) disclosure in the annual meeting proxy statement soliciting a Say-on-Pay vote. The disclosure includes a table labeled "Golden Parachute Compensation," as well as detailed narrative disclosure about the arrangements pursuant to which the compensation is to be paid. The disclosure is also required under a variety of rules and forms; however, the SEC made clear that Item 402(t) disclosure is not required in third-party bidders' tender offer statements, so long as the subject transactions are not also Exchange Act Rule 13e-3 going-private transactions.

Compensation Committees and Compensation Consultants

The Dodd-Frank Act requires that stock exchange listing standards prescribe that compensation committee members be independent in light of the Dodd-Frank Act standards and that a compensation committee may only select compensation consultants, legal counsel, or other advisers after taking into consideration independence standards established by the SEC. The Dodd-Frank Act requires that these independence factors include:

- The provision of other services by the person that employs the adviser;
- The amount of fees received as a percentage of an entity's total revenue;
- Policies and procedures designed to prevent conflicts of interest;
- Any business or personal relationship of the adviser with a member of the compensation committee; and
- Any stock of the company owned by an adviser.

Further, the compensation committee must be vested with direct authority for the appointment, compensation, and oversight of the work of the consultant.

Enhanced disclosure is also required by the SEC, addressing whether the compensation committee retained or obtained the advice of a compensation consultant and whether the consultant's work raised any conflicts of interest, the nature of any such conflict, and how it was addressed. In December 2009, the SEC adopted rules requiring disclosure of fees paid to compensation consultants when they provide executive compensation consulting and additional services.

SEC Rulemaking

On June 20, 2012, the SEC adopted Rule 10C-1, which directs the national securities exchanges to adopt listing standards requiring that each member of a compensation committee must be an independent member of the board of directors. Neither the Dodd-Frank Act nor the SEC's final rule specifically define independence for this purpose; however, consistent with Section 10C of the Exchange Act, the national securities exchanges must consider: (1) the sources of compensation of the director, including any consulting, advisory or other compensatory fee paid by the company to the director; and (2) whether the director is affiliated with the company or any of its subsidiaries or their affiliates.

The SEC provided the national securities exchanges with more discretion in setting the definition of independence than is available with respect to the independence of audit committee members as required pursuant to the Section 10A(m) of the Exchange Act. The SEC did not adopt any additional factors to be considered by the national securities exchanges in establishing their listing standards. The SEC did not adopt any "look back" period to be applied with respect to the independence determination, leaving it to the national securities exchanges to determine whether to adopt a look back period.

Rule 10C-1 also directs the national securities exchanges to prohibit the listing of an equity security of an issuer that is not in compliance with the following standards:

- The compensation committee, in its sole discretion, must have authority to obtain or retain the advice of compensation advisers;
- The compensation committee must be directly responsible for the appointment, retention, compensation and oversight of the work of any compensation advisers; and
- The issuer must provide the appropriate funding for the payment of reasonable compensation, as determined by the compensation committee, to the compensation advisers, if any.

Under the rule as adopted, a compensation committee is expressly permitted to receive advice from a non-independent adviser, such as in-house counsel or a compensation consultant engaged by management. The SEC made clear that the final rule would not require that the compensation committee act in accordance with the advice of compensation advisers or otherwise affect the ability or obligation of the compensation committee to exercise its own judgment. Further, the final rule and the resulting listing standards are not intended to preclude the engagement of non-independent legal counsel or obtaining advice from in-house or outside counsel retained by the company or the company's management.

Rule 10C-1 also directs the national securities exchanges to adopt listing standards requiring that the compensation committee consider the independence factors specified in Rule 10C-1, as well as any other relevant factors identified by the national securities exchanges, prior to engaging any compensation advisers. The SEC did not define or provide further clarification regarding any of the factors specified in Section 10C, however it did adopt one additional factor, which is any business or personal relationships between the company's executive officers and the compensation adviser or the firm employing the compensation adviser.

Further, in accordance with Section 10C, the SEC adopted an amendment to expand its current disclosure requirements regarding compensation consultants. The SEC amended Item 407 of Regulation S-K to specifically require that a company disclose the nature of any conflict of interest and how it is being addressed if the work of the compensation consultant raised a conflict of interest. While the SEC has not defined what constitutes a conflict of interest, Item 407 provides that the same six factors specified in Rule 10C-1 should be considered in determining if a conflict of interest exists.

Exchange Listing Standards

Pursuant to Rule 10C-1, the national securities exchanges were directed to provide the SEC with proposed changes to their listing standards related to compensation committee and adviser independence. The New York Stock Exchange ("NYSE") and Nasdaq submitted their proposed changes to the SEC on September 25, 2012. Both exchanges later submitted amendments to their proposals and the SEC approved the exchanges' proposals, as amended, on January 11, 2013. Further amendments to Nasdaq's standards were approved in December 2013.

Independence of Compensation Committee Members

Under Rule 10C-1, the exchanges were directed to adopt listing standards related to the independence of compensation committee members. Although neither the Dodd-Frank Act nor Rule 10C-1 specifically defines independence for this purpose, the listing standards adopted by national securities exchanges must consider:

- The sources of compensation of the director, including any consulting, advisory, or other compensatory fee paid by the company to the director; and
- Whether the director is affiliated with the company or any of its subsidiaries or their affiliates.

Rule 10C-1 provided the exchanges with more discretion in setting the definition of independence than is permitted in determining the independence of audit committee members. In its rulemaking, the SEC did not adopt any additional factors to be considered by the exchanges in establishing their listing standards beyond what was required under the Dodd-Frank Act, which left open the possibility that the exchanges would consider and adopt additional relevant factors to be considered when determining whether a compensation committee member is independent.

The NYSE and Nasdaq listing standards do not, however, include any additional criteria to be considered in determining whether a member of the compensation committee is independent. The commentary to both the NYSE's and Nasdaq's proposals made clear that in order to be considered independent, members of the compensation committee must meet both the general independence criteria already included in the exchanges' listing standards and the compensation committee-specific criteria required by Rule 10C-1.

The NYSE listing standards provide some guidance as to how issuers should apply the two factors listed above in making an independence determination. With respect to sources of compensation, the commentary to the NYSE standards instructs the listed company's board to consider whether the director receives compensation from any person or entity that would impair the director's ability to make independent judgments about the listed company's executive compensation. Similarly, when considering any affiliate relationship, the commentary to the listing standards instructs the board to consider whether there is an affiliate relationship that places the director "under the direct or indirect control of the listed company or its senior management, or creates a direct relationship between the director and members of senior management, in each case of a nature that would impair his ability to make independent judgments about the listed company's executive compensation." The NYSE specifically declined to include a bar on independence based solely on affiliate status due to stock ownership.

Nasdaq amended its listing standards in December 2013 to harmonize the compensation committee-specific independence standards with these standards adopted by the NYSE. As amended, Nasdaq Rule 5605(d)(2)(A) provides that "in affirmatively determining the independence of any director who will serve on the compensation committee of a board of directors, the board of directors must consider all factors specifically relevant to determining whether a director has a relationship to the Company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to: (i) the source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the Company to such director; and (ii) whether such director is affiliated with the Company, a subsidiary of the Company or an affiliate of a subsidiary of the Company." The focus of this analysis is on independence from management, and the revised interpretive material (IM-5605-6) makes clear that compensation must be evaluated in the context of whether it could affect judgments regarding executive compensation, noting "[w]hen considering the sources of a director's compensation for this purpose, the board should consider whether the director receives compensation from any person or entity that would impair the director's ability to make independent judgments about the Company's executive compensation." The revised interpretation also states that when considering affiliate relationships, the board should consider whether the affiliate relationship places the director under the "direct or indirect control of the Company or its senior management, or creates a direct relationship between the director and members of senior management, in each case of a nature that would impair the director's ability to make independent judgments about the Company's executive compensation."

Compensation Committee Authority and Funding

Rule 10C-1 also directed the exchanges to prohibit the listing of a security of an issuer that is not in compliance with the following standards:

- The compensation committee, which for this purpose includes those members of a the board of directors who oversee executive compensation matters on behalf of the board of directors in the absence of a board committee, must be directly responsible for the appointment, compensation, and oversight of the work of any compensation advisers;
- The compensation committee, in its sole discretion, must have authority to retain or obtain the advice of compensation advisers;
- The issuer must provide the appropriate funding for the payment of reasonable compensation, as determined by the compensation committee, to the compensation advisers, if any; and
- Before selecting any compensation adviser, the compensation committee must take into consideration the six independence criteria specified in Rule 10C-1 (described below), as well as any additional factors specified in the listing criteria adopted by the exchanges.

The SEC made clear that Rule 10C-1 does not require that the compensation committee act in accordance with the advice of compensation advisers or otherwise affect the ability or obligation of the compensation committee to exercise its own judgment. Further, Rule 10C-1 and the resulting listing standards are not intended to preclude obtaining advice from in-house counsel. Rule 10C-1 and both exchanges' listing standards also make clear that while the compensation committee must conduct an independence assessment in selecting a compensation adviser, companies may still retain and seek advice from advisers who are not independent (subject to the new compensation adviser disclosure requirements in Item 407 of Regulation S-K).

The NYSE and Nasdaq listing standards both require companies to impose the requirements listed above on their compensation committees. The NYSE noted in its commentary that the required powers of the compensation committee set forth above had in significant part already been required by existing NYSE listing standards, which require these powers to be included in the compensation committee charter. In any case, the NYSE adopted the requirements noted above exactly as they appear in Rule 10C-1, and removed the comparable requirements included in existing NYSE listing standards. Nasdaq's listing standards also require that, subject to certain exceptions described below, listed companies adopt a formal compensation committee charter that states that the compensation committee will review and reassess the adequacy of the charter on an annual basis.

Compensation Adviser Independence

Rule 10C-1 also directed the exchanges to adopt listing standards requiring that the compensation committee consider the independence factors specified in Rule 10C-1, as well as any other relevant factors identified by the exchange, prior to engaging any compensation advisers. The independence criteria specified in Rule 10C-1 are:

- The provision of other services to the company by the firm employing the compensation adviser;
- The amount of fees received from the company by the firm employing the compensation adviser, as a percentage of that firm's total revenue;
- The policies and procedures adopted by the firm employing the compensation adviser that are designed to prevent conflicts of interest;
- Any business or personal relationship of the compensation adviser with a member of the compensation committee;
- The compensation adviser's ownership of the company's stock; and
- Any business or personal relationships between the company's executive officers and the compensation adviser or the firm employing the adviser.

As with the criteria relating to compensation committee member independence, the new NYSE and Nasdaq listing standards do not include any additional factors to be considered in determining the independence of compensation advisers beyond those in Rule 10C-1.

Consistent with the compensation adviser disclosure requirements in Item 407 of Regulation S-K, the NYSE and Nasdaq listing standards provide that a compensation committee is not required to conduct the independence assessment with respect to a compensation adviser that acts in a role limited to:

(1) consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the registrant, and that is available generally to all salaried employees; or (2) providing information that either is not customized for a particular registrant or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice.

Exemptions and Applicability of Listing Standards

The listing standards for compensation committee member independence and compensation committee adviser independence do not apply to controlled companies, issuers of securities futures products cleared by a registered clearing agency or a clearing agency exempt from registration, or registered clearing agencies that issue standardized options. The following categories of companies are also exempt from the compensation committee member independence requirements:

- Limited partnerships;
- Companies in bankruptcy proceedings;
- Open-end management investment companies registered under the Investment Company Act of 1940;
- Foreign private issuers that disclose annually why they do not have an independent compensation committee; and
- Smaller reporting companies.

The NYSE and Nasdaq listing standards both include general exemptions for other categories of issuers that are currently exempt from their existing compensation committee requirements. These include passive business organizations and issuers whose only listed equity security is a preferred stock.

The listing standards of both the NYSE and Nasdaq already provide that a foreign private issuer may follow its home country's practice rather than U.S. compensation-related listing standards so long as the issuer discloses in its annual reports filed with the SEC each requirement that it does not follow and describes the home country practice the issuer follows in lieu of such requirements. Under both the NYSE and Nasdaq listing standards, a foreign private issuer that follows its home country's practice in lieu of the requirement to maintain an independent compensation committee must now also disclose in its annual reports filed with the SEC the reasons why it does not have such a committee.

Under both the NYSE and Nasdaq listing standards, smaller reporting companies are not required to adhere to the enhanced independence standards for compensation committee members or the compensation adviser independence considerations. Nasdaq's listing standards also permit smaller reporting companies to adopt a board resolution that specifies the compensation committee's responsibilities and authority in lieu of adopting a formal written compensation committee charter. Further, under Nasdaq's listing standards, smaller reporting companies are not required to include language regarding the committee's authority to retrain compensation advisers in the compensation committee charter or board resolutions. Under Nasdaq's listing standards, smaller reporting companies are also exempt from the requirement to review the compensation committee charter or board resolutions on an annual basis.

Implementation Timeline

Under the NYSE and Nasdaq listing standards, companies had until the earlier of (1) their first annual meeting after January 15, 2014, or (2) October 31, 2014, to comply with the compensation committee independence requirements. Issuers were required to comply with the other new standards, including those related to the funding and authority of the compensation committee and the independence of compensation committee advisers, by July 1, 2013.

Both the NYSE and Nasdaq listing standards provided listed companies with opportunities to cure compensation committee member independence issues after the standards went into effect. Under the NYSE listing standards, if a member of a compensation committee ceases to be independent for reasons outside the member's reasonable control, that member may remain on the compensation committee until the earlier of the next annual meeting or one year from the occurrence of the event that caused the member to be no longer independent. Notably, however, the cure period provided under the NYSE standards is limited to circumstances where the compensation committee continues to have a majority of directors who are independent under the listing standards. Under the Nasdaq listing standards, the listed company is required to cure any noncompliance by the earlier of the next annual shareholders' meeting or one year from the occurrence of the event that caused the noncompliance. Both exchanges' listing standards require companies to notify the relevant exchange upon learning of noncompliance.

The NYSE and Nasdaq listing standards both generally provide a phased-in compliance period for newly listed companies. These issuers are required to have one independent compensation committee member at the time of listing, a majority of independent compensation committee members within 90 days of listing, and all independent compensation committee members within one year of listing.

Expanded Compensation Disclosure

Several provisions of the Dodd-Frank Act required that the SEC further expand the disclosure requirements applicable for proxy statements and other filings to address several areas of compensation with respect to employees, executive officers, and directors; including:

- Disclosure of Pay versus Performance—Section 953(a) of the Dodd-Frank Act requires that the SEC adopt rules mandating that issuers disclose the relationship of the compensation actually paid to their executive officers versus the issuer's financial performance, taking into account changes in the value of stock and dividends or distributions. This disclosure may be presented graphically or in narrative form.

- Disclosure of CEO Pay versus Median Employee Pay—Section 953(b) of the Dodd-Frank Act requires that the SEC adopt rules mandating disclosure of the median annual total compensation of all employees (except the CEO), the annual total compensation of the CEO, and the ratio of the median employee total compensation to the CEO total compensation. Total compensation is determined by reference to the "total compensation" column of the Summary Compensation Table.
- Disclosure of Employee or Director Hedging Policies—Section 955 of the Dodd-Frank Act directs the SEC to adopt rules mandating disclosure of whether any employee or director (or designee of such persons) is permitted to purchase financial instruments, such as prepaid variable forwards, equity swaps, collars, and exchange funds, that are designed to hedge or offset any decrease in the market value of equity securities granted as compensation or held directly or indirectly by the employee or director.

The SEC adopted rules implementing pay versus performance disclosure, CEO pay ratio disclosure and disclosure of employee or director hedging policies.

Pay Versus Performance Disclosure

On August 25, 2022, the SEC adopted the pay versus performance disclosure requirements that that the agency was directed to promulgate by Section 953(a) of the Dodd-Frank Act.

The amendments adopted by the SEC add new paragraph (v) to Item 402 of Regulation S-K, which requires an issuer to describe the relationship between the executive compensation actually paid by the issuer and the financial performance of the issuer over the time horizon of the disclosure. Item 402(v) of Regulation S-K requires disclosure of the cumulative total shareholder return ("TSR") of the issuer (substantially as defined in Item 201(e) of Regulation S-K), the TSR of the issuer's peer group, the issuer's net income, and a measure chosen by the issuer and specific to the issuer (the "Company-Selected Measure") as the measures of financial performance. The amendments require that the information be presented in a tabular form as specified in the rule.

The disclosure required by Item 402(v) of Regulation S-K must be included in any proxy or information statement for which disclosure under Item 402 of Regulation S-K is required. The SEC does not require the pay versus performance disclosure in other filings where disclosure under Item 402 of Regulation S-K is required, such as in registration statements filed under the Securities Act of 1933, as amended (the "Securities Act").

Certain information required by Item 402(v) must be presented in the following tabular format, subject to certain exceptions for smaller reporting companies:

Year	Summary Compensation Table Total for PEO	Compensation Actually Paid to PEO	Average Summary Compensation Table Total for Non-PEO NEOs	Average Compensation Actually Paid to Non-PEO NEOs	Value of Initial Fixed $100 Investment Based On:		Net Income	[Company Selected Measure]
					Total Shareholder Return	Peer Group Total Shareholder Return		
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
Y1								
Y2								
Y3								
Y4								
Y5								

In addition, issuers must use the information in the above table to provide clear descriptions of the relationships between compensation actually paid and three measures of financial performance, as follows: describe the relationship between (a) the executive compensation actually paid to the issuer's PEO and (b) the average of the executive compensation actually paid to the issuer's remaining NEOs to (i) the cumulative TSR of the issuer, (ii) the net income of the issuer, and (iii) the issuer's Company-Selected Measure, in each case over the issuer's five most recently completed fiscal years. Issuers that do not use any financial performance measures to link executive compensation actually paid to issuer performance, or that only use measures already required to be disclosed in the table, would not be required to disclose a Company-Selected Measure or its relationship to executive compensation actually paid.

Issuers are also required to provide a clear description of the relationship between the issuer's TSR and the TSR of a peer group chosen by the issuer, also over the issuer's five most recently completed fiscal years. Companies will have flexibility as to the format in which to present the descriptions of these relationships, whether graphical, narrative, or a combination of the two. Smaller reporting companies are only required to present the descriptions with respect to the measures they are required to include in the table and for their three, rather than five, most recently completed fiscal years.

Issuers also must provide an unranked list of the most important financial performance measures used by the issuer to link executive compensation actually paid to the issuer's NEOs during the last fiscal year to issuer performance. While issuers may include non-financial performance measures in this list, they must select the Company-Selected Measure from the financial performance measures included in this list, and it must be the financial performance measure that, in the issuer's assessment, represents the most important performance measure (that is not otherwise required to be disclosed in the table) used by the issuer to link compensation actually paid to the issuer's NEOs, for the most recently completed fiscal year, to issuer performance.

Item 402(v) of Regulation S-K permits issuers to voluntarily provide supplemental measures of compensation or financial performance (in the table or in other disclosure), and other supplemental disclosures, so long as any such measure or disclosure is clearly identified as supplemental, not misleading, and not presented with greater prominence than the required disclosure.

For the purposes of Item 402(v) of Regulation S-K, the definition of "executive compensation actually paid" for a fiscal year is, generally, total compensation as reported in the Summary Compensation Table for that year (i) less the change in the actuarial present value of pension benefits, (ii) less the grant-date fair value of any stock and option awards granted during that year, (iii) plus the pension service cost for the year and, in the case of any plan amendments (or initiations), the associated prior service cost (or less any associated credit), and (iv) plus the change in fair value of outstanding and unvested stock and option awards during that year (or as of the vesting date or the date the issuer determines the award will not vest, if within the year) as well as the fair value of new stock and option awards granted during that year as of the end of the year (or as of the vesting date or the date the issuer determines the award will not vest, if within the year). Adjustments (i) and (iii) with respect to pension plans do not apply to smaller reporting companies, because they are not otherwise required to disclose executive compensation related to pension plans.

Under Item 402(v) of Regulation S-K, an issuer is required to disclose the cumulative TSR of the issuer, which is to be computed in accordance with the requirements set forth in Item 201(e) of Regulation S-K. Item 201(e) of Regulation S-K sets forth the specific disclosure requirements for the issuer's stock performance graph, which is required to be included in the annual report to security holders provided for Rules 14a-3 and 14c-3 under the Exchange Act. Item 201(e) provides that cumulative TSR is calculated by dividing the sum of the cumulative amount of dividends for the measurement period, assuming dividend reinvestment, and the difference between the issuer's share price at the end and the beginning of the measurement period; by the share price at the beginning of the measurement period.

The rules require an issuer to disclose the weighted peer group TSR (weighted according to the respective companies' stock market capitalization at the beginning of each period for which a return is indicated), using either the same peer group used for purposes of Item 201(e) of Regulation S-K or a peer group used in the CD&A for purposes of disclosing an issuer's compensation benchmarking practices. If the peer group is not a published industry or line-of-business index, the identity of the companies composing the group must be disclosed in a footnote. An issuer that has previously disclosed the composition of the companies in its peer group in prior filings with the SEC would be permitted to comply with this requirement by incorporation by reference to those filings. Consistent with the approach specified in Item 201(e) of Regulation S-K, if an issuer changes the peer group used in its pay-versus-performance disclosure from the one used in the previous fiscal year, it will be required to include tabular disclosure of peer group TSR for that new peer group (for all years in the table), but must explain, in a footnote, the reason for the change, and compare the issuer's TSR to that of both the old and the new peer group.

The final rules require issuers to separately tag each value disclosed in the table, block-text tag the footnote and relationship disclosure, and tag specific data points (such as quantitative amounts) within the footnote disclosures, all in Inline XBRL.

The final rules apply to all reporting companies except foreign private issuers, registered investment companies, and emerging growth companies. Business development companies are treated in the same manner as companies other than registered investment companies and, therefore, are subject to the disclosure requirement of new Item 402(v) of Regulation S-K.

Issuers must comply with these disclosure requirements in proxy and information statements that are required to include Item 402 executive compensation disclosure for fiscal years ending on or after December 16, 2022.

Issuers (except for smaller reporting companies) are required to provide the information for three years in the first proxy or information statement in which they provide the disclosure, adding another year of disclosure in each of the two subsequent annual proxy filings that require the Item 402(v) disclosure. Both issuer TSR and peer group TSR must be calculated based on a fixed investment of one hundred dollars at the measurement point.

Smaller reporting companies are required to provide disclosure under Item 402(v) of Regulation S-K, but the disclosure is scaled for those issuers, consistent with the existing scaled executive compensation disclosure requirements applicable to smaller reporting companies. Specifically, smaller reporting companies are:

- Only required to present three, instead of five, fiscal years of disclosure under Item 402(v) of Regulation S-K;
- Not required to disclose amounts related to pensions for purposes of disclosing executive compensation actually paid;

- Not required to present peer group TSR;
- Permitted to provide two years of data, instead of three, in the first applicable filing after the rules became effective; and
- Required to provide disclosure in the prescribed table in Inline XBRL format beginning in the third filing in which the smaller reporting company provides pay versus performance disclosure.

In February 2023, the Staff of the Division of Corporation Finance provided guidance regarding the pay versus performance disclosure requirements in new Regulation S-K Compliance and Disclosure Interpretations.

In Regulation S-K Compliance and Disclosure Interpretations Question 128D.01, the Staff indicates that the information required pursuant to Item 402(v) of Regulation S-K is not required to be included in an annual report on Form 10-K. The information required by Item 402(v) of Regulation S-K must be provided in connection with any proxy or information statement for which executive compensation disclosure pursuant to Item 402 of Regulation S-K is required. Furthermore, the Staff notes that information provided under Item 402(v) of Regulation S-K will not be deemed to be incorporated by reference into any filing under the Securities Act or Exchange Act, unless an issuer specifically incorporates it by reference.

In Regulation S-K Compliance and Disclosure Interpretations Question 128D.02, the Staff notes that the change in the value of equity awards that are granted to an issuer's NEO prior to that individual being appointed as a NEO are required to be to be included in the calculation of compensation actually paid under Item 402(v) of Regulation S-K.

In Regulation S-K Compliance and Disclosure Interpretations Question 128D.03, the Staff notes that, in an issuer's first Pay Versus Performance table, the issuer should provide footnote disclosure of each amount deducted and added to calculate the compensation actually paid to the PEO and the average of the compensation actually paid to the other NEOs for each of the periods presented in the table. After the first Pay Versus Performance table, issuers are required to provide footnote disclosure for years other than the most recent fiscal year only if it is material to an investor's understanding of the information reported in the Pay Versus Performance table or the relationship disclosure provided under Item 402(v)(5) of Regulation S-K.

In Regulation S-K Compliance and Disclosure Interpretations Question 128D.04, the Staff notes that Item 402(v)(3) of Regulation S-K requires footnote disclosure of each of the amounts deducted or added in calculating compensation actually paid. The Staff indicates that disclosing only the aggregate amount calculated for pension value adjustments and equity award adjustments does not satisfy the footnote disclosure requirement. The footnote disclosure must include each of the amounts deducted and added pursuant to Item 402(v)(2)(iii)(B) and Item 402(v)(2)(iii)(C) to calculate compensation actually paid to the PEO and average of the compensation actually paid to the other NEOs.

In Regulation S-K Compliance and Disclosure Interpretations Question 128D.05, the Staff notes that for the purposes of calculating the peer group TSR under Item 402(v)(2)(iv) of Regulation S-K, an issuer may use a peer group that is disclosed in its CD&A, even if such peer group is not used for benchmarking purposes under Item 402(b)(2)(xiv) of Regulation S-K, as that term is explained in Regulation S-K Compliance and Disclosure Interpretations Question 118.05. In Regulation S-K Compliance and Disclosure Interpretations Question 128D.07, the Staff indicates that an issuer electing to use the peer group from its CD&A should present the peer group TSR for each year in the Pay Versus Performance table using the peer group as disclosed in its CD&A for the respective period.

In Regulation S-K Compliance and Disclosure Interpretations Question 128D.06, the Staff notes that an issuer which went public during the earliest year included in the Pay Versus Performance table should calculate the TSR and peer group TSR beginning with the date that the issuer's class of securities was registered under Section 12 of the Exchange Act during the earliest year included in the table, consistent with the calculation of TSR under Item 201(e) of Regulation S-K.

In Regulation S-K Compliance and Disclosure Interpretations Question 128D.08, the Staff notes that an issuer is required to present in the Pay Versus Performance table its net income or loss as required by Regulation S-X in the issuer's audited GAAP financial statements. Other net income amounts, such as net income attributable to a controlling interest or income from continuing operations, cannot be reported in the Pay Versus Performance table for this purpose.

In Regulation S-K Compliance and Disclosure Interpretations Question 128D.09, the Staff notes that the Company-Selected Measure must be a financial performance measure that is not otherwise required to be disclosed in the Pay Versus Performance table, and the financial measures required to be reported in the Pay Versus Performance table include net income and the cumulative TSR of the issuer. The Staff notes that the Company-Selected Measure can be any financial performance measure that differs from the financial performance measures otherwise required to be disclosed in the table, including a measure that is derived from, a component of, or similar to, net income or cumulative TSR, such as earnings per share, gross profit, income or loss from continuing operations, or relative TSR. Further, in Regulation S-K Compliance and Disclosure Interpretations Question 128D.10, the Staff indicates that an issuer's stock price can be disclosed as a Company-Selected Measure only if the issuer uses its stock price to link the compensation actually paid to its NEOs to company performance, even if stock price has a significant impact on the amounts reported in the Pay Versus Performance table. Therefore, if the only impact of stock price on a NEO's compensation is through changes in the value of share-based awards (which would be evident from the issuer's Summary Compensation Table disclosure), the issuer could not include its stock price as the Company Selected Measure. By contrast, if the issuer's stock price is used as a market condition applicable to an incentive plan award or is used to determine the size of the bonus pool, it may be included as the issuer's Company-Selected Measure. In Compliance and Disclosure Interpretations Question 128D.11, the Staff notes that the Company-Selected Measure included in the Pay Versus Performance table cannot include a measure that is measured over a multi-year period that includes the relevant fiscal year as the final year, because the Company-Selected Measure is a measure which, in the issuer's assessment, represents the most important financial performance measure (that is not otherwise disclosed in the Pay Versus Performance table) used by the issuer to link compensation actually paid to the issuer's NEOs, for the most recently completed fiscal year, to the issuer's performance.

In Regulation S-K Compliance and Disclosure Interpretations Question 128D.12, the Staff addresses a situation where an issuer uses a "pool plan" to determine its annual bonus awards, where under the plan a bonus pool is available for payout only upon achievement of a financial performance measure or the size of the pool is determined based upon the extent such measure is achieved. Once that financial performance measure is achieved, the compensation committee may allocate bonus payouts to participants in its discretion, based on criteria independent of the achievement of any financial performance measure(s). In this example, the issuer's executive compensation does not use any other financial performance measures. The Staff indicates that the issuer may not omit the Tabular List required under Item 402(v)(6) of Regulation S-K and the Company-Selected Measure required under Item 402(v)(2)(vi) of Regulation S-K and the related relationship disclosure required under Item 402(v)(5)(iii) of Regulation S-K from its disclosure under Item 402(v) of Regulation S-K, because the size of the bonuses paid from the "bonus pool" is determined based wholly or in part on satisfying the financial performance measure, therefore the issuer is using the financial performance measure to link the executive compensation actually paid to company performance within the meaning of Item 402(v)(2)(vi) and Item 402(v)(6) of Regulation S-K.

In Regulation S-K Compliance and Disclosure Interpretations Question 128D.13, the Staff states that if an issuer has multiple PEOs in a fiscal year, the Staff will not object to the aggregation of the PEOs' compensation for purposes of the narrative, graphical or combined comparison between compensation actually paid and TSR, net income and the Company-Selected Measure.

In Regulation S-K Compliance and Disclosure Interpretations Interpretation 228D.01, the Staff indicates that if an issuer changes its fiscal year during the time period covered by the Pay Versus Performance table, the issuer must provide the disclosure required by Item 402(v) for the “stub period,” and the issuer may not annualize or restate compensation. For example, in late 2022, an issuer that is not a Smaller Reporting Company changed its fiscal year end from June 30 to December 31. In the issuer’s first Pay Versus Performance table, the issuer must provide disclosure for each of the following four periods: July 1, 2022 to December 31, 2022; July 1, 2021 to June 30, 2022; July 1, 2020 to June 30, 2021; and July 1, 2019 to June 30, 2020. The issuer would continue providing such disclosure including the stub period until there is disclosure for five full fiscal years after the stub period. The Staff notes that this approach is consistent with the approach applicable to reflecting changes in fiscal year end in the Summary Compensation Table, as addressed in Regulation S-K Compliance and Disclosure Interpretations Interpretation 217.05.

In Regulation S-K Compliance and Disclosure Interpretations Interpretation 228D.02, the Staff addresses a situation where an issuer emerged from bankruptcy, and a new class of stock that was issued under the bankruptcy plan started trading in September 2020. The Staff notes that, consistent with Regulation S-K Compliance and Disclosure Interpretations Interpretation 206.14, the issuer will be presenting less than five full years of data in its stock performance graph under Item 201(e) using a measurement period for the graph from September 2020 through December 2022. For purposes of the requirement in Item 402(v)(2)(iv) of Regulation S-K, the Staff indicates that the issuer may provide its cumulative TSR and peer group cumulative TSR in the same manner. The Staff states that the issuer should provide footnote disclosure to explain the approach and its effect on the Pay Versus Performance table.

CEO Pay Ratio Disclosure

On August 5, 2015, the SEC adopted the rules implementing Section 953(b) of the Act. The final rule added new paragraph (u) to Item 402 of Regulation S-K, which requires disclosure of the following:

A. The median of the annual total compensation of all employees of the company, except the CEO of the issuer;

B. The annual total compensation of the CEO of the issuer; and

C. The ratio of the amount in (B) to the amount in (A), presented as a ratio in which the amount in (A) equals one, or, alternatively, expressed narratively in terms of the multiple that the amount in (B) bears to the amount in (A).

The final rule also requires disclosure of the ratio such that the CEO's annual total compensation is always compared to the median employee's annual total compensation—the ratio must always show how much larger or smaller the CEO's annual total compensation is as compared to the median employee's annual total compensation. Issuers that are subject to the rule were required to provide the disclosure starting with the first fiscal year beginning on or after January 1, 2017. The final rules also include the following provisions:

- Filings Requiring Pay Ratio Disclosure. The pay ratio disclosure as set forth in the final rule is required in any filing that calls for executive compensation disclosure pursuant to Item 402 of Regulation S-K, including annual reports on Form 10-K and registration statements under the Securities Act of 1933, as amended (the "Securities Act"), as well as proxy materials to the same extent that these forms require compliance with Item 402 of Regulation S-K. The pay ratio disclosure, as with other Item 402 information, will be treated as "filed" for purposes of the Securities Act and Exchange Act and, as such, will be subject to potential liabilities under those statutes, including Section 18 liability under the Exchange Act.
- Definition of "Employee." The final rule defines "employee" to include an issuer's U.S. and non-U.S. employees, as well as its part-time, seasonal, and temporary employees employed by the issuer or any of its consolidated subsidiaries. Also included in this definition are all of a issuer's officers, other than the CEO. The definition of "employee" does not include independent contractors or "leased" workers employed by a third party and whose com-pensation is determined by the third party. An issuer can supplement its pay ratio disclosure or provide additional pay ratios for its shareholders to consider if it wants to explain the effect of including part-time, seasonal, and temporary employees on its CEO pay ratio disclosure. The final rule includes only employees of consolidated subsidiaries, as determined by reference to applicable accounting standards, rather than employees of all subsidiaries, as was originally proposed.
- Median Employee Determination Date. The final rule provides flexibility in choosing the median employee determination date, as opposed to the proposed rule, which proposed to define "employee" as an individual employed as of the last date of the company's last completed fiscal year. The final rule defines "employee" as an individual employed on any date of the issuer's choosing within the last three months of the issuer's last completed fiscal year. Issuers must disclose the date used to identify the median employee.
- Exemptions. In response to particular issues and concerns raised during the comment process, the final rule provides two tailored exemptions from the general requirement to include all employees located outside of the United States.

- Data Privacy Exemption. The first exemption to the general requirement that non-U.S. employees be included in the pay ratio disclosure is when a jurisdiction's data privacy laws or regulations are such that, despite an issuer's reasonable efforts to obtain or process information necessary to comply with the rule, it is unable to do so without violating those laws or regulations. For example, the European Union prohibits the transfer of personal data to a third country that does not ensure an adequate level of privacy protection; China, Japan, Mexico, Canada, Peru, Australia, Russia, Switzerland, Argentina, and Singapore have adopted or are considering similar rules. To prevent any potential manipulation, issuers are required to exercise reasonable efforts to obtain or process the information necessary for compliance with the final rule. As part of its reasonable efforts, the issuer must seek an exemption or other relief under the applicable jurisdiction's governing data privacy laws or regulations and use the exemption if granted. If an issuer excludes any non-U.S. employees in a particular jurisdiction under the data privacy exemption, it must exclude all non-U.S. employees in that jurisdiction. Additionally, the issuer must list the excluded jurisdictions, identify the specific data privacy law or regulation, explain how complying with the final rule violates the law or regulation (including the efforts made by the issuer to use or seek an exemption or other relief under such law or regulation), and provide the approximate number of employees exempted from each jurisdiction based on this exemption. The issuer must obtain a legal opinion that opines on the inability of the issuer to obtain or process the information necessary for compliance with the final rule without violating that jurisdiction's laws or regulations governing data privacy,
  including the issuer's inability to obtain an exemption or other relief under any governing laws or regulations. The legal opinion must be filed as an exhibit to any filing in which the pay ratio disclosure is included.
- De Minimis Exemption. The second exemption from the general requirement to include non-U.S. employees in identifying the median employee is when a *de minimis* number of an issuer's employees work outside the United States. Under the final rule, if an issuer's non-U.S. employees account for five percent or less of its total employees, it may exclude all of those employees when making its pay ratio calculations. If the issuer chooses to exclude any non-U.S. employees, it must exclude all of them. If an issuer's non-U.S. employees exceed five percent of the issuer's total U.S. and non-U.S. employees, it may exclude up to five percent of its total employees who are non-U.S. employees. If an issuer excludes any non-U.S. employees in a particular jurisdiction, it must exclude all non-U.S. employees in that jurisdiction. The issuer must also disclose the jurisdictions from which its non-U.S. employees are being excluded, the approximate number of employees excluded from each jurisdiction under the *de minimis* exemption, the total number of its U.S. and non-U.S. employees irrespective of any exemption (*de minimis* or data privacy), and the total number of its U.S. and non-U.S. employees used for its *de minimis* calculation.

- Cost-of-Living Adjustments. The SEC recognized that differences between the underlying economic conditions of the countries in which companies operate likely have an effect on the compensation paid to employees in those jurisdictions, and therefore the final rule provides issuers with the option of making cost-of-living adjustments to the compensation of their employees in jurisdictions other than the jurisdiction in which the CEO resides when identifying the median employee (whether using annual total compensation or any other consistently applied compensation measure). The issuer is required to disclose the country in which the median employee is located, briefly describe the cost-of-living adjustments it used to identify the median employee, and briefly describe the cost-of-living adjustments it used to calculate the median employee's annual total compensation, including the measure used as the basis for the cost-of-living adjustment. To provide context for the Item 402(u)(1)(iii) disclosure, an issuer electing to present the pay ratio in this manner must also disclose the median employee's annual total compensation and pay ratio without the cost-of-living adjustments. To calculate this pay ratio, the issuer must identify the median employee without using any cost-of-living adjustments.
- Replacement of CEO. When an issuer replaces its CEO with another CEO during its fiscal year, the final rule allows a choice of two options in calculating the annual total compensation for its CEO: (a) an issuer may take the total compensation calculated pursuant to Item 402(c)(2)(x), and reflected in the Summary Compensation Table, provided to each person who served as CEO during the year and combine those figures, which would constitute the company's annual total CEO compensation; or (b) an issuer may look to the CEO serving in that position on the date it selects to identify the median employee and annualize that CEO's compensation. An issuer must disclose which option it chooses, and how it calculates its CEO's annual total compensation.
- Additional Information. The final rule includes an instruction stating that issuers may present additional ratios or other information to supplement the required ratio, but are not required to do so. Additional pay ratios are not limited to any particular information, such as pay ratios covering U.S. and non-U.S. employees. If an issuer includes any additional ratios, the ratios must be clearly identified, not misleading, and not presented with greater prominence than the required ratio.
- Identification of the Median Employee. In order to comply with the final rule, an issuer must identify the "median employee"—whose compensation will be used for the annual total compensation calculation—once every three years, unless there has been a change in its employee population or employee compensation arrangements such that the issuer reasonably believes the change would result in a significant change in the pay ratio. If there has been such a change, the issuer must disclose this change, re-identify the median employee, and provide a brief explanation about the reason or reasons for the change. Alternatively, if there has been no such change, the issuer must disclose that it is using the same median employee in its pay ratio

calculation and describe briefly the basis for its reasonable belief. For example, the issuer could disclose that there has been no change in its employee population or employee compensation arrangements that it believes would significantly affect the pay ratio. If the median employee identified in year one is no longer in the same position or no longer employed by the issuer on the median employee determination date in year two or year three, the final rule permits the issuer to replace its median employee with an employee in a similar compensation position.

- Methodology for Identifying the Median Employee. To provide additional transparency about how the pay ratio disclosure has been calculated, the final rule requires that issuers disclose the date used to identify the median employee. Although Section 953(b) of the Act requires that issuers choose the "median" employee as the point of comparison, rather than the average or some other measure, the provision did not prescribe a methodology that must be used to identify the median. Consistent with the proposal, the final rule provides issuers with the flexibility to choose a method to identify the median employee based on their own facts and circumstances. Issuers may use a methodology that uses reasonable estimates. The median employee may be identified using annual total compensation, or any other compensation measure that is consistently applied to all employees included in the calculation, such as information derived from tax and/or payroll records. In addition, in determining the employees from which the median is derived, an issuer is permitted to use its employee population or statistical sampling, and/or other reasonable methods. If statistical sampling is used, the SEC believes that a relatively small sample size may be appropriate in certain situations, and that reasonable estimates of the median may be determined using more than one statistical sampling approach by issuers with multiple business lines or geographical units. Regardless of the calculation method chosen, the final rule requires that the company briefly describe the methodology it used to identify the median employee and any material assumptions, adjustments (including any cost- of-living adjustments), or estimates it used to identify the median employee or to determine total compensation or any elements of total compensation, which shall be consistently applied. The final rule requires issuers to briefly describe and consistently apply any methodology used to identify the median and any material assumptions, adjustments (including cost-of-living adjustments), or estimates used to identify the median or to determine total compensation or any elements of total compensation. The final rule also requires an issuer to clearly identify any estimates used. For example, when statistical sampling is used, an issuer must describe the size of both the sample and the estimated whole population, any material assumptions used in determining the sample size, and the sampling method (or methods) used. However, issuers are not required to include any technical analyses, formulas, confidence levels, or the steps used in data analysis.

- Annual Total Compensation. The final rule requires that "annual total compensation" for both the median employee and CEO be calculated using the requirements of Item 402(c)(2)(x) of Regulation S-K. This is the case even if the issuer has identified the median employee using reasonable estimates of compensation based on payroll or tax records. Accordingly, an issuer must go through the process of replicating the Summary Compensation Table compensation for the median employee, including, for example, the grant date fair value of equity awards, the incremental change in pension value, and "all other compensation" items such as 401(k) contributions and other benefits. The SEC notes in the final rule that any compensation that is permitted to be excluded from annual total compensation under Item 402 of Regulation S-K, such as benefits under plans available to all employees, may be added back into the calculation if necessary to reflect benefits that are significant for non-management employees of the issuer. Issuers are permitted to use reasonable estimates in calculating the annual total compensation of their median employee, including any elements of the total compensation, but must clearly identify any estimates used and have a reasonable basis to conclude that their estimates approximate the actual amounts of Item 402(c)(2)(x) compensation, or a particular element of compensation that is awarded to, earned by, or paid to the median employee. Although the final rule allows issuers to identify the median employee every three years, it requires total compensation for that employee to be calculated each year. Accordingly, following the issuer's calculation of the median employee's annual total compensation in year one, it must recalculate the annual total compensation for that employee in year two and again in year three.

On October 18, 2016, the Staff of the SEC's Division of Corporation Finance published five Regulation S-K Compliance and Disclosure Interpretations on Item 402(u) of Regulation S-K, the CEO pay ratio disclosure requirement.

Treatment of independent contractors and leased workers. Section 953(b)(1)(A) of the Dodd-Frank Act requires a company to determine the median of the annual total compensation of "all employees." Item 402(u)(3) provides: "The definition of employee or employee of the registrant does not include those workers who are employed, and whose compensation is determined, by an unaffiliated third party but who provide services to the registrant or its consolidated subsidiaries as independent contractors or "leased" workers." In Compliance and Disclosure Interpretation Question 128C.05, the SEC Staff indicated that in determining when a worker is an "employee" under the rule, a company must consider the composition of its workforce and its overall employment and compensation practices, issuers should include in "employee" population those workers whose compensation the issuer determines, regardless of whether these workers would be considered "employees" for tax or employment law purposes. Where an issuer obtains the services of workers by contracting with an unaffiliated third party that employs the workers, the

SEC Staff does not believe the issuer is “determining” the workers’ compensation for purposes of the rule. This concept would apply even if, for example, the issuer only specifies that those workers receive a minimum level of compensation. An individual who is an independent contractor may be the “unaffiliated third party” who determines his or her own compensation.

Selection of a “Consistently Applied Compensation Measure.” Due to concerns about the expected compliance costs arising from the complexity of using the “annual total compensation” as calculated under Item 402(c)(2)(x) of Regulation S-K to identify the “median employee,”, the SEC permits a reasonable alternative in identifying the “median employee” that was easier to calculate. Instruction 4.3 to Item 402(u) provides: “A registrant may identify the median employee using annual total compensation or any other compensation measure that is consistently applied to all employees included in the calculation, such as information derived from the registrant’s tax and/or payroll records.” This instruction permits the use of information derived from tax and/or payroll records to identify the “median employee.” In Compliance and Disclosure Interpretation Question 128C.01, the SEC Staff indicates that any measure which reasonably reflects the annual compensation of employees may serve as a “consistently applied compensation measure.” The appropriateness of any measure will depend on the issuer’s particular facts and circumstances. For example, total cash compensation could be a “consistently applied compensation measure unless the issuer also distributed annual equity awards widely among its employees. Social Security taxes withheld would likely not be a “consistently applied compensation measure” unless all employees earned less than the Social Security wage base. The issuer must also briefly disclose the compensation measure used. Although the “consistently applied compensation measure” must reasonably reflect annual compensation, it is not expected that it would necessarily identify the same median employee that would be identified if the issuer were to use “annual total compensation.”

In Compliance and Disclosure Interpretation Question 128C.02, the SEC Staff indicates that an issuer may not exclusively use hourly or annual rates of pay as its “consistently applied compensation measure.” Although an hourly or annual pay rate may be a component used to determine an employee’s overall compensation, the use of the pay rate alone generally is not an appropriate “consistently applied compensation measure” to identify the “median employee.” Using an hourly rate without taking into account the number of hours actually worked would be similar to making a full-time equivalent adjustment for part-time employees, which is not permitted. Similarly, using an annual rate only, without regard to whether the employees worked the entire year and were actually paid that amount during the year, would be similar to annualizing pay, which the rule only permits in limited circumstances.

Selection of determination date for identifying employee population. As adopted, the CEO pay ratio rule permits issuers to use a date other than the last day of the last completed fiscal year to identify the "median employee." Instruction 1 to Item 402(u) provides: "A registrant shall disclose the date within the last three months of its last completed fiscal year that it selected pursuant to paragraph (u)(3) of this Item to identify its median employee." Once the employee population is determined, the issuer must then identify the median employee from that population using either annual total compensation or another "consistently applied compensation measure." In Compliance and Disclosure Interpretation Question 128C.03, the Staff indicates that, in applying a "consistently applied compensation measure" to identify the "median employee," an issuer is not required to use: (i) a period that includes the date on which the employee population is determined; nor (ii) a full annual period. Instead, a "consistently applied compensation measure" may also consist of annual total compensation from the issuer's prior fiscal year, so long as there has not been a change in the issuer's employee population or employee compensation arrangements that would result in a significant change of its pay distribution to its workforce.

In Compliance and Disclosure Interpretation Question 128C.04, the SEC Staff indicates that because a "furlough" could have different meanings for different employers, issuers will need to determine whether furloughed workers should be included as employees based on the facts and circumstances. If the furloughed worker is determined to be an employee of the company on the date the employee population is determined, his or her compensation should be determined by the same method as for a non-furloughed employee: (i) the issuer must determine into which class (full-time, part-time, temporary, or seasonal) the furloughed employee belongs on the determination date; and (ii) also determine that individual's compensation using annual total compensation or another "consistently applied compensation measure" in accordance with Instruction 5 of Item 402(u). The issuer may annualize the total compensation for all permanent employees (full-time or part-time) that were employed by the company for less than the full fiscal year or who were on an unpaid leave of absence during the period, however the issuer may not annualize the total compensation for employees in temporary or seasonal positions. Further, the issuer may not make a full-time equivalent adjustment for any employee.

On February 6, 2017, then Acting SEC Chairman Michael Piwowar issued a Public Statement titled "Reconsideration of Pay Ratio Rule Implementation." In the Public Statement, Acting Chairman Piwowar stated "it is my understanding that some issuers have begun to encounter unanticipated compliance difficulties that may hinder them in meeting the reporting deadline" and indicated that he was seeking public input on any unexpected challenges that issuers have experienced as they prepare for compliance with the rule and whether relief is needed. Then Acting Chairman Piwowar also directed the Staff to reconsider the implementation of the rule based on any comments submitted and to determine as promptly as possible whether additional guidance or relief may be appropriate. No further action has been taken by the Staff or the SEC with respect to the CEO pay ratio disclosure rule.

Employee or Director Hedging Policies Disclosure

On December 18, 2018, the SEC adopted amendments to its rules to implement Section 955 of the Dodd-Frank Act, which added new Section 14(j) to the Exchange Act. As adopted, paragraph (i) of Item 407 of Regulation S-K requires an issuer to describe any practices or policies it has adopted (whether written or not) regarding the ability of its employees (including officers) or directors of the issuer, or any of their designees, to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars and exchange funds), or otherwise engage in transactions that hedge or offset, or are designed to hedge or offset, any decrease in the market value of issuer equity securities granted as compensation of the employee or director, or held, directly or indirectly, by the employee or director. An issuer is required to provide a fair and accurate summary of the practices or policies that apply, including the categories of persons covered and any categories of hedging transactions that are specifically permitted and any categories that are specifically disallowed. Alternatively, the issuer is required to disclose the practices or policies in full. If an issuer does not have any such practices or policies, the issuer must disclose that fact or state that hedging transactions are generally permitted.

Issuers that are not foreign private issuers, listed closed-end investment companies, smaller reporting companies or emerging growth companies were required to comply with the disclosure requirement specified in Item 407(i) of Regulation S-K in proxy statements or information statements with respect to the election of directors during fiscal years beginning on or after July 1, 2019. Issuers that qualify as smaller reporting companies or emerging growth companies were required to comply with the new disclosure requirement specified in Item 407(i) of Regulation S-K in proxy statements or information statements with respect to the election of directors during fiscal years beginning on or after July 1, 2020. The disclosure is not required for foreign private issuers and listed closed-end investment companies.

Exchange Act Section 14(j) directed the SEC to require each issuer to disclose in any proxy or consent solicitation material for an annual meeting of shareholders whether any employee or member of its board of directors, or any designee of such employee or director, is permitted to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars and exchange funds) that are designed to hedge or offset any decrease in the market value of equity securities: (i) granted to the employee or director by the issuer as part of the compensation of the employee or director; or (ii) held, directly or indirectly, by the employee or director.

The SEC proposed to adopt new paragraph (i) of Item 407 of Regulation S-K in February 2015. The SEC considered the report issued by the Senate Committee on Banking, Housing, and Urban Affairs with regard to Section 955 of the Dodd-Frank Act, and noted that the additional disclosure required by the proposed amendments would "provide transparency" to shareholders "to know if executives are allowed to purchase financial instruments to effectively avoid compensation restrictions that they hold stock long-term, so that they will receive their compensation even in the case that their firm does not perform." The SEC received twenty-two comments on the proposal. Comments received by the SEC were largely supportive of the proposed amendments and their objectives.

In the adopting release, the SEC noted that the final rule amendments do not direct issuers to have practices or policies regarding hedging, or dictate the content of any such practice or policy.

As adopted, Item 407(i) of Regulation S-K requires an issuer to describe any practices or policies it has adopted (whether written or not) regarding the ability of its employees (including officers) or directors of the issuer, or any of their designees, to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars and exchange funds), or otherwise engage in transactions that hedge or offset, or are designed to hedge or offset, any decrease in the market value of issuer equity securities granted as compensation of the employee or director, or held, directly or indirectly, by the employee or director.

An issuer is required to provide either:

- A fair and accurate summary of the practices or policies (whether written or not) that apply, including the categories of persons covered and any categories of hedging transactions that are specifically permitted and any categories that are specifically disallowed; or
- Disclosure of the practices or policies in full.

If an issuer does not have any practices or policies regarding hedging, then the issuer must: (i) disclose that the issuer does not have any practices or policies regarding hedging; or (ii) state that hedging transactions are generally permitted.

Item 407(i) does not require disclosure in the annual meeting proxy statement or information statement of any hedging transactions that have occurred. In the adopting release, the SEC indicates that such disclosure would be repetitive, considering an issuer's existing Section 16 reporting requirements.

The disclosure specified in Item 407(i) of Regulation S-K is required to be disclosed in a proxy statement or information statement when action is to be taken with respect to the election of directors. The disclosure is not required in Form 10-K Part III disclosure, even if that disclosure is incorporated by reference from the issuer's definitive proxy statement or information statement.

Item 407(i) of Regulation S-K requires disclosure of practices or policies regarding the ability of an issuer's employees (including officers) or directors of the issuer, or any of their designees. In this regard, the rule is broader in application than Item 402(b)(2)(xiii) of Regulation S-K, which is limited to disclosure of hedging policies applicable to the issuer's named executive officers.

The SEC did not define the term "designee" for the purpose of the rule amendments, explaining in the adopting release that whether someone is a designee of an employee or director is to be determined by the issuer based on the particular facts and circumstances of the relationship.

Exchange Act Section 14(j) refers to financial instruments "that are designed to hedge or offset any decrease in the market value." Consistent with Exchange Section 14(j), the term "financial instruments" includes, but is not limited to, prepaid variable forward contracts, equity swaps, collars and exchange funds. The rule is not limited to transactions in financial instruments, however, and in fact extends to any transactions "that hedge or offset, or are designed to hedge or offset, any decrease in the market value of registrant equity securities."

The SEC did not define the terms "hedge" or "hedging" in the final rule amendments. In the adopting release, the SEC referred to the language of Exchange Act Section 14(j), and noted that, for purposes of the disclosure requirements, "hedging" should be applied by issuers "as a broad principle," and that the term applies to transactions with the same economic effects as the transactions specified in Exchange Act Section 14(j). As such, an issuer must "make its own judgments" when determining whether transactions are subject to the new disclosure requirements.

As proposed, the rule amendments would have used the term "equity securities." The final rule amendments clarify the scope of Item 407(i) disclosure by expanding the term "equity securities" to "registrant equity securities." Registrant equity securities include equity securities issued by the issuer and its parents, subsidiaries or subsidiaries of the registrant's parents. In the adopting release, the SEC notes that the required disclosure is not limited to registrant equity securities that are registered under Section 12 of the Exchange Act. If an issuer has a practice or policy with respect to different classes of equity securities, the issuer's disclosure should reflect those distinctions.

The disclosure required by new Item 407(i) must be included in a proxy statement or information statement when action is to be taken with respect to the election of directors. Noting that Item 402(b) of Regulation S-K requests disclosure of policies regarding hedging by named executive officers and that the two distinct disclosure requirements could lead to repetition in the proxy statement or information statement, the SEC adopted new Instruction 6 to Item 402(b) of Regulation S-K, which indicates that an issuer may satisfy the Item 402(b) disclosure requirement by cross-referencing the information disclosed pursuant to new Item 407(i), to the extent that the information disclosed pursuant to new Item 407(i) satisfies the requirement.

Additional Governance Requirements

Compensation Recovery

Section 954 of the Dodd-Frank Act requires that stock exchange listing standards be amended to require that issuers adopt a policy providing that, if an issuer is required to prepare an accounting restatement due to material noncompliance with any financial reporting requirement under the securities laws, it will recover from any current or former executive officer who received incentive-based compensation (including stock options awarded as compensation) during the three-year period preceding the date on which the issuer is required to prepare an accounting restatement, amounts based on the erroneous data, in excess of what would have been paid under the restatement. Additional disclosure is also required concerning an issuer's policy on incentive-based compensation that is based on financial information required to be reported under the securities laws.

On October 26, 2022, the SEC adopted Rule 10D-1 under the Exchange Act, which directs U.S. national securities exchanges to adopt listing standards requiring listed companies, including foreign private issuers, EGCs and smaller reporting companies, to establish and enforce policies which must provide that, if the listed company is required to prepare an accounting restatement, including to correct an error that would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period, the listed company must recover "reasonably promptly" from any current or former "executive officer" incentive-based compensation that was erroneously awarded during the three years preceding the date such a restatement was required. The recoverable amount is the amount of incentive-based compensation received in excess of the amount that otherwise would have been received had it been determined based on the restated financial measure and must be computed without regard to any taxes paid.

The SEC notes in the adopting release for Rule 10D-1 that there are situations where, under current accounting standards, certain changes to a listed company's financial statements do not represent error corrections, and therefore would not trigger application of the listed company's clawback policy:

- Retrospective application of a change in accounting principle;
- Retrospective revision to reportable segment information due to a change in the structure of an issuer's internal organization;
- Retrospective reclassification due to a discontinued operation;
- Retrospective application of a change in reporting entity, such as from a reorganization of entities under common control;

- Retrospective adjustment to provisional amounts in connection with a prior business combination (IFRS filers only); and
- Retrospective revision for stock splits, reverse stock splits, stock dividends or other changes in capital structure.

The listing standards must require that a listed company recover all erroneously awarded compensation, even if there was no misconduct or failure of oversight on the part of an individual executive officer, subject to limited impracticability exceptions available only in circumstances where:

- Direct expenses paid to third parties to assist in enforcing the policy would exceed the amount to be recovered and the listed company has made a reasonable attempt to recover;
- Recovery would violate home country law that existed at the time of adoption of the rule, and the listed company provides an opinion of counsel to that effect to the exchange; or
- Recovery would likely cause an otherwise tax-qualified retirement plan to fail to meet the requirements of the Internal Revenue Code.

Companies will be required to disclose their recovery policies as an element of the listing standards adopted pursuant to Rule 10D-1, and the SEC has adopted amendments that require disclosure about, and the filing of, a listed company's recovery policy. Under these filing requirements, a listed company will be required to:

- File its clawback policy as an exhibit to its annual report;
- Include new checkboxes to the cover page of its annual report, with one checkbox indicating whether the financial statements included in the report reflect the correction of an error to previously issued financial statements, and one checkbox indicating whether any of the error corrections require a recovery analysis under the listed company's clawback policy; and
- Disclose in its proxy statement how the listed company applied the clawback policy if, at any time during the last completed fiscal year, either: (i) a financial restatement that triggered the clawback policy was completed; or (ii) there was an outstanding balance of excess incentive-based compensation from the application of the policy to a prior restatement.

In a situation when a listed company completes a financial restatement that triggered the listed company's clawback policy, the listed company will be required to disclose the following details about the pending recovery of erroneously awarded compensation in its executive compensation disclosure required by Item 402 of Regulation S-K:

- The date on which the listed company was required to prepare the restatement;

- The aggregate dollar amount of excess incentive-based compensation attributable to the restatement (including an analysis of how the recoverable amount was calculated);
- If the incentive-based compensation was determined based on a stock price or TSR-related financial reporting measure, the estimates used to determine the excess incentive-based compensation attributable to the restatement (and an explanation of the methodology used to calculate such estimates);
- The aggregate dollar amount of such excess incentive-based compensation that remains outstanding at the end of its last completed fiscal year;
- If the aggregate dollar amount of erroneously awarded compensation has not yet been determined, this fact must be disclosed, along with the reasons, and the listed company must include the previous information in the next filing required to include Item 402 compensation information;
- If recovery would be impracticable, for each current and former named executive officer and for all other current and former executive officers as a group, the listed company must disclose the amount of recovery forgone and a brief description of the reason the listed company decided not to pursue recovery; and
- For each current or former named executive officer, the amounts of incentive-based compensation that are subject to clawback that are still outstanding for more than 180 days since the date the listed company determined the recoverable amount.

The SEC's final rules became effective on January 27, 2023. Each national securities exchange must file its proposed listing standards with the SEC no later than February 27, 2023, and those listing standards must become effective no later than November 28, 2023. Each issuer subject to the listing standards will be required to adopt a clawback policy no later than 60 days following the date on which the applicable standards become effective.

If a listed company fails to adopt a clawback policy, disclose the policy and its application, or enforce the policy's recovery provision, it may be subject to delisting. Companies are urged to review their existing clawback policies to consider what changes, if any, may be required. Companies may want to wait to make substantive changes to their clawback policies until their respective national securities exchange proposes its own listing standards, because those listing standards may differ from the requirements specified in Rule 10D-1.

In January 2023, the Staff of the Division of Corporation Finance published new Compliance and Disclosure Interpretations addressing certain interpretive questions under the clawback rules.

One of the disclosure requirements is a set of new checkboxes for the cover page of the Form 10-K, Form 20-F and Form 40-F, with one of those checkboxes indicating whether the financial statements included in the report reflect the correction of an error to previously issued financial statements, and another checkbox indicating whether any of the error corrections require a recovery analysis under the company's clawback policy. The text associated with those checkboxes is as follows:

> If securities are registered pursuant to Section 12(b) of the Act, indicate by check mark whether the financial statements of the registrant included in the filing reflect the correction of an error to previously issued financial statements. ☐
>
> Indicate by check mark whether any of those error corrections are restatements that required a recovery analysis of incentive-based compensation received by any of the registrant's executive officers during the relevant recovery period pursuant to §240.10D-1(b). ☐

In new Exchange Act Rules Compliance and Disclosure Interpretations Question 121H.01, the Staff states:

> **Question:** The form amendments adding check boxes to the cover page of Form 10-K, Form 20-F, and Form 40-F indicating whether the form includes the correction of an error in previously issued financial statements and a related recovery analysis are effective January 27, 2023. However, the listing standards are not required to be effective until November 28, 2023 and issuers subject to such listing standards will not be required to adopt a recovery policy for 60 days following the date on which the applicable listing standards become effective. Will issuers be required to mark the check boxes in 2023 before an issuer is required to adopt a recovery policy and comply with the applicable listing standards?
>
> **Answer:** In the adopting release, the Commission indicated that it does not expect compliance with the disclosure requirements until issuers are required to have a recovery policy under the applicable exchange listing standard. While the check boxes and other disclosure requirements will be in the rules and forms in 2023, we do not expect issuers to provide such disclosure until they are required to have a recovery policy under the applicable listing standard. [January 27, 2023]

Under the SEC's new clawback disclosure rules, in a situation when a company completes the financial restatement that triggered the company's clawback policy, the company will be required to disclose certain details about the pending recovery of erroneously awarded compensation, including, for each current or former named executive officer, the amounts of incentive-based compensation that are subject to clawback that are still outstanding for more than 180 days since the date the company determined the recoverable amount. In Exchange Act Rules Compliance and Disclosure Interpretations Question 121H.02 and Question 121H.03, the Staff addressed how the term “named executive officer” is to be interpreted for foreign private issuers filing on Forms 20-F and 40-F, given that foreign private issuers do not provide disclosure under Item 402 of Regulation S-K, which includes the definition of “named executive officer:”

Question 121H.02

Question: Which persons will be considered named executive officers for purposes of determining the parties for whom individualized disclosure pursuant to Item 6.F of Form 20-F must be provided?

Answer: Item 6.F of Form 20-F provides for individualized disclosure for an issuer’s named executive officers. Foreign private issuers that file on domestic forms and provide executive compensation disclosure under Item 402 of Regulation S-K should provide individualized disclosure for their named executive officers to the extent required by Form 20-F. For foreign private issuers that use Form 20-F, individualized disclosure is required about members of their administrative, supervisory, or management bodies for whom the issuer otherwise provides individualized compensation disclosure in the filing. [January 27, 2023]

Question 121H.03

Question: Which persons will be considered named executive officers for purposes of determining the parties for whom individualized disclosure pursuant to Item B.(19) of Form 40-F must be provided?

Answer: Item B.(19) of Form 40-F provides for individualized disclosure for an issuer’s named executive officers. Such individualized disclosure is required about executive officers for whom the issuer otherwise provides individualized compensation disclosure in the filing. [January 27, 2023]

The Staff also published these same interpretations in Exchange Act Forms Compliance and Disclosure Interpretations Questions 110.08 and 112.03.

The Staff also addressed in Exchange Act Rules Compliance and Disclosure Interpretations Question 121H.04 the extent to which a clawback policy that complies with Rule 10D-1 could reach compensation in a variety of compensation plans other than tax-qualified retirement plans. The new Compliance and Disclosure Interpretation states:

Question: Because the clawback rule applies broadly to incentive-based compensation, would the rules affect compensation that is in any sort of plan, other than tax-qualified retirement plans, including long term disability, life insurance, SERPs, or any other compensation that is based on the incentive-based compensation?

Answer: The rule is intended to apply broadly. For plans that take into account incentive-based compensation, an issuer would be expected to claw back the amount contributed to the notional account based on erroneously awarded incentive-based compensation and any earnings accrued to date on that notional amount. [January 27, 2023]

Other Governance Provisions

The Dodd-Frank Act includes a number of additional corporate governance provisions, including:

- Authorizing the SEC to promulgate "proxy access" rules, allowing specified shareholders to include director nominees in the issuer's proxy materials, but not prescribing specific standards for those rules (Section 971). The SEC issued final rules facilitating shareholder director nominations on August 25, 2010, which were scheduled to become effective on November 15, 2010. However, Rule 14a-11 was vacated by U.S. Court of Appeals for the District of Columbia Circuit in July 2011;
- Directing the SEC to promulgate rules mandating proxy statement disclosure of the reasons why the issuer has chosen to have one person serve as Chairman and CEO, or to have different individuals serve in those roles (Section 972). The SEC amended its disclosure rules in December 2009 to require a discussion of this topic and it appears that no further SEC rulemaking will be completed on this topic; and
- Barring brokers from using discretionary authority to vote proxies in connection with election of directors, executive compensation, or other significant matters, as determined by the SEC (Section 957). Under changes already adopted by Rule 452 of the rules of the New York Stock Exchange, no broker discretionary voting is permitted for the election of directors and executive compensation matters.

Proxy Voting Advice

On July 22, 2020, the SEC adopted final rules governing proxy voting advice provided by proxy advisory firms. The SEC proposed the amendments on November 5, 2019 and the comment period for these proposals ended on February 3, 2020. Proxy voting advice businesses subject to the final rules were not required to comply with the amendments to Rule 14a-2(b)(9) until December 1, 2021. This extended transition period did not apply to the amendments to Rule 14a-1(l) and Rule 14a-9, because those rule changes codified "existing Commission interpretations and guidance, and do not impose new obligations that necessitate significant time for preparation." The amendments to Rule 14a-1(l) and Rule 14a-9 were effective on November 2, 2020. As discussed below, the SEC adopted amendments to these rules in July 2022.

In July 2020, the SEC adopted an amendment to Exchange Act Rule 14a-1(l) to codify the SEC's longstanding view that, when a person or entity furnishes proxy voting advice (which the SEC refers to as a "proxy voting advice business"), that proxy voting advice generally constitutes a "solicitation" under Section 14(a) of the Exchange Act. Absent an applicable exemption, any person providing proxy voting advice would be subject to the information and filing requirements in the proxy rules, including the obligation to file and furnish definitive proxy statements.

In July 2020, the SEC also amended Rule 14a-1(l)(1)(iii) to add paragraph (A) to make clear that the terms "solicit" and "solicitation" include any proxy voting advice that makes a recommendation to a shareholder as to its vote, consent, or authorization on a specific matter for which shareholder approval is solicited, and that is furnished by a person who markets its expertise as a provider of such advice, separately from other forms of investment advice, and sells such advice for a fee.

In the final rules adopted in July 2020, the SEC recognized that proxy voting advice businesses may use more than one voting policy or set of guidelines in formulating their voting recommendations. For example, a proxy voting advice business may offer differing voting recommendations on a matter based on the application of its benchmark policy or various specialty policies. Under the final rule, the voting recommendations formulated under the benchmark policy and each of the specialty policies would be considered to be a separate communication of proxy voting advice under proposed Rule 14a-1(l)(1)(iii)(A). In addition to voting recommendations formulated pursuant to a proxy voting advice business's benchmark and specialty policies, the SEC also included voting recommendations formulated pursuant to a proxy voting advice business's client's own custom policies within the scope of the term "solicitation," consistent with its prior interpretation. The SEC noted that, to the extent a business that provides proxy voting services "is not providing any voting recommendations and is instead exercising delegated voting authority on behalf of its clients, such services generally will not constitute 'proxy voting advice'—and, therefore, not be a 'solicitation'—under Rule 14a-1(l)(1)(iii)(A)."

The SEC also amended Rule 14a-1(l)(2) in July 2020 to add paragraph (v), which makes clear that the terms "solicit" and "solicitation" do not include any proxy voting advice provided by a person who furnishes such advice only in response to an unprompted request. This amendment "codifies the Commission's historical view that such a communication should not be regarded as a solicitation subject to the proxy rules."

In July 2020, the SEC adopted amendments to Rule 14a-2(b) to require that persons who provide proxy voting advice in reliance on the exemptions in either Rule 14a-2(b)(1) or (b)(3) must include, in their proxy voting advice to clients, the conflicts of interest disclosure that is specified in new Rule 14a-2(b)(9)(i). The exemption from the proxy disclosure and filing requirements in either Rule 14a-2(b)(1) or (b)(3) was conditioned on the proxy voting advice business including, in their voting advice (or in any electronic medium used to deliver the advice), prominent disclosure of: (i) any information regarding an interest, transaction, or relationship of the proxy voting advice business (or its affiliates) that is material to assessing the objectivity of the proxy voting advice in light of the circumstances of the particular interest, transaction, or relationship; and (ii) any policies and procedures used to identify, as well as the steps taken to address, any such material conflicts of interest arising from such interest, transaction, or relationship.

Rule 14a-2(b)(9)(ii) required, as a separate condition to the availability of the exemptions in Rules 14a-2(b)(1) and (b)(3), that a proxy voting advice business adopt and publicly disclose written policies and procedures reasonably designed to ensure that: (i) companies that are the subject of proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the proxy voting advice business's clients; and (ii) the proxy voting advice business provides its clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding its proxy voting advice by companies that are the subject of such advice, in a timely manner before the shareholder meeting (or, if no meeting, before the votes, consents, or authorizations may be used to effect the proposed action).

Paragraph (iii) of Rule 14a-2(b)(9) as adopted in July 2020 included a non-exclusive safe harbor provision that states a proxy voting advice business will be deemed to satisfy Rule 14a-2(b)(9)(ii)(A) if it has written policies and procedures that are reasonably designed to provide companies with a copy of its proxy voting advice, at no charge, no later than the time it is disseminated to the proxy voting advice business's clients. Such policies and procedures could include conditions requiring that such companies have: (i) filed their definitive proxy statement at least 40 calendar days before the shareholder meeting; and (ii) expressly acknowledged that they will only use the proxy voting advice for their internal purposes and/or in connection with the solicitation and it will not be published or otherwise shared except with the issuer's employees or advisers. The safe harbor sets forth two methods by which the proxy voting advice business may provide such notice to its clients: (i) provide notice on its electronic client platform that the company has filed, or has informed the proxy voting advice business that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available); or (ii) provide notice through email or other electronic means that the registrant has filed, or has informed the proxy voting advice business that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available). The SEC states in the adopting release that "the inclusion of the hyperlink required under Rule 14a-2(b)(9)(iv) would not, by itself, make the proxy voting advice business liable for the content of the hyperlinked company's statement."

In accordance with Rules 14a-2(b)(9)(v) and (vi), proxy voting advice businesses do not need to comply with Rule 14a-2(b)(9)(ii) in order to rely on either the Rule 14a-2(b)(1) or (b)(3) exemption: (i) to the extent that their proxy voting advice is based on a custom policy; or (ii) if they provide proxy voting advice as to non-exempt solicitations regarding certain mergers and acquisitions or contested matters.

The SEC adopted amendments in July 2020 to Rule 14a-9 to include examples of what may be misleading within the meaning of the rule. The amended Note to Rule 14a-9 included paragraph (e), which stated that the failure to disclose material information regarding proxy voting advice, "such as the proxy voting advice business's methodology, sources of information, or conflicts of interest" could, depending upon particular facts and circumstances, be misleading within the meaning of Rule 14a-9.

In June 2021, SEC Chair Gensler announced that he was directing the SEC Staff to review recent interpretations and rulemakings regarding the applicability of the SEC's rules to proxy advisory firms, with a view toward reconsidering the interpretive guidance and rulemaking. In light of Chair Gensler's direction to reconsider the rules and guidance, the Division of Corporation Finance determined that it would not recommend enforcement action to the SEC based on the interpretive guidance and the rule amendments during the period in which the SEC is considering further regulatory action in this area. The Staff would not recommend any enforcement action based on those conditions for a reasonable period of time after any resumption by ISS of its litigation challenging the rules and guidance.

On November 17, 2021, the SEC proposed further amendments to its rules governing proxy voting advice. The SEC proposed to rescind the conditions to the availability of two exemptions from the proxy rules' informational and filing requirements on which proxy voting advice businesses rely. Investors and others expressed concerns that these conditions would impose increased compliance costs on proxy voting advice businesses and impair the independence and timeliness of their proxy voting advice.

On July 13, 2022, the SEC adopted rule amendments reversing certain changes to the proxy rules that were adopted in 2020. The final amendments rescind conditions to the availability of two exemptions from the proxy rules' information and filing requirements on which proxy voting advice businesses rely. Those conditions required that: (i) issuers that are the subject of proxy voting advice have such advice made available to them in a timely manner; and (ii) clients of proxy voting advice businesses are provided with a means of becoming aware of any written responses by registrants to proxy voting advice. The final amendments also delete the 2020 changes made to the proxy rules' liability provision. The adopting release for the July 2022 rule amendments points out that this rulemaking did not represent a wholesale reversal of the 2020 rulemaking, noting:

- Proxy voting advice generally remains a solicitation subject to the proxy rules, including liability under Rule 14a-9 for material misstatements or omissions of fact;

- In order to rely on the exemptions from the proxy rules' information and filing requirements set forth in Rules 14a-2(b)(1) and (3), proxy advisory firms must satisfy Rule 14a-2(b)(9)'s conflicts of interest disclosure requirements; and
- The deletion of Note (e) does not affect the scope of Rule 14a-9 or its application to proxy voting advice.

The SEC noted in the adopting release for the July 2022 rulemaking that the final amendments reflect the fact that "our thinking has evolved with respect to the Rule 14a-2(b)(9)(ii) conditions and Note (e) to Rule 14a-9, informed, in part, by the concerns expressed by PVABs' clients and other investors that were among the primary intended beneficiaries of the 2020 Final Rules."

Shareholder Proposals

On September 23, 2020, the SEC adopted amendments to its shareholder proposal rule, Rule 14a-8 under the Exchange Act, which governs the process for a shareholder to have his or her proposal included in a company's proxy materials for consideration by the company's shareholders. These rule amendments were proposed on November 5, 2019 and the comment period for the proposed amendments ended on February 3, 2020. The amendments were effective on January 4, 2021. The amendments applied to proposals submitted for an annual or special meeting to be held on or after January 1, 2022. The amendments include a transition period with respect to the ownership thresholds that will allow shareholders who meet the $2,000/one-year ownership threshold as of the effective date of the amendments to submit proposals for an annual or special meeting held prior to January 1, 2023, provided they continuously hold at least $2,000 of a company's securities from the effective date through the date of submission.

The amendments to Rule 14a-8(b):

- Replaced the previous requirement that a proponent hold at least $2,000 or one percent of a company's securities for at least one year to be eligible to submit a proposal with three alternative thresholds, any one of which a shareholder could satisfy to be eligible to submit a proposal:
    - continuous ownership of at least $2,000 of the company's securities for at least three years,
    - continuous ownership of at least $15,000 of the company's securities for at least two years, or
    - continuous ownership of at least $25,000 of the company's securities for at least one year;
- Prohibit the aggregation of holdings for purposes of satisfying the amended ownership thresholds;

- Require that a proponent who elects to use a representative for the purpose of submitting a shareholder proposal provide documentation that:
  - identifies the annual or special meeting for which the proposal is submitted,
  - identifies the shareholder submitting the proposal and the shareholder's designated representative,
  - includes the shareholder's statement authorizing the designated representative to submit the proposal and otherwise act on the shareholder's behalf,
  - identifies the specific topic of the proposal to be submitted,
  - includes the shareholder's statement supporting the proposal, and
  - is signed and dated by the shareholder; and
- Require that each proponent state that he or she is able to meet with the company, either in person or via teleconference, no less than 10 calendar days, or more than 30 calendar days, after submission of the shareholder proposal, and provide contact information as well as specific business days and times that the proponent is available to discuss the proposal with the company.

Shareholders are permitted to co-file proposals as a group if each shareholder-proponent in the group meets all of the eligibility requirements. The SEC did not adopt a requirement that co-filers identify a lead filer or specify whether the lead filer is authorized to negotiate a withdrawal on behalf of co-filers, as requested by several commenters, stating that such a rule "does not appear necessary at this time as co-filers already tend to designate a lead filer."

The amendments to Rule 14a-8(c):

- Apply the one-proposal rule to "each person" rather than "each shareholder" who submits a proposal, such that a proponent is not permitted to submit one proposal in his or her own name and simultaneously serve as a representative to submit a different proposal on another shareholder's behalf for consideration at the same meeting; and
- Provide that a representative is not permitted to submit more than one proposal to be considered at the same meeting, even if the representative were to submit each proposal on behalf of different shareholders.

Under the final rule, entities and all persons under their control, including employees, are treated as a "person" for purposes of such rule. The final rule does not, however, prohibit a single representative from representing multiple co-filers in connection with the submission of one shareholder proposal. The amendments to Rule 14a-8(i)(12) modernized the former resubmission thresholds of three percent, six percent, and 10 percent for matters voted on once, twice, or three or more times in the last five years, respectively, with thresholds of five percent, 15 percent, and 25 percent, respectively.

On July 13, 2022, the SEC proposed amendments to three of the thirteen substantive bases for exclusion of a shareholder proposal under Rule 14a-8 of the Exchange Act. The proposed amendments would introduce new tests to be used for determining whether:

- A shareholder proposal has been substantially implemented under Rule 14a-8(i)(10);
- A shareholder proposal substantially duplicates another proposal that will appear on an issuer's proxy card under Rule 14a-8(i)(11); and
- A shareholder proposal substantially duplicates a proposal that appeared in a previous proxy statement for purposes of determining if the proposal is eligible to be resubmitted under Rule 14a-8(i)(12).

The SEC proposes to amend Rule 14a-8(i)(10) to provide that a shareholder proposal may be excluded as substantially implemented "[i]f the company has already implemented the essential elements of the proposal." The SEC indicates in the proposing release that an analysis focused on the "specific elements of a proposal would provide a reliable indication of whether the actions taken to implement a proposal are sufficiently responsive to the proposal such that it has been substantially implemented." The SEC indicates that, in order to identify essential elements of a shareholder proposal, the "degree of specificity of the proposal and of its stated primary objectives would guide the analysis." If Rule 14a-8 is amended as proposed, a shareholder proposal could be excluded as substantially implemented "only if the company has implemented all of its essential elements." Under this analytical framework, an issuer would be permitted to exclude a proposal "it has not implemented precisely as requested if the differences between the proposal and the company's actions are not essential to the proposal." The SEC notes that, if a shareholder proposal contains more than one element, each essential element would need to be implemented to exclude the proposal. If a shareholder proposal contains only one essential element, that single essential element must be implemented to exclude the proposal.

The SEC proposes to amend Rule 14a-8(i)(11) to state that a proposal "substantially duplicates" another proposal if it "addresses the same subject matter and seeks the same objective by the same means." In the proposing release, the SEC addresses the example of two proposals, with one proposal requesting that the issuer publish in newspapers a detailed statement of each of its direct or indirect political contributions or attempts to influence legislation and another proposal requesting a report to shareholders on the issuer's process for identifying and prioritizing legislative and regulatory public policy advocacy activities. Under Rule 14-8(i)(11) as it is proposed to be amended, the two proposals would not be deemed substantially duplicative because they seek different objectives by different means.

The SEC also proposes to revise Rule 14a-8(i)(12) to the same "substantially duplicates" standard as under Rule 14a-8(i)(11). The proposed amendments would provide that, for purposes of Rule 14a-8(i)(12), a proposal "substantially duplicates" another proposal if it "addresses the same subject matter and seeks the same objective by the same means."

Disclosure Effectiveness Initiative

Over the past several years, the SEC has adopted numerous rules and rule amendments as part of its overall Disclosure Effectiveness Initiative, which began over a decade ago.

Disclosure Updates and Simplification

On August 17, 2018, the SEC adopted amendments to certain disclosure requirements that, in the SEC's view, may have become redundant, duplicative, overlapping, outdated, or superseded, in light of other SEC disclosure requirements, U.S. GAAP, International Financial Reporting Standards, or changes in the information environment. The SEC also addressed certain disclosure requirements that overlap with, but require information incremental to, U.S. GAAP to determine whether to retain, modify, eliminate, or refer them to the Financial Accounting Standards Board for potential incorporation into U.S. GAAP. These amendments were part of an initiative by the Division of Corporation Finance to review disclosure requirements applicable to issuers to consider ways to improve the requirements for the benefit of investors and issuers, and were also issued as part of the SEC's efforts to implement Title LXXII, Section 72002(2) of the FAST Act.

FAST Act Modernization and Simplification of Regulation S-K

On March 20, 2019, the SEC adopted rule amendments to modernize and simplify certain disclosure requirements in Regulation S-K and related rules and forms. These amendments were adopted pursuant to a directive from the FAST Act, and were based in part on the SEC's report to Congress under the FAST Act, which was published on November 23, 2016. The amendments are part of the SEC's broader effort to improve the effectiveness of public company disclosure by revisiting many disclosure rules and forms. The SEC proposed these amendments on October 11, 2017.

In addition to seeking to improve the quality and accessibility of disclosures in filings, the SEC indicated that the rule changes "clarify ambiguous disclosure requirements, remove redundancies, and further leverage the use of technology." The principal rule changes affect disclosures required in registration statements, prospectuses and periodic and current reports.

The amendments were effective on May 2, 2019, with the following exceptions: (i) the new rules providing for the filing of redacted material contracts without submitting a request for confidential treatment were effective on April 2, 2019; and (ii) the Inline XBRL requirements for cover pages will have a three-year phase-in period. Under this phase-in period, the Inline XBRL requirements are effective: (i) for reports for fiscal periods ending on or after June 15, 2019, for large accelerated filers that report in U.S. GAAP; (ii) for reports for fiscal periods ending on or after June 15, 2020, for accelerated filers that report in U.S. GAAP; and (iii) for reports for fiscal periods ending on or after June 15, 2021, for all other filers.

The SEC amended Item 102 of Regulation S-K, "Description of Property," to clarify that disclosure is required only to the extent that physical properties are material to the issuer, and that the issuer's property information may be disclosed on a collective basis. The rule retains the specific instructions for property disclosures of issuers in the mining, real estate and oil and gas industries. In adopting the amendments to Item 102, the SEC noted that "disclosure elicited in response to this item may not have been consistently material."

The SEC adopted a revision to Instruction 1 to Item 303(a) of Regulation S-K, "Management's Discussion and Analysis of Financial Condition and Results of Operations" ("MD&A"), to allow issuers to omit the discussion of the earliest of the three years in the MD&A, if such discussion was already included in any of the issuer's prior filings on EDGAR that required Item 303 disclosure. When opting to exclude the third year, issuers must identify the location in such prior filing where the omitted discussion may be found. If an issuer needs to incorporate the third year into a Securities Act registration statement, it should explicitly incorporate by reference the omitted discussion rather than just identify the location in the prior filing. The amendments do not affect smaller reporting companies or emerging growth companies, both of which already provide a discussion covering only two fiscal years, based on the financial statements that they are required to provide. The amendments also revise Instruction 1 of Item 303 of Regulation S-K to eliminate the reference to presenting year-to-year comparisons to explain the financial information presented in the MD&A. Issuers may use any presentation that, in the issuer's judgment, enhances a reader's understanding of the issuer's financial condition, changes in financial condition, and results of operations. In addition, the reference to five-year selected financial data in Instruction 1 to Item 303(a) of Regulation S-K was deleted. The adopting release indicates that, because Item 303(a)(3)(ii) of Regulation S-K already requires disclosure of known trends and uncertainties, the SEC does not anticipate that the removal of this wording will impact the level of disclosure concerning trends, or otherwise reduce disclosure of material information. The SEC also adopted similar revisions to Item 5 of Form 20-F for foreign private issuers.

Form 10-K permits issuers to incorporate the information required by Part III of Form 10-K, including the disclosure regarding the identity and background information of an issuer's directors, executive officers, and significant employees, by reference to their definitive proxy or information statement. Alternatively, Instruction 3 to Item 401(b) of Regulation S-K, "Directors, Executive Officers, Promoters and Control Persons," permits issuers to disclose this information in Part I of Form 10-K. The SEC amended Item 401 of Regulation S-K to confirm that any disclosure required by Item 401 of Regulation S-K does not need to be repeated in an issuer's proxy statement if it is already included in the Form 10-K. The SEC also adopted a revision to the required caption for the Item 401 disclosure if it is included in Part I of Form 10-K to reflect a "plain English" approach. The required caption is "Information about our Executive Officers," instead of "Executive officers of the registrant."

Section 16(a) of the Exchange requires officers, directors, and specified types of security holders to report their beneficial ownership of an issuer's equity securities by filing forms prescribed by the SEC. The SEC eliminated the requirement in Rule 16a-3(e) that such reporting persons provide Section 16 reports to the issuer. Rather, issuers may rely on EDGAR filings in determining whether the issuer's reporting persons have been delinquent in filing reports required under Section 16(a), but issuers are not required to limit their inquiry to those filings. Item 405 of Regulation S-K, "Compliance with Section 16(a) of the Exchange Act," was also amended to change the disclosure heading required by Item 405(a)(1), from "Section 16(a) Beneficial Ownership Reporting Compliance" to the more specific "Delinquent Section 16(a) Reports," and encourage issuers to exclude this heading from their disclosures when they have no Section 16(a) delinquencies to report. The SEC also removed the checkbox from the cover page of Form 10-K indicating that there is no disclosure of delinquent filers in Form 10-K and, to the best of the issuer's knowledge, will not be included in a definitive proxy statement or information statement incorporated by reference.

The SEC amended Item 407(e)(5) of Regulation S-K, "Corporate Governance," to explicitly exclude emerging growth companies ("EGCs") from the requirement to provide a Compensation Committee Report, because EGCs are not required to provide a Compensation Discussion and Analysis in their disclosures. The SEC also amended Item 407(b)(3)(i)(B) of Regulation S-K, which requires an issuer's audit committee to state in the proxy statement whether it has discussed with the independent auditor the matters required under applicable auditing standards, to now include a general reference to "the applicable requirements of the Public Company Accounting Oversight Board (PCAOB) and the Commission," rather than reference an outdated auditing standard.

The SEC amended the instruction to Item 501(b)(1) of Regulation S-K, "Forepart of the Registration Statement and Outside Cover Page of the Prospectus," which requires disclosure of an issuer's name on the cover page of the prospectus. This instruction had specified that, if an issuer's name is the same as that of a well-known company, or if the issuer's name leads to a misleading inference about the issuer's line of business, then the issuer must include information to eliminate any potential confusion or misleading inference and, in some circumstances, disclosure may not be sufficient and the issuer may be required to change its name, subject to certain exceptions. The SEC deleted the portion of the Instruction to Item 501(b)(1) of Regulation S-K which indicated that disclosure may not be sufficient in certain circumstances and the issuer would need to change its name, recognizing that clarifying disclosure can typically address the potential confusion or misleading inference associated with an issuer's name. Item 501(b)(3) of Regulation S-K requires that the front cover page of the prospectus include the price of the securities being offered, the underwriter's discounts and commissions, and the net proceeds that the issuer and any selling security holders will receive, and dictates that the information be provided on an aggregate and per share basis.

When it is not practicable to provide a price for the securities, Instruction 2 to Item 501(b)(3) has permitted issuers to explain on the cover page the method by which the price is to be determined. The SEC adopted amendments to Instruction 2 to Item 501(b) of Regulation S-K to now permit issuers to include a clear statement on the cover page that the offering price will be determined by a particular method or formula that is more fully explained elsewhere in the prospectus, along with a cross-reference (including the page number) to that more detailed explanation of how the offering price will be determined. Item 501(b)(4) of Regulation S-K requires an issuer to name any "national securities exchange" that lists the securities being offered, and to disclose the trading symbol for the securities. As amended, Item 501(b)(4) of Regulation S-K will require disclosure on the prospectus cover page of the principal United States market or markets for the securities being offered, in addition to the issuer's symbols for the securities. In adopting this change, the SEC stated that the information about markets where the offered securities will be traded could be important to investors, even when such markets are not "national securities exchanges."

Item 501(b)(10) of Regulation S-K requires that an issuer using a preliminary prospectus before the effectiveness of a registration statement must include a "Subject to Completion" legend, which advises readers that the information will be amended or completed. The SEC amended Item 501(b)(10) of Regulation S-K so that issuers may exclude the portion of the legend which states that the prospectus is not an offer to sell or a solicitation of an offer to buy securities in any state where the offer or sale is not permitted, when the legend is included in a preliminary prospectus for an offering that is not prohibited by state blue sky laws. The SEC also combined paragraphs (b)(10) and (b)(11) of Item 501 of Regulation S-K without substantive change to the requirement that the "Subject to Completion" legend also be included if an issuer relies on Rule 430A to omit pricing information and the prospectus is used after the effectiveness of the registration statement but before the public offering price is determined.

The SEC adopted amendments that relocate Item 503(c) of Regulation S-K, “Prospectus Summary and Risk Factors,” which requires disclosure of the most significant factors that make an offering speculative or risky, to new Item 105 in Subpart 100 of Regulation S-K. The SEC noted that this change was warranted because the risk factor disclosure covers a broad category of business information and is not limited to offering-related disclosure. The SEC also eliminated the specific risk factor examples enumerated in the Item 503 of Regulation S-K, in line with the SEC’s policy to discourage “boiler plate” risk factors and to better align with the principles-based objectives of the disclosure requirement.

Item 508 of Regulation S-K, “Plan of Distribution,” requires disclosure in the prospectus about the plan of distribution for the securities being offered and sold, including specific information about dealers who are participating in the offering as “sub-underwriters,” a term which is not defined in the Item. The SEC adopted an amendment to Rule 405 of Regulation C (which defines the term “principal underwriter”) to also define a “sub-underwriter” as a dealer that is participating as an underwriter in an offering by committing to purchase securities from a principal underwriter for the securities but is not itself in privity of contract with the issuer of the securities.

The SEC adopted amendments to Item 512 of Regulation S-K, “Undertakings,” to eliminate undertakings that, in the SEC’s view, are duplicative of other rules or have become unnecessary due to developments since their adoption. The undertaking required by Item 512(c) of Regulation S-K, which was required for an offering of warrants and rights when securities not purchased are reoffered to the public, was eliminated because it is no longer necessary. The SEC eliminated the following undertakings because they were obsolete:

- The undertaking required by Item 512(d) of Regulation S-K, which was required for offerings involving competitive bidding;
- The undertaking required by Item 512(e), which was required when incorporating an annual report into a prospectus; and
- The undertaking required by Item 512(f) of Regulation S-K, which was required in equity offerings by issuers not subject to the Exchange Act reporting requirements.

The SEC adopted amendments that now permit issuers to file redacted material contracts under Item 601(b)(10) of Regulation S-K, "Exhibits," without applying to the SEC for confidential treatment of the redacted information, provided that the redacted information: (i) is not material; and (ii) would be competitively harmful if publicly disclosed. Issuers are required to identify where information has been omitted from a filed exhibit by:

- Marking the exhibit index to indicate that portions of the exhibit or exhibits have been omitted;
- Including a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and would be competitively harmful if publicly disclosed; and
- Indicating with brackets where the information has been omitted from the filed version of the exhibit.

The SEC adopted parallel amendments to Item 601(b)(2) and Form 20-F. In addition to the new rules governing the omission of information from material contracts because it is not material and disclosure would be competitively harmful, the SEC codified the Staff's practice of permitting the omission of personally identifiable information, such as social security numbers, bank account numbers, home addresses or telephone numbers. New paragraph (a)(6) of Item 601 of Regulation S-K expressly permits the omission of such information without requiring the submission of a confidential treatment request. The SEC adopted comparable amendments to Form 20-F to align the requirements of that form.

The SEC also adopted an amendment to Item 601(b)(10) of Regulation S-K that will require only "newly-reporting companies" to file material contracts that were entered into within two years of the registration statement or report. This new limitation on the two-year look back test includes a definition of which issuers will be considered "newly-reporting registrants." The adopting release states that this change is intended to help ensure that investors receive access to agreements containing material information, while the SEC also recognizes that issuers with established reporting histories no longer need to be subject to the two-year look-back requirement, because investors will continue to have access to any material agreements previously filed. The SEC adopted comparable amendments to Form 20-F to align the requirements of that form.

The SEC adopted new paragraph (a)(5) to Item 601 of Regulation S-K, which provides that issuers will no longer be required to file attachments to material agreements, as long as the attachments do not contain material information and are not otherwise disclosed in the exhibit or disclosure. The issuer must provide with each exhibit a list briefly identifying the contents of any omitted schedules and attachments, unless that information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. Issuers are also required to provide, on a supplemental basis, a copy of any omitted schedule or attachment to the Staff upon request. The SEC adopted comparable amendments to Form 20-F to align the requirements of that form.

The existing requirements under Item 202 of Regulation S-K require an issuer to provide a brief description of its registered capital stock, debt securities, warrants, rights, American Depositary Receipts in the prospectus offering such securities, and other securities. Under amendments to Item 601 of Regulation S-K, issuers will now be required to provide the information required by Item 202(a)-(d) and (f) as an exhibit to their Form 10-K. The SEC adopted comparable amendments to Form 20-F to align the requirements of that form.

The SEC consolidated the procedural requirements governing the incorporation of information by reference into Regulation C and Regulation 12B. The SEC eliminated the prohibition that had been set forth in Item 10(d) of Regulation S-K on incorporating documents by reference if such documents had been on file with the SEC for more than five years, subject to certain exceptions. Under the new rules, an issuer will no longer be required to file as an exhibit any document or part thereof that is incorporated by reference in a filing, and instead the issuer will provide a hyperlink to the document that is incorporated by reference. The SEC eliminated a requirement in Item 601(b)(13) that issuers file a Form 10-Q as an exhibit when it is specifically incorporated by reference into a prospectus. The SEC's amendments also prohibit incorporating by reference, or cross-referencing to, information outside of the financial statements into the issuer's financial statements, unless otherwise specifically permitted or required by the SEC's rules or by U.S. GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board. The SEC also amended Rule 0-4 to, except as provided in SEC rules, restrict the incorporation of financial information required to be given in comparative form for two or more fiscal years or periods unless the information incorporated by reference includes the entire period for which comparative data is given.

The amendments include changes impacting the cover page disclosure of Forms 8-K, 10-Q, 10-K, 20-F and 40-F. Issuers will be required to tag specific cover page data using Inline XBRL, such as the form type, the issuer's name, the type of filer and the issuer's public float. The requirement to tag information on the cover page of Form 20-F or 40-F only applies when the form is being used as an annual report (rather than as a registration statement). Issuers will be required to file with each of the specified forms a "Cover Page Interactive Data File." These requirements are subject to the phase-in schedule described above. Under the amendments, the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F and Form 40-F will require disclosure of the trading symbol for each class of registered securities. Further, the cover pages of Form 10-Q and Form 8-K will require disclosure of the title of each class of securities registered under the Exchange Act and each exchange on which the securities are listed.

Financial Statement Requirements for Registered Debt Offerings

On March 2, 2020, the SEC adopted amendments to the financial disclosure requirements for guarantors and issuers of guaranteed securities registered or being registered under the Securities Act, and affiliates whose securities collateralize securities registered or being registered under the Securities Act. Under the amendments, the rule will continue to permit the omission of separate financial statements of subsidiary issuers and guarantors when certain conditions are met and the parent company provides supplemental financial and non-financial disclosure about the subsidiary issuers and/or guarantors and the guarantees. Similar to the existing rule, the amended rules specifies the conditions that must be met in order to omit separate subsidiary issuer or guarantor financial statements. The amendments: (i) replace the condition that a subsidiary issuer or guarantor be 100%-owned by the parent company with a condition that it be consolidated in the parent company's consolidated financial statements; (ii) replace condensed consolidating financial information with new financial and non-financial disclosures; (iii) permit the amended disclosures to be provided outside of the footnotes to the parent company's audited annual and unaudited interim consolidated financial statements; and (iv) require the amended financial and non-financial disclosures for as long as an issuer or guarantor has an Exchange Act reporting obligation with respect to the guaranteed securities, rather than for as long as the guaranteed securities are outstanding.

The SEC also amended the rule requiring financial information for each affiliate whose securities constitute a substantial portion of the collateral, based on a numerical threshold, for any class of registered securities as if the affiliate were a separate issuer. The amendments: (i) replace the requirement to provide separate financial statements for each affiliate whose securities are pledged as collateral with amended financial and non-financial disclosures about the affiliate and the collateral arrangement as a supplement to the consolidated financial statements of the issuer that issues the collateralized security, and such information can be provided outside of the footnotes to the consolidated financial statements; and (ii) replace the requirement to provide disclosure only when the pledged securities meet or exceed a numerical threshold relative to the securities registered (or being registered) with a requirement to provide the proposed financial and non-financial disclosures in all cases, unless they are immaterial. The amendments were effective on January 4, 2021.

Financial Statement Requirements for Acquisitions and Dispositions

On May 20, 2020, the SEC adopted amendments to the financial statement and other disclosure requirements related to acquisitions and dispositions of businesses, including real estate operations. The amendments were effective on January 1, 2021; however, the SEC permitted voluntary compliance before that date. The SEC, which originally proposed the amendments in May 2019, adopted the amendments largely as proposed, with certain modifications based on comments received. The amendments significantly clarify and simplify the disclosures required in connection with acquisitions and dispositions.

The amendments relate to the significance tests in the definition of "significant subsidiary" and the historical and pro forma financial statement disclosure requirements in Regulation S-X for acquisitions and dispositions of businesses, including real estate operations. Specifically, the SEC amended Rules 3-05, 3-14, 8-04, 8-05, and 8-06 and Article 11 of Regulation S-X, as well as other related rules and forms, including with respect to the inclusion of such financial statements in registration statements and proxy statements and the impact on Item 2.01 of Form 8-K.

Some of the key amendments include the following:

- Update the significance tests used to determine whether acquisitions or dispositions will require the presentation of historical financial statements and/or pro forma financial information, including the addition of a revenue component to the income test and the use of the market value of the registrant's common equity, if available, rather than total assets for the investment test;
- Require the financial statements of the acquired business to cover only up to the two most recent fiscal years (reduced from three)—one year if greater than 20% significant but less than 40% significant and two years if greater than 40% significant;
- Align Rule 3-14 (acquisition of real estate operations) to Rule 3-05 where no unique industry considerations exist, including raising the significance threshold from 10% to 20% and eliminating the requirement to provide three years of financial statements for acquisitions from related parties;
- Modify the presentation and adjustment requirements for pro forma financial information, including the use of optional "management's adjustments" that reflect forward-looking information regarding synergies identified by management in connection with the transaction;
- Increase the significance threshold for dispositions from 10% to 20% and conform the significance tests to those used for acquisitions;
- Permit disclosure of abbreviated financial statements for acquisitions of a component of an entity, subject to certain "qualifying conditions" and "presentation conditions";
- No longer require separate acquired business financial statements once the business has been included in the registrant's post-acquisition audited annual financial statements for either nine months or a complete fiscal year, depending on the level of significance;

- Eliminate the requirement that acquired business financial statements continue to be provided when they have been previously filed but the acquired business is of "major significance";
- For foreign businesses, permit the use of, or reconciliation to, International Financial Reporting Standards as issued by the International Accounting Standards Board in certain circumstances;
- Expand the use of pro forma financial information in measuring significance; and
- Modify and enhance the required disclosure for the aggregate effect of acquisitions for which financial statements are not required or are not yet required.

Business, Legal Proceeding and Risk Factor Disclosure Requirements

On August 26, 2020, the SEC adopted amendments to modernize the description of business required by Item 101 of Regulation S-K, legal proceedings disclosure required by Item 103 of Regulation S-K, and risk factor disclosures required by Item 105 of Regulation S-K. The SEC had proposed amendments to these disclosure requirements on August 8, 2019, as part of the SEC's comprehensive evaluation of the SEC's disclosure requirements that was recommended in the Staff's Report on Review of Disclosure Requirements in Regulation S-K that was mandated by Section 108 of the JOBS Act. The amendments were effective on November 9, 2020.

Consistent with the proposals, the SEC adopted amendments to Item 101(a) of Regulation S-K to make it largely principles-based, requiring disclosure of information material to an understanding of the general development of the business, and replaced the prescribed five-year timeframe with a materiality framework. The amendments permit a company, in filings made after the company's initial filing, to provide only an update of the general development of the business focused on material developments that have occurred since its most recent full discussion of the development of its business, which will be incorporated by reference. The SEC also amended Item 101(c) to clarify and expand its principles-based approach, with a non-exclusive list of disclosure topic examples, and to include, as a disclosure topic, a description of the company's human capital resources, to the extent such disclosures would be material to an understanding of the company's business. The SEC also adopted amendments that refocus the regulatory compliance disclosure requirement to include as a topic all material government regulations, not only environmental laws.

The SEC adopted amendments to Item 103 of Regulation S-K which state that the required information may be provided by hyperlink or cross-reference to legal proceedings disclosure located elsewhere in the document to avoid duplicative disclosure. The SEC also adopted a modified disclosure threshold for certain governmental environmental proceedings resulting in monetary sanctions that increases the existing quantitative threshold for disclosure of those proceedings from $100,000 to $300,000. As amended, the rule allows a company, at its election, to select a different threshold that it determines is reasonably designed to result in disclosure of material environmental proceedings, provided that the threshold does not exceed the lesser of $1 million or one percent of the current assets of the company.

The SEC adopted amendments to Item 105 of Regulation S-K that require summary risk factor disclosure of no more than two pages if the risk factor section exceeds 15 pages. The amendments also refine the principles-based approach of Item 105 by requiring disclosure of "material" risk factors. The amendments also require that risk factors be organized under relevant headings in addition to the subcaptions currently required, with any risk factors that may generally apply to an investment in securities disclosed at the end of the risk factor section under a separate caption.

MD&A, Selected Financial Data and Supplementary Financial Data

On November 19, 2020, the SEC adopted amendments intended to modernize, simplify, and enhance certain financial disclosure requirements in Regulation S-K. The SEC proposed the amendments to the selected financial data, supplementary financial data and MD&A requirements on January 30, 2020 as part of its ongoing evaluation of disclosure requirements.

Selected Financial Data

The SEC adopted amendments to eliminate Item 301 of Regulation S-K, the Selected Financial Data requirement. The SEC noted in the adopting release that "[n]otwithstanding the amendments to eliminate Item 301, we encourage registrants 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.'" The SEC also encourages companies "to consider whether a tabular presentation of relevant financial or other information, as part of an introductory section or overview, including to demonstrate material trends, may help a reader's understanding of MD&A."

Supplementary Financial Data

The SEC adopted amendments retaining Item 302(a) of Regulation S-K (which requires Supplementary Financial Data) while streamlining its requirements to require disclosure only when 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 and that, individually or in the, aggregate, are material. Item 302(a) as amended will require companies to provide an explanation of the reasons for such material changes and to disclose, for each affected quarterly period and the fourth quarter in the affected year, summarized financial information related to the statements of comprehensive income (as specified in Rule 1-02(bb)(ii) of Regulation S-X) and earnings per share reflecting such changes. For this purpose, the affected quarters may include, depending on the facts and circumstances, a single quarter in which the material retrospective change applies, or it may flow through to subsequent quarters during the relevant look-back period (i.e., 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). The SEC also amended Rule 1-02(bb) to clarify that the disclosure of summary financial information may vary, as appropriate, to conform to the nature of the company's business.

MD&A Disclosure Requirements

Item 303 of Regulation S-K requires disclosure of information relevant to assessing a company's financial condition, changes in financial condition, and results of operations. The SEC adopted a number of amendments to Item 303 of Regulation S-K that are intended to modernize, simplify, and enhance the MD&A disclosures for investors, while reducing compliance burdens for companies.

The SEC adopted a new Item 303(a) largely as proposed to succinctly state the purposes of MD&A by incorporating a portion of the substance of Instruction 1, as well as much of the substance of Instructions 2 and 3, into the item. As amended, Item 303(a) articulates the objectives of MD&A, which is for companies to provide disclosure regarding:

- Material information relevant to an assessment of the financial condition and results of operations of the company, including an evaluation of the amounts and certainty of cash flows from operations and from outside sources;
- The material financial and statistical data that the company believes will enhance a reader's understanding of the company's financial condition, cash flows and other changes in financial condition, and results of operations; and
- Material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition, including descriptions and amounts of matters that: (i) have had a material impact on future operations; and (ii) are reasonably likely, based on management's assessment, to have material impact on future operations.

The SEC also codified the guidance that a company should provide a narrative explanation of its financial statements that enables investors to see a company "through the eyes of management," specifying that "[a] discussion and analysis that meets these requirements is expected to allow investors to view the registrant from management's perspective."

The SEC adopted amendments re-captioning current Item 303(a) as Item 303(b), which applies to all MD&A disclosures, while retaining the current language that outlines what is to be covered in the discussion of a company's financial condition, changes in financial condition, and results of operations. In addition, the SEC amended this item to add product lines as an example of other subdivisions of a company's business that should be discussed where, in the company's judgment, such a discussion would be necessary to an understanding of the company's business.

The SEC adopted amendments to move to Item 303(b) that portion of current Instruction 4 to Item 303(a) that requires a description of the causes of material changes from year-to-year in line items of the financial statements to the extent necessary to an understanding of the company's business as a whole. The SEC amended that language to clarify that MD&A requires a narrative discussion of the "underlying reasons" for material changes from period-to-period in one or more line items in quantitative and qualitative terms, rather than only the "cause" for material changes. The SEC also amended the language to clarify that companies should discuss material changes within a line item, even when such material changes offset each other.

The SEC adopted other amendments to further streamline Item 303:

- Instruction 8 to current Item 303(b) indicates that the term "statement of comprehensive income" is defined by Rule 1-02 of Regulation S-X, and the SEC moved this language to Instruction 11 to Item 303(b) to clarify that the instruction applies to both full fiscal year and interim period MD&A disclosure; and
- The SEC eliminated current Instructions 13 and 14 to Item 303(a), which reference certain industry guides, noting that companies would still need to consider the industry guides when preparing their disclosures, to the extent applicable.

The SEC amended Item 303(a)(2) to specify, consistent with the SEC's prior guidance, that a company should broadly disclose material cash commitments, including, but not limited, to capital expenditures. The amendment requires a company to describe its material cash requirements, including commitments for capital expenditures, as of the latest fiscal period, the anticipated source of funds needed to satisfy such cash requirements, and the general purpose of such requirements. The SEC indicates that this change is intended to modernize Item 303(a)(2) by specifically requiring disclosure of material cash requirements in addition to capital expenditures, and to complement the deletion of the contractual obligations, discussed below.

The SEC amended Item 303(a)(3)(ii) to provide that when a company knows of events that are *reasonably likely* to cause (as opposed to *will* cause) a material change in the relationship between costs and revenues, such as known or reasonably likely future increases in costs of labor or materials, price increases or inventory adjustments, the reasonably likely change must be disclosed. This amendment conforms the language to other Item 303 disclosure requirements for known trends and aligns the disclosure requirement with the SEC's guidance on forward-looking disclosure. The SEC clarified in the adopting release that, as part of MD&A's objectives, "whether a matter is 'reasonably likely' to have a material impact on future operations is based on 'management's assessment.'"

The SEC amended Item 303(a)(3)(iii) of Regulation S-K to codify guidance that the results of operations discussion should describe not only increases but also decreases in net sales or revenues and to clarify the requirement by tying the required disclosure to "material changes" in net sales or revenues, rather than solely to "material increases" in those line items. The SEC eliminated Item 303(a)(3)(iv) and Instructions 8 and 9 to Item 303(a).

The SEC adopted amendments that replace current Item 303(a)(4) (the off-balance sheet arrangements disclosure requirement) with a new instruction to Item 303(b) that requires companies to discuss commitments or obligations, including contingent obligations, arising from arrangements with unconsolidated entities or persons that have, or are reasonably likely to have, a material current or future effect on a company's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements, or capital resources. The SEC notes in the adopting release that this more principles-based approach is appropriate, particularly in light of the updates that have been made to U.S. GAAP, which have resulted in overlap between U.S. GAAP requirements and current Item 303(a)(4).

The SEC eliminated the requirement to provide a table of contractual requirements in Item 303(a)(5). The SEC amended Item 303(b) to specifically require disclosure of material cash requirements from known contractual and other obligations as part of a liquidity and capital resources discussion. The amendments to Item 303(b) "are intended to clarify the requirements while continuing to emphasize a principles-based approach focused on material short- and long-term liquidity and capital resources needs, while also specifying that material cash requirements from known contractual and other obligations should be considered as part of these disclosures." Specifically, these amendments:

- Create a new Item 303(b)(1) to provide the overarching requirements for liquidity and capital resources disclosures in order to clarify these requirements;

- Incorporate in Item 303(b)(1) portions of current Instruction 5 to Item 303(a), which defines "liquidity" as the ability to generate adequate amounts of cash to meet the needs for cash, clarifying its applicability to the liquidity and capital resources requirements more generally;
- Codify prior SEC guidance that specifies that short-term liquidity and capital resources covers cash needs up to 12 months into the future while long-term liquidity and capital resources covers items beyond 12 months;
- Require the discussion on both a short-term and long-term basis;
- Require the discussion to analyze material cash requirements from known contractual and other obligations and such disclosures to specify the type of obligation and the relevant time period for the related cash requirements;
- Include a new instruction that states that the discussion of material cash requirements from known contractual obligations may include, for example, lease obligations, purchase obligations, or other liabilities reflected on the registrant's balance sheet; and
- Include a new instruction that states, consistent with prior SEC guidance, the analysis for all of Item 303(b) should be in a format that facilitates easy understanding and does not duplicate disclosure already provided in the filing.

The SEC amended Item 303(a) of Regulation S-K to explicitly require disclosure of critical accounting estimates, consistent with prior SEC guidance on the topic. Critical accounting estimates are defined in the rule as "those estimates made in accordance with generally accepted accounting principles that involve a significant level of estimation uncertainty and have had or are reasonably likely to have a material impact on the financial condition or results of operations of the registrant." The item requires companies to provide qualitative and quantitative information necessary to understand the estimation uncertainty and the impact the critical accounting estimate has had or is reasonably likely to have on financial condition or results of operations to the extent the information is material and reasonably available. The rule indicates that this information should include why each critical accounting estimate is subject to uncertainty and, to the extent the information is material and reasonably available, how much each estimate and/or assumption has changed over a relevant period, and the sensitivity of the reported amount to the methods, assumptions and estimates underlying its calculation.

The SEC adopted amendments to Item 303(b) (renumbered as Item 303(c)). The item as amended permits companies to compare their most recently completed quarter to either the corresponding quarter of the prior year (as is currently required) or to the immediately preceding quarter. If a company elects to discuss changes from the immediately preceding sequential quarter, the company must provide summary financial information that is the subject of the discussion for that quarter or identify the prior filing on EDGAR that presents the information. If a company changes the comparison from the prior interim period comparison, the company would be required to explain the reason for the change and present both comparisons in the filing where the change is announced.

The SEC also adopted amendments to simplify the item that:

- Eliminate the text that states that companies need not provide a discussion of the impact of inflation and changing prices; and
- Amend Item 303(b)(2) (adopted as Item 303(c)(2)) to break the requirements into two subsections: (i) Item 303(c)(2)(i) continues to require companies to discuss any material changes in their results of operations between the most recent year-to date interim period(s) and the corresponding period(s) of the preceding fiscal year for which statements of comprehensive income are provided; and (ii) Item 303(c)(ii) requires companies to compare their most recently completed quarter to either of the corresponding quarter of the prior year (as is currently required) or to the immediately preceding quarter.

The SEC also eliminated the language of the item that requires companies subject to Rule 3-03(b) of Regulation S-X that elect to provide a statement of comprehensive income for the 12 month period ended as of the date of the most recent interim balance sheet to discuss material changes in that 12-month period with respect to the preceding fiscal year, rather than the corresponding preceding period. The SEC also deleted Instructions 2, 3, 5, 6, 7, and 8 to current paragraph (b).

As proposed, the SEC eliminated Item 303(c). The SEC notes that the amendments do not alter the availability or scope of the statutory and regulatory safe harbors. The SEC also eliminated Item 303(d), given the elimination of Items 303(a)(3)(iv) and (a)(5).

The SEC adopted corresponding amendments that would apply to foreign private issuers providing disclosure required by Form 20-F or Form 40-F. The SEC also adopted amendments to current Instruction 11 to Item 303 of Regulation S-K, which specifically applies to foreign private issuers that choose to file on domestic forms. The SEC adopted conforming amendments to numerous rules and forms to reflect the amendments.

The final rules were effective February 10, 2021, which is referred to as the “effective date.” Companies were required to apply the amended rules for their first fiscal year ending on or after 210 days after publication in the Federal Register, which is referred to as the “mandatory compliance date.” Companies were be required to apply the amended rules in a registration statement and prospectus that on its initial filing date is required to contain financial statements for a period on or after the mandatory compliance date.

OTHER DISCLOSURE INITIATIVES

Conflict Minerals Disclosure

On April 7, 2017, the Staff issued an "Updated Statement on the Effect of the Court of Appeals Decision on the Conflict Minerals Rule," responding an order from the U.S. District Court for the District of Columbia remanding the conflict minerals disclosure rule to the SEC to determine how to address the ruling of the U.S. Court of Appeals for the District of Columbia Circuit that portions of the statute and the rule are unconstitutional.

In the April 7 statement, that Staff stated "the [District] court and the Court of Appeals left open the question of whether this description [*i.e.*, 'not found to be DRC conflict free'] is required by the statute or, rather, is a product of the Commission's rulemaking." The Staff further states in the April 7 statement that "the Division of Corporation Finance has determined that it will not recommend enforcement action to the Commission if companies, including those that are subject to paragraph (c) of Item 1.01 of Form SD, only file disclosure under the provisions of paragraphs (a) and (b) of Item 1.01 of Form SD. This statement is subject to any further action that may be taken by the Commission, expresses the Division's position on enforcement action only, and does not express any legal conclusion on the rule." Based on the Staff's guidance, issuers are still expected to conduct, in good faith, a reasonable country of origin inquiry in accordance with Item 1.01(a) of Form SD. Disclosure regarding that reasonable country of origin inquiry would still be required pursuant to Item 1.01(b) of Form SD if the conditions in Item 1.01(b) are satisfied. Under the guidance, an issuer that is subject to Item 1.01(c) of Form SD has option to not provide all of the disclosure required by Item 1.01(c) of Form SD (in the form of an attached Conflict Minerals Report), but rather provide the disclosures required by paragraphs (a) and (b) of Item 1.01 of Form SD.

Mining Disclosure

On October 31, 2018, the SEC adopted revisions to the property disclosure requirements and guidance for mining issuers. The revisions also modernized the SEC's disclosure requirements and policies for mining properties by aligning them with current industry and global regulatory practices and standards. In addition, the SEC rescinded Industry Guide 7 and included the SEC's mining property disclosure requirements in a new subpart of Regulation S-K.

On May 7, 2019, the Division of Corporation Finance published interpretive guidance regarding voluntary compliance with the SEC's mining property disclosure rules prior to completion of EDGAR reprogramming. The SEC provided a two-year transition period to permit mining companies sufficient time to comply with the new mining property disclosure requirements. Pursuant to this transition period, a mining company is not required to comply with the new rules until its first fiscal year beginning on or after January 1, 2021. The SEC also indicated that a mining company could voluntarily comply with the new requirements before the required date, but only if the company complied with all of the new requirements. The Division provided the following guidance with regard to this voluntary, early compliance:

- While EDGAR reprogramming changes are being completed, a mining company may voluntarily comply with the new mining property disclosure rules if it complies with all of the new requirements and existing EDGAR requirements;
- If a mining company is required to file a technical report summary, the company "should file it as an additional exhibit under Item 601(b)(99) of Regulation S-K or Exhibit No. 15 of Form 20-F. Any maps, diagrams or other graphic material included in the technical report summary must meet EDGAR's technical specification requirements;" and
- Mining companies that do not elect to comply early should continue looking to Guide 7.

Update of Statistical Disclosures for Bank and Savings and Loan Registrants

On September 11, 2020, the SEC adopted rules to update and expand the statistical disclosures that bank and savings and loan companies provide to investors. The rules update the disclosures and eliminate disclosures that overlap with SEC rules, U.S. GAAP or IFRS. The rules codify the updated disclosure requirements in new subpart 1400 of Regulation S-K and rescind Industry Guide 3, *Statistical Disclosure by Bank Holding Companies*. These rule changes are part of the Division of Corporation Finance's disclosure effectiveness initiative. The rule changes are effective on November 16, 2020 and will apply to fiscal years ending on or after December 15, 2021. Guide 3 will be rescinded effective January 1, 2023. Voluntary compliance with the new rules is accepted in advance of the mandatory compliance date.

The rules apply to domestic and foreign bank holding companies, banks, savings and loan holding companies, and savings and loan associations. Disclosures are required for each annual period presented and any additional interim period if a material change in the information or trend evidenced thereby has occurred. The rules require disclosure about the following:

- Distribution of assets, liabilities and stockholders' equity, the related interest income and expense, and interest rates and interest differential;
- Weighted average yield of investments in debt securities by maturity;
- Maturity analysis of the loan portfolio including the amounts that have predetermined interest rates and floating or adjustable interest rates;
- Certain credit ratios and the factors that explain material changes in the ratios, or the related components during the periods presented;

- The allowance for credit losses by loan category; and
- Bank deposits including average amounts and rate paid and amounts that are uninsured.

Disclosure of Payments by Resource Extraction Issuers

On December 16, 2020, the SEC to adopted final rules that will require resource extraction issuers that are required to file reports under Section 13 or 15(d) of the Exchange Act to disclose payments made to the U.S. federal government or foreign governments for the commercial development of oil, natural gas, or minerals. The rules implement Section 13(q) of the Exchange Act, which was added by the Dodd-Frank Act. The adopted rules will require a domestic or foreign reporting issuer to disclose payments made by the issuer or a subsidiary or entity controlled by the issuer to the U.S. federal government or a foreign government if the issuer engages in the commercial development of oil, natural gas, or minerals.

The rules will require resource extraction issuers (defined as oil, natural gas, and mining companies that are required to file reports under Section 13 or 15(d) of the Exchange Act to file a Form SD on an annual basis that includes information about payments related to the commercial development of oil, natural gas, or minerals that are made to a foreign government or the Federal Government. The final rules will, among other things:

- Require public disclosure of company-specific, project-level payment information;
- Define the term "project" to require disclosure at the national and major subnational political jurisdiction, as opposed to the contract, level, recognizing that more granular contract-level disclosure could be used to satisfy the rule;
- Add two new conditional exemptions for situations in which a foreign law or a pre-existing contract prohibits the required disclosure;
- Add a conditional exemption for smaller reporting companies and emerging growth companies;
- Define "control" to exclude entities or operations in which an issuer has a proportionate interest;
- Limit the liability for the required disclosure by deeming the payment information to be furnished to, but not filed with, the Commission;
- Add relief for issuers that have recently completed their U.S. initial public offerings; and
- Extend the deadline for furnishing the payment disclosures.

Following a two-year transition period after the effective date of the rule, an issuer will be required annually to submit Form SD no later than 270 days following the end of its most recently completed fiscal year.

The SEC has indicated in its Fall 2023 Regulatory Flexibility Act Agenda that it intends to propose further changes to the resource extraction issuer disclosure requirements during 2023.

Holding Foreign Companies Accountable Act

The Holding Foreign Companies Accountable Act amended the Sarbanes-Oxley Act of 2002 to prohibit listing on US exchanges of foreign companies for which the PCAOB has been unable to inspect audit work papers. Under the Act, the SEC is required to identify companies that have registered public accounting firms that are located in foreign jurisdictions and for which the PCAOB is unable to inspect work papers. If the SEC determines that a company has three consecutive non-inspection years, it must prohibit the securities from being traded on a national securities exchange or over-the-counter. Companies must also submit documentation to show they are not owned or controlled by a governmental entity and disclose information about relationships to the Chinese Communist Party.

In March 2021, the SEC adopted interim final rules implementing the requirements. In November 2021, the SEC approved the PCAOB's Rule 6100, *Board Determinations Under the Holding Foreign Companies Accountable Act*. Rule 6100 establishes a framework for the PCAOB's determinations under the Holding Foreign Companies Accountable Act that the PCAOB is unable to inspect or investigate completely registered public accounting firms located in a foreign jurisdiction because of a position taken by an authority in that jurisdiction. PCAOB Rule 6100 was effective immediately.

In December 2021, the SEC adopted amendment to finalize rules implementing the submission and disclosure requirements in the Holding Foreign Companies Accountable Act. These rules apply to issuers that the SEC identifies as having filed an annual report with an audit report issued by a registered public accounting firm that is located in a foreign jurisdiction and that the PCAOB is unable to inspect or investigate (referred to as "Commission-Identified Issuers").

Consistent with the Holding Foreign Companies Accountable Act, the amendments require Commission-Identified Issuers to submit documentation to the SEC through the EDGAR system on or before its annual report due date that establishes that it is not owned or controlled by a governmental entity in its public accounting firm's foreign jurisdiction.

The amendments also require each Commission-Identified Issuer that is also a "foreign issuer," as defined in Exchange Act Rule 3b-4, to provide certain additional specified disclosures in their annual report for itself and its consolidated foreign operating entity or entities, including any variable-interest entity or similar structure that results in additional foreign entities being consolidated in the registrant's financial statements. The required disclosures include:

- During the period covered by the form, the registered public accounting firm has prepared an audit report for the issuer;
- The percentage of the shares of the issuer owned by governmental entities in the foreign jurisdiction in which the issuer is incorporated or otherwise organized;
- Whether governmental entities in the applicable foreign jurisdiction with respect to that registered public accounting firm have a controlling financial interest with respect to the issuer;
- The name of each official of the Chinese Communist Party who is a member of the board of directors of the issuer or the operating entity with respect to the issuer; and
- Whether the articles of incorporation of the issuer (or equivalent organizing document) contains any charter of the Chinese Communist Party, including the text of any such charter.

The SEC will identify an issuer as a Commission-Identified Issuer as early as possible after the issuer files its annual report and on a rolling basis. The SEC will "provisionally identify" an issuer as a Commission-Identified Issuer on the SEC's website at www.sec.gov/HFCAA. For 15 business days after this provisional identification, an issuer may email the SEC if it believes it has been incorrectly identified, providing evidence supporting its claim. After reviewing the information, the issuer will be notified whether the SEC will "conclusively identify" the registrant as a Commission-Identified Issuer. If the issuer does not contact the SEC to dispute the provisional identification within 15 business days, the SEC will conclusively identify the issuer as a Commission-Identified Issuer. The SEC will publish a list on its website identifying Commission-Identified Issuers, indicating the number of years a Commission-Identified Issuer has been published on the list, and noting whether the Commission-Identified Issuer has been subject to any prior trading prohibitions.

The SEC will impose an initial trading prohibition on an issuer as soon as practicable after it is conclusively identified as a Commission-Identified Issuer for three consecutive years. If the SEC ends the initial trading prohibition and, thereafter, the issuer is again determined to be a Commission-Identified Issuer, the SEC will impose a subsequent trading prohibition on the issuer for a minimum of five years. To end an initial or subsequent trading prohibition, a Commission-Identified Issuer must certify that it has retained or will retain a registered public accounting firm that the PCAOB has determined it is able to inspect or investigate. To make that certification, the Commission-Identified Issuer must file financial statements that include an audit report signed by such a registered public accounting firm.

Accelerated Filer and Large Accelerated Filer Definitions

On March 12, 2020, the SEC adopted amendments to the "accelerated filer" and "large accelerated filer" definitions. The SEC proposed these amendments on May 9, 2019 and the comment period ended on July 29, 2019. The SEC stated that these amendments were adopted "to more appropriately tailor the types of issuers that are included in the categories of accelerated and large accelerated filers and promote capital formation, preserve capital, and reduce unnecessary burdens for certain smaller issuers while maintaining investor protections." The amendments were effective on April 27, 2020. The amendments apply to an annual report filing due on or after the effective date.

The amendments add a new condition to the accelerated and large accelerated filer definitions in Rule 12b-2 of the Exchange Act that excludes an issuer that is eligible to be a smaller reporting company and that had annual revenues of less than $100 million in the most recent fiscal year for which audited financial statements are available. These amendments also permit business development companies to qualify for this exclusion if they meet the requirements of the smaller reporting company revenue test using their annual investment income as the measure of annual revenue; however, business development companies would continue to be ineligible to be smaller reporting companies.

Under the definition as amended, an accelerated filer is an issuer that:

- Has a public float of $75 million or more, but less than $700 million, as of the last business day of the issuer's most recently completed second fiscal quarter;
- Has been subject to the requirements of Exchange Act Section 13(a) or 15(d) for a period of at least 12 calendar months;
- Has filed at least one annual report pursuant Exchange Act Section 13(a) or 15(d); and
- Is not eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B), as applicable, of the "smaller reporting company" definition in Exchange Act Rule 12b-2 or, in the case of a business development company, does not meet the requirements of the revenue test in those paragraphs using annual investment income as the measure of its annual revenues.

Under the definition as amended, a large accelerated filer must meet the above conditions, except that, with respect to the first condition, the issuer has a public float of $700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter.

An issuer that is eligible to be a smaller reporting company and that meets the smaller reporting company revenue test discussed above is not required to comply with accelerated filer or large accelerated filer requirements, and therefore is not subject to the internal control over financial reporting auditor attestation requirement. A foreign private issuer is excluded from the definitions for accelerated filer and large accelerated filer if the issuer qualifies, and elects to be treated as, a smaller reporting company based on the smaller reporting company revenue test discussed above.

The cover pages of annual reports on Forms 10-K, 20-F, and 40-F were amended to include a check box to indicate whether an internal control over financial reporting auditor attestation is included in the report.

The amendments increase the public float transition thresholds for accelerated filers and large accelerated filers to become non-accelerated filers from $50 million to $60 million, as well as increase the threshold for exiting large accelerated filer status from $500 million to $560 million. These amendments were adopted to increase the thresholds to be 80 percent of the initial thresholds, consistent with the approach for eligibility to be deemed a smaller reporting company. The amendments also add the smaller reporting company revenue test to the transition thresholds applicable to accelerated filers and large accelerated filers.

Electronic Signatures

On November 17, 2020, the SEC adopted amendments to Regulation S-T to permit to the use of electronic signatures in signature authentication documents required under Regulation S-T in connection with EDGAR filings that are required to be signed. Amended Rule 302(b) sets forth various requirements that must be followed to use electronic signatures for SEC filings. Specifically, before a signatory initially uses an electronic signature to sign an authentication document for a particular SEC filing, the signatory must manually sign "a document attesting that the signatory agrees that the use of an electronic signature in any authentication document constitutes the legal equivalent of such individual's manual signature for purposes of authenticating the signature to any filing for which it is provided" (initial electronic signature authentication document). Once that initial manual signature is obtained, an electronic signature may be used to sign an authentication document for a SEC filing, provided that the signing process for the electronic signature must, at a minimum:

- Require the signatory to present a physical, logical, or digital credential that authenticates the signatory's individual identity;
- Reasonably provide for non-repudiation of the signature;
- Provide that the signature be attached, affixed, or otherwise logically associated with the signature page or document being signed; and

- Include a timestamp to record the date and time of the signature.

The other requirements of Rule 302(b) remain unchanged, including the requirement that an electronic filer retain the authentication document for a period of five years and furnish a copy of it upon request to the SEC or its staff. An electronic filer must retain the initial electronic signature authentication document for a minimum period of seven years after the date of the most recent electronically signed authentication document, and likewise must furnish a copy to the SEC or its staff upon request.

Universal Proxy

On November 17, 2021, the SEC adopted amendments to the proxy rules to require the use of a universal proxy card in proxy contests for most SEC-registered companies. The new rules do not apply to registered investment companies and business development companies. The SEC indicates in the adopting release that these changes, which were originally proposed in 2016, are intended to “enhance the ability of shareholders to elect directors though the proxy process in a manner consistent with their ability to vote in person at a shareholder meeting.” The rule changes became effective on January 31, 2022; however, the rules are subject to a transition period and therefore begin to apply for any shareholder meetings held after August 31, 2022.

Prior to the amendments to Rule 14a-19(e), shareholders voting by proxy in a contested director election were generally unable to vote for a combination of director nominees from competing slates, while shareholders attending and voting at the meeting could vote for any combination of duly-nominated director nominees presented by all parties. The SEC amended Rule 14a-19(e) to mandate the use of universal proxy cards, with the names of company, dissident, and other shareholder nominees, by registered companies (other than registered investment companies and business development companies) in non-exempt director election contests.

The SEC also amended the formatting and presentation requirements for universal proxy cards to require the conditions below, among others:

- The proxy card must set forth the names of all duly nominated director candidates;
- The proxy card must provide a means for shareholders to grant authority to vote for the nominees set forth in the proxy card;
- The proxy card must clearly distinguish among company nominees, dissident nominees, and proxy access nominees, with nominees being listed in alphabetical order within each group;
- The proxy card must present all nominees in the same font type, style, and size;

- The proxy card must prominently disclose the maximum number of nominees for which authority to vote can be granted; and
- The proxy card must prominently disclose the treatment and effect of a proxy executed in a manner that grants authority to vote for more nominees than the number of directors being elected, in a manner that grants authority to vote for fewer nominees than the number of directors being elected, or in a manner that does not grant authority to vote with respect to any nominees.

The SEC amended Rule 14a-19(b), as proposed, to require that a dissident provide the company with the names of its nominees no later than 60 calendar days before the anniversary of the previous year's annual meeting date. The SEC also adopted, as proposed, a requirement for the dissident in a contested director election to file its definitive proxy statement by the later of 25 calendar days prior to the meeting date or five calendar days after the registrant files its definitive proxy statement. The SEC also amended Rule 14a-19(d), requiring a company to notify the dissident of the names of its nominees no later than 50 calendar days prior to the anniversary of the previous year's annual meeting date. The rules as amended will allow both dissidents and companies to change their nominees after providing the initial notice under Rule 14a-19, while requiring prompt notice of any changes in nominees. Further, the rules do not require dissidents or companies to provide notice under Rule 14a-19 if the information required by the notice is provided by the applicable deadlines in a preliminary or definitive proxy statement.

The SEC requires that the dissident in a contested election must (i) solicit holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors; and (ii) make a statement in its proxy materials and notice to the registrant affirming its intention to satisfy the minimum solicitation requirement. To address some commenters' concerns regarding costs imposed on dissidents to deliver proxy materials to shareholders, the SEC notes in the Adopting Release that "the adopted rules, like the Proposed Rules, do not mandate a specific method of furnishing the proxy materials. A dissident may choose to use the less costly e-proxy delivery method (i.e., the "notice and access" method of mailing a notice of internet availability and posting the proxy materials on a website) should it wish."

As amended, Item 7(h) of Schedule 14A requires each party in a contested election to "refer shareholders to the other party's proxy statement for information about the other party's nominees and explain that shareholders can access the other party's proxy statement without cost on the [SEC]'s website." Amended Rule 14a-5(c) allows parties to refer to information that would be furnished in the other party's filing in order to satisfy disclosure obligations. The SEC also changed the definition of "participant" in Instruction 3 to Items 4 and 5 of Schedule 14A, clarifying that only a party's own nominees would be considered "participants" in that party's solicitation, even though all nominees would be included on the universal proxy card.

As adopted, Rule 14a-4(b) requires the inclusion of an "against" voting option, rather than a "withhold authority to vote" option, on the form of proxy for director elections where there is a legal effect to an "against" vote and prohibits the inclusion of an "against" voting option on a proxy card where there is no legal effect to an "against" vote. Similarly, Rule 14a-4(b) requires the inclusion of an "abstain" voting option, rather than a "withhold authority to vote" option, in a director election with a majority voting standard.

Previously, a bona fide nominee would be required to consent to being named in the proxy statement of the party listing that nominee on its card. In order to facilitate universal proxy requirements, the SEC expanded the scope of a bona fide nominee's consent in an election contest to "include consent to being named in *any* proxy statement for the applicable meeting."

The SEC also eliminated the short slate rule, which "allows dissidents soliciting in support of a partial slate of nominees that would make up a minority of the board of directors to seek authority to vote for some of a registrant's nominees," for companies that will be subject to the universal proxy requirements, noting that "it would be unnecessary with a universal proxy requirement and the revised bona fide nominee rule." The SEC clarified that the short slate rule would still be available with respect to registered investment companies and business development companies, as they are not subject to universal proxy requirements at this time.

In August 2022, the Staff issued Proxy Rules and Schedules 14A/14C Compliance and Disclosure Interpretations Questions 139.01, 139.02 and 139.03. These new Compliance and Disclosure interpretations address the operation of Rule 14a-19 in the context of proxy contests and disclosure of the proxy notice deadline when an issuer's advance notice bylaw imposes a deadline that is earlier than the deadline imposed by Rule 14a-19:

Question 139.01

Question: Rule 14a-19(a)(1), in conjunction with Rule 14a-19(b), generally requires a dissident shareholder in an election contest to provide the registrant with notice of the names of the dissident shareholder's nominees for whom it intends to solicit proxies at least 60 calendar days before the anniversary of the prior year's annual meeting date. Can a dissident shareholder include in the Rule 14a-19(b) notice the names of more nominees than there are director seats up for election, without the intent of actually soliciting proxies for all of them but, instead, finalizing its slate of nominees after the Rule 14a-19(b) deadline and closer to the date of the shareholder meeting?

Answer: No. The Rule 14a-19(b) notice must contain only the names of nominees for whom the dissident shareholder intends to solicit proxies. The purpose of this requirement is to provide a definitive date by which the parties in a contested election will have the names of all nominees in order to compile a universal proxy card. See Release No. 34-93596 (Nov. 17, 2021). Knowingly submitting the names of more nominees than there are director seats up for election, with the intention of finalizing the actual slate of nominees after the Rule 14a-19(b) notice deadline, would be inconsistent with the purpose of the rule.

The staff, however, recognizes that a dissident shareholder may need to change its slate of nominees after the Rule 14a-19(b) notice deadline (for example, because a nominee withdraws from the slate or the registrant increases the number of director seats up for election). Therefore, the staff will not object if the dissident shareholder includes in its Rule 14a-19(b) notice: (1) the names of the nominees for whom it intends to solicit proxies and (2) the names of additional or alternate nominees who, in accordance with the registrant's governing documents and state law, would be presented for election in the event of a need to change the original slate, so long as the notice clearly identifies the persons who are being presented as additional or alternate nominees. If the dissident shareholder later changes its slate to include any of the additional or alternate nominees, then it must promptly notify the registrant of the change as required by Rule 14a-19(c).

The views above also apply to the ability of a registrant to include in its Rule 14a-19(d) notice the names of more nominees than director seats up for election. [August 25, 2022]

Question 139.02

Question: Rule 14a-19(b) generally requires a dissident shareholder in an election contest to send a notice to the registrant with the names of its nominees. Similarly, Rule 14a-19(d) requires the registrant to provide the names of the registrant's nominees to any person conducting a solicitation pursuant to Rule 14a-19. In a contested director election where more than one dissident shareholder intends to present a slate of director nominees, should the registrant inform each dissident shareholder of the Rule 14a-19(b) notice that the registrant received with respect to persons nominated by other dissident shareholders?

Answer: Yes. The Rule 14a-19 notification requirements are intended to provide the parties in a contested election with the names of all director nominees by a definitive date so they can compile a universal proxy card. See Release No. 34-93596 (Nov. 17, 2021). Although Rule 14a-19 does not expressly address a situation where there is more than one dissident shareholder submitting a slate of nominees, the registrant is best positioned to notify all parties of the slates submitted by the dissident shareholders as it alone receives the Rule 14a-19(b) notices that all dissident shareholders must send in a contested election. Accordingly, the registrant should notify each dissident shareholder, by the deadline prescribed in Rule 14a-19(d), of not only the names of its nominees and any nominees submitted under a "proxy access" provision but also of the names of any other persons nominated by another dissident shareholder who provided a Rule 14a-19(b) notice. This view also applies to the Rule

14a-19 requirements with respect to prompt notifications of any changes in the registrant's and dissident shareholders' slates of nominees. [August 25, 2022]

Question 139.03

Question: Rule 14a-19(b)(1) requires the dissident shareholder in an election contest to send notice of its director nominees generally no later than 60 calendar days before the anniversary of the prior year's annual meeting. In addition, Rule 14a-5(e)(4) requires the registrant to disclose in its proxy statement the Rule 14a-19(b)(1) deadline for a dissident shareholder to provide notice of its director nominees for election at the next annual meeting. If the registrant's advance notice bylaw provision imposes an earlier deadline for notice of a dissident shareholder's nominees than Rule 14a-19(b)(1), must the registrant's proxy statement also include disclosure of Rule 14a-19(b)(1)'s later deadline?

Answer: Rule 14a-19(b)(1) establishes a minimum, not a maximum, notice period for a dissident shareholder to inform the registrant of its intent to present its own director nominees. See Release No. 34-93596 (Nov. 17, 2021)("Rule 14a-19's notice requirement is a minimum period that does not override or supersede a longer period established in the registrant's governing documents."). Accordingly, where the registrant's advance notice bylaw provision requires earlier notice than Rule 14a-19(b)(1), then the registrant disclosing only the earlier advance notice bylaw deadline would satisfy Rule 14a-5(e)(4).

Note, however, that Rule 14a-19(b) requires specific information to be included in the notice, such as a statement that the dissident shareholder intends to solicit the holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors. To the extent that the registrant's advance notice bylaw provision does not require the same information as that required by Rule 14a-19(b), then the registrant's proxy statement must clearly state the need for a dissident shareholder to comply with the additional requirements of Rule 14a-19(b). [August 25, 2022]

In December 2022, the Staff issued Proxy Rules and Schedules 14A/14C Compliance and Disclosure Interpretations Questions 139.04, 139.05 and 139.06. These new Compliance and Disclosure interpretations address the operation of Rule 14a-19 in the context of proxy contests:

Question 139.04

Question: A registrant receives director nominations from a dissident shareholder purporting to nominate candidates for election to the registrant's board of directors at an upcoming annual meeting. The registrant, however, determines that the nominations are invalid due to the dissident shareholder's failure to comply with its advance notice bylaw requirements. Must the registrant include the names of the dissident shareholder's nominees on its proxy card pursuant to Rule 14a-19(e)(1) under these circumstances?

Answer: No. Only duly nominated candidates are required to be included on a universal proxy card. See Release No. 34-93596 (Nov. 17, 2021) (noting that universal proxy cards "must include the names of all duly nominated director candidates presented for election by any party…", and explaining that "[a] duly nominated director candidate is a candidate whose nomination satisfies the requirements of any applicable state or foreign law provision and a registrant's governing documents as they relate to director nominations"). If the registrant determines, in accordance with state or foreign law, that the dissident shareholder's nominations do not comply with its advance notice bylaw requirements, then it can omit the dissident shareholder's nominees from its proxy card. [December 6, 2022]

Question 139.05

Question: A registrant determines that a dissident shareholder's director nominations do not comply with its advance notice bylaw requirements and excludes the dissident shareholder's nominees from its proxy card. The dissident shareholder then initiates litigation challenging the registrant's determination regarding the validity of the director nominations. Under these factual circumstances, what are the registrant's obligations with respect to its proxy statement disclosures and solicitation efforts?

Answer: The registrant must disclose in its proxy statement its determination that the dissident shareholder's director nominations are invalid, a brief description of the basis for that determination, the fact that the dissident shareholder initiated litigation challenging the determination, and the potential implications (including any risks to the registrant or its shareholders) if the dissident shareholder's nominations are ultimately deemed to be valid.

If a registrant furnishes proxy cards that do not include the dissident shareholder's director candidates and a court subsequently determines that the dissident shareholder's candidates are duly nominated, then the registrant is obligated under Rule 14a-19 to furnish universal proxy cards with the dissident shareholder's candidates. Accordingly, it should discard any previously-furnished proxy cards that it received. The registrant also should ensure that shareholders are provided with sufficient time to receive and cast their votes on the universal proxy cards prior to the shareholder meeting, including, if necessary, through the postponement or adjournment of the meeting. [December 6, 2022]

Question 139.06

Question: Can a dissident shareholder conducting a non-exempt solicitation in support of its own director nominees simply file a proxy statement on EDGAR, avoid providing its own proxy card, and instead rely exclusively on the registrant's proxy card to seek to have its director nominees elected?

Answer: No. Rule 14a-19(e) requires each soliciting party in a director election contest to use a universal proxy card that includes the names of all director candidates, including those nominated by other soliciting parties and proxy access nominees. Rule 14a-19(a)(3) further requires a dissident shareholder to solicit holders of at least 67% of the voting power of shares entitled to vote on the director election contest and to include a representation to that effect in its proxy statement. This requirement is intended to prevent a dissident shareholder from capitalizing on the inclusion of its nominees on the registrant's universal proxy card without undertaking meaningful solicitation efforts. See Release No. 34-93596 (Nov. 17, 2021). A dissident shareholder would fail to comply with these rules if it does not furnish its own universal proxy cards to holders of at least 67% of the voting power through permitted methods of delivering proxy materials (such as the Rule 14a-16 "notice and access" method). [December 6, 2022]

Electronic Filing Requirements for Annual Reports

On June 3, 2022, the SEC adopted amendments to the electronic filing requirements. As a result of these amendments, issuers will be required to file on EDGAR the "glossy" annual report that companies provide as part of their annual meeting proxy materials. The electronic submission of glossy annual reports to the SEC should capture the graphics, styles of presentation, and prominence of disclosures contained in the report. The as-filed version should not reformat, resize, or otherwise redesign the report for purposes of its submission on EDGAR. Issuers were required to begin complying with these amendments on January 11, 2023. The previous guidance from the Staff of the Division of Corporation Finance that it will not object if a company posts an electronic version of its glossy annual report to its corporate website by the due date in lieu of mailing paper copies or submitting it on EDGAR was rescinded as of January 11, 2023.

Rule 10b5-1 and Insider Trading Disclosure

On December 14, 2022, the SEC adopted amendments to the affirmative defense in Rule 10b5-1(c) under the Exchange Act, and adopted a number of changes to disclosure requirements applicable to issuers and insiders.

Amendments to Rule 10b5-1

Rule 10b5-1(c)(1) establishes an affirmative defense to Rule 10b-5 liability for a trade if the trade was made pursuant to a binding contract, an instruction to another person to execute the trade for the instructing person's account, or a written plan. Both historically and as amended, a person asserting a Rule 10b5-1(c)(1) defense must satisfy several conditions:

- The person must demonstrate that, before becoming aware of material nonpublic information, they had entered into a binding contract to purchase or sell the security, provided instructions to another person to execute the trade for the instructing person's account, or adopted a written plan for trading the securities;

- The person must demonstrate that the applicable contract, instructions, or plan: (i) specified the amount of securities to be purchased or sold, price, and date; (ii) provided a written formula or algorithm, or computer program, for determining amounts, prices, and dates; or (iii) did not permit the person to exercise any subsequent influence over how, when, or whether to effect purchases or sales; provided, in addition, that any other person who exercised such influence was not aware of the material nonpublic information when doing so; and
- The person must demonstrate that the purchase or sale was pursuant to the prior contract, instruction, or plan.

Rule 10b5-1(c)(1) states that a purchase or sale is not pursuant to a contract, instruction, or plan if, among other things, the person who entered into the arrangement altered or deviated from the contract, instruction, or plan, or entered into or altered a corresponding or hedging transaction or position with respect to the securities.

Cooling-Off Period

Prior to the SEC's amendments, Rule 10b5-1(c)(1) did not impose any cooling-off period between the date on which the trading arrangement is adopted and the date of the first transaction to be executed under the trading arrangement. The SEC amended Rule 10b5-1(c)(1) to add, as a condition to the availability of the affirmative defense:

- A director or "officer" (as defined in Exchange Act Rule 16a-1(f)) who adopts (including a modification of) a Rule 10b5-1 plan would not be able to rely on the Rule 10b5-1 affirmative defense unless the plan provides that trading under the plan will not begin until the later of (1) 90 days after the adoption of the Rule 10b5-1 plan or (2) two business days following the disclosure of the issuer's financial results in a Form 10-Q or Form 10-K for the fiscal quarter in which the plan was adopted or, for foreign private issuers, in a Form 20-F or Form 6-K that discloses the issuer's financial results (but in any event, the required cooling-off period is subject to a maximum of 120 days after adoption of the plan); and
- For persons other than directors, officers or the issuer, the cooling off period is 30 days following the adoption or modification of a Rule 10b5-1 plan.

In a change from the proposed amendments, the final amendments do not require a cooling-off period for an issuer when it enters into or modifies a Rule 10b5-1 plan to trade in its own securities. In the Rule 10b5-1 adopting release, the SEC indicates that it will continue to consider whether a cooling-off period should be required for issuers. Further, the SEC did not adopt a proposed 120-day cooling off period that would have applied to officers and directors.

Rule 10b5-1 was amended to note that any modification or change to the amount, price, or timing of the purchase or sale of the securities underlying a contract, instruction, or written plan is a termination of such contract, instruction, or written plan, and the adoption of a new contract, instruction, or written plan. A plan modification, such as the substitution or removal of a broker that is executing trades pursuant to a Rule 10b5-1 arrangement on behalf of the person, that changes the price or date on which purchases or sales are to be executed, is deemed to be a termination of such plan and the adoption of a new plan.

Director and Officer Certifications

The SEC amended Rule 10b5-1(c) to specify that, if a director or officer of the issuer of the securities adopts a Rule 10b5-1 plan, as a condition to the availability of the affirmative defense, such director or officer is required to include a representation in the plan certifying that, at the time of the adoption of a new or modified Rule 10b5-1 plan: (i) they are not aware of material nonpublic information about the issuer or its securities; and (ii) they are adopting the contract, instruction, or plan in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b-5.

Restricting Multiple Overlapping Rule 10b5-1 Trading Arrangements and Single-Trade Arrangements

With respect to multiple overlapping Rule 10b5-1 plans, the final amendments add a condition to the Rule 10b5-1(c)(1) affirmative defense that persons, other than issuers, may not have another outstanding (and may not subsequently enter into any additional) contract, instruction or plan that would qualify for the affirmative defense under the amended Rule 10b5-1 for purchases or sales of any class of securities of the issuer on the open market during the same period.

The rule provides that a series of separate contracts with different broker-dealers or other agents acting on behalf of the person (other than the issuer) to execute trades thereunder may be treated as a single "plan," provided that the contracts with each broker-dealer or other agent, when taken together as a whole, meet all of the applicable conditions of and remain collectively subject to the provisions of Rule 10b5-1(c)(1). A modification of any such contract will be a modification of each other contract or instruction under such single plan.

Further, the final amendment provides that a broker-dealer or other agent executing trades on behalf of the insider pursuant to the Rule 10b5-1 plan may be substituted by a different broker-dealer or other agent as long as the purchase or sales instructions applicable to the substituted broker and the substitute are identical, including with respect to the prices of securities to be purchased or sold, dates of the purchases or sales to be executed, and amount of securities to be purchased or sold. However, a plan modification, such as the substitution or removal of a broker that is executing trades pursuant to a Rule 10b5-1 arrangement on behalf of the insider that changes the purchase or sale amount, price or date on which purchases or sales are to be executed is a termination of such plan and the adoption of a new plan.

The SEC also adopted a provision that permits persons to maintain two separate Rule 10b5-1 plans at the same time, so long as trading under the later-commencing plan is not authorized to begin until after all trades under the earlier-commencing plan are completed or expire without execution. This provision is not available for the later-commencing plan, however, if the first trade under the later-commencing plan is scheduled to begin during the "effective cooling-off period" if the date of adoption of the later-commencing plan were deemed to be the date of termination of the earlier-commencing plan.

The SEC also adopted a modification in the final rules for plans authorizing certain "sell-to-cover" transactions, in which an insider instructs their agent to sell securities in order to satisfy tax withholding obligations at the time an award vests. Under this provision, an insider will not lose the benefit of the affirmative defense with respect to an otherwise eligible Rule 10b5-1 plan if the insider has in place another plan that would qualify for the affirmative defense, so long as the additional plan or plans only authorize qualified sell-to-cover transactions. A plan authorizing sell-to-cover transactions is qualified for this provision where the plan authorizes an agent to sell only such securities as are necessary to satisfy tax withholding obligations incident to the vesting of a compensatory award, such as restricted stock or stock appreciation rights, and the insider does not otherwise exercise control over the timing of such sales. This provision does not include sales incident to the exercise of option awards.

The SEC adopted amendments limiting the use of single-trade Rule 10b5-1 plans. As amended, Rule 10b5-1 specifies that if the plan is designed to effect the open-market purchase or sale of the total amount of securities as a single transaction, the plan may not qualify for the affirmative defense unless:

- The person who entered into the plan has not, during the prior 12-month period, adopted another plan that was designed to effect the open-market purchase or sale of the total amount of securities subject to that plan in a single transaction; and
- Such other plan in fact was eligible for the affirmative defense under Rule 10b5-1.

A person (other than the issuer) will be able to rely on the Rule 10b5-1(c)(1)(ii) affirmative defense for only one single-trade plan during any 12-month period. The defense will only be available for a single-trade plan if the person had not, during the preceding 12-month period, adopted another single-trade plan, where the other plan qualified for the affirmative defense under Rule 10b5-1.

For this purpose, a plan is “designed to effect” the purchase or sale of securities as a single transaction when the contract, instruction, or plan has the practical effect of requiring such a result. In contrast, a plan is not designed to effect a single transaction where the plan leaves the person’s agent discretion over whether to execute the contract, instruction, or plan as a single transaction. Similarly, a plan is also not designed to effect the purchase or sale of securities as a single transaction when:

- The contract, instruction, or plan does not leave discretion to the agent, but instead provides that the agent’s future acts will depend on events or data not known at the time the plan is entered into, such as a plan providing for the agent to conduct a certain volume of sales or purchases at each of several given future stock prices; and
- It is reasonably foreseeable at the time the plan is entered into that the contract, plan, or instruction might result in multiple transactions.

For reasons that are similar to those with respect to multiple overlapping trades, the SEC modified the single-trade limitation as it was proposed with respect to qualified sell-to-cover transactions. This modification applies to the same plans eligible for the sell-to-cover provision of the overlapping trade limitation.

Good Faith Condition

The SEC amended Rule 10b5-1 to add the condition that the person who entered into the Rule 10b5-1 contract, instruction, or plan “has acted in good faith with respect to” the contract, instruction, or plan. This amendment was adopted based on a concern that corporate insiders “may take actions after adopting a Rule 10b5-1 plan to benefit from material nonpublic information the insider acquires after establishment of the plan.”

Additional Disclosures Regarding Rule 10b5-1 Trading Arrangements

The SEC adopted new Item 408 under Regulation S-K and corresponding amendments to Forms 10-Q and 10-K to require:

- Quarterly disclosure of the use of Rule 10b5-1 and other trading arrangements by an issuer, and its directors and officers for the trading of the issuer’s securities; and
- Annual disclosure of an issuer’s insider trading policies and procedures.

The SEC also adopted Item 16J to Form 20-F to require annual disclosure of a foreign private issuer's insider trading policies and procedures. As adopted, Item 408(a) of Regulation S-K will require issuers to:

- Disclose whether, during the issuer's last fiscal quarter (the issuer's fourth fiscal quarter in the case of an annual report), any director or officer has adopted or terminated:
  - Any contract, instruction or written plan for the purchase or sale of securities of the registrant that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c), referred to as a "Rule 10b5-1(c) trading arrangement," and/or
  - Any written trading arrangement for the purchase or sale of securities of the registrant that meets the requirements of a non-Rule 10b5-1 trading arrangement as defined in Item 408(c), referred to as a "non-Rule 10b5-1 trading arrangement," as discussed below; and
- Provide a description of the material terms of the Rule 10b5-1 trading arrangement or non-Rule 10b5-1 trading arrangement other than terms with respect to the price at which the individual executing the respective trading arrangement is authorized to trade, such as:
  - The name and title of the director or officer;
  - The date of adoption or termination of the trading arrangement;
  - The duration of the trading arrangement; and
  - The aggregate number of securities to be sold or purchased under the trading arrangement.

With respect to any given trading arrangement subject to disclosure under Item 408(a), the issuer must indicate whether such trading arrangement is a Rule 10b5-1 trading arrangement or is a non-Rule 10b5-1 trading arrangement. In addition, any modification or change to a Rule 10b5-1 plan by a director or officer that falls within the meaning of new Rule 10b5-1(c)(1)(iv) would also be required to be disclosed under Item 408(a), as it constitutes the termination of an existing plan and the adoption of a new contract, instruction, or written plan. In a change from the proposal, Item 408(a) as adopted does not require disclosure of the price at which the individual executing the trading arrangement is authorized to trade. Further, the SEC decided to not require corresponding disclosure regarding the use of trading arrangements by the issuer.

Under the final rule, a trading arrangement with respect to a director or officer would be a "non-Rule 10b5-1 trading arrangement" where the director or officer asserts that, at a time when they were not aware of material nonpublic information about the security or the issuer of the security, they:

- Adopted a written arrangement for trading the securities; and

- The trading arrangement:
  - Specified the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be subsequently purchased or sold;
  - Included a written formula or algorithm, or computer program, for determining the amount of securities to be purchased or sold and the price at which the securities were to be purchased or sold; or
  - Did not permit the covered person to exercise any subsequent influence over how, when, or whether to effect purchases or sales; provided, in addition, that any other person who, pursuant to the trading arrangement did exercise such influence must not have been aware of material nonpublic information when doing so.

As adopted, Item 408(b) of Regulation S-K will require issuers to disclose whether they have adopted insider trading policies and procedures governing the purchase, sale, and other dispositions of their securities by directors, officers, and employees, or the issuer itself, that are reasonably designed to promote compliance with insider trading laws, rules, and regulations, and any listing standards applicable to the issuer. If an issuer has not adopted such insider trading policies and procedures, it must explain why it has not done so. These disclosures will be required in annual reports on Form 10-K and proxy and information statements on Schedules 14A and 14C. Pursuant to new Item 16J in Form 20-F, foreign private issuers will be required to provide analogous disclosure in their annual reports on Form 20-F.

If all of the issuer's insider trading policies and procedures are included in its code of ethics (as defined in Item 406(b) of Regulation S-K) and the code of ethics is filed as an exhibit pursuant to Item 406(c)(1), a hyperlink to that exhibit accompanying the issuer's disclosure as to whether it has insider trading policies and procedures would satisfy this component of the disclosure requirement.

Identification of Rule 10b5-1(c) Transactions on Forms 4 and 5

The SEC added a Rule 10b5-1(c) checkbox as a new mandatory disclosure requirement in Forms 4 and 5. This checkbox would require a Form 4 or Form 5 filer to indicate "that a transaction was made pursuant to a contract, instruction or written plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c)." Filers are also required to provide the date of adoption of the Rule 10b5-1 trading arrangement in the "Explanation of Responses" section, and filers have the option to provide additional relevant information about the reported transaction in the "Explanation of Responses" section.

Disclosure Regarding the Timing of Option Grants

Based on a concern that existing disclosure requirements do not provide investors with adequate information regarding an issuer's policies and practices with respect to stock option awards timed to precede or follow the release of material nonpublic information, the SEC adopted a new paragraph (x) to Item 402 of Regulation S-K. Under this new disclosure requirement, issuers must provide narrative disclosure discussing the issuer's policies and practices on the timing of awards of stock options, stock appreciation rights (SARs) and/or similar option-like instructions in relation to the disclosure of material nonpublic information by the issuer, including:

- How the board determines when to grant such awards;
- Whether, and if so, how, the board or compensation committee considers material nonpublic information when determining the timing and terms of an award; and
- Whether the issuer has timed the disclosure of material nonpublic information for the purpose of affecting the value of executive compensation.

If, during the last completed fiscal year, stock options, SARs and/or similar option-like instruments were awarded to a named executive officer (an "NEO") within a period starting four business days before the filing of a periodic report on Form 10-Q or Form 10-K, or the filing or furnishing of a current report on Form 8-K that discloses material nonpublic information, which includes earnings information, and ending one business day after such triggering event, the issuer must provide the following information concerning each such award for the NEO on an aggregated basis in the tabular format set forth in the rule:

- The name of the NEO;
- The grant date of the award;
- The number of securities underlying the award;
- The per-share exercise price;
- The grant date fair value of each award computed using the same methodology as used for the issuer's financial statements under generally accepted accounting principles; and
- The percentage change in the market price of the underlying securities between the closing market price of the security one trading day prior to and one trading day following the disclosure of material nonpublic information.

The SEC notes in the Rule 10b5-1 adopting release that "the purpose of the new table is to highlight for investors options award grants that may be more likely than most to have been made at a time that the board of directors was aware of material nonpublic information affecting the value of the award."

Reporting of Gifts on Form 4

Prior to the SEC's amendments, Section 16 reporting persons were required to report any *bona fide* gift of equity securities registered under Exchange Act Section 12 on Form 5. Exchange Act Rule 16a-3(f) provides that every person who, at any time during an issuer's fiscal year, was subject to Section 16 of the Exchange Act must file a Form 5 within 45 days after the issuer's fiscal year end to disclose certain beneficial ownership transactions and holdings not reported previously on Forms 3, 4, or 5. The acquisition and disposition of *bona fide* gifts were eligible for delayed reporting on Form 5 pursuant to Rule 16a-3(f)(1).

The SEC amended Exchange Act Rule 16a-3(f)(1) to now require the reporting of dispositions of bona fide gifts of equity securities on Form 4 before the end of the second business day following the date of execution of the transaction. The SEC also provided interpretive guidance indicating that the terms "trade" and "sale" could include a *bona fide* gift of a security.

Structured Data Requirements

The SEC requires that issuers tag the disclosure provided in response to Item 408, Item 402(x) and Item 16J(a) of Form 20-F using Inline XBRL in accordance with Rule 405 of Regulation S-T and the EDGAR Filer Manual. The requirements include block text tagging of narrative disclosures, as well as detail tagging of quantitative amounts disclosed within the narrative disclosures. Issuers must comply with the Inline XBRL tagging requirements in Forms 10-Q, 10-K and 20-F, and any proxy or information statements that are required to include the Item 408 and/or Item 402(x) disclosures, beginning with the first such filing that covers the first full fiscal period beginning on or after April 1, 2023, for issuers other than smaller reporting companies. Smaller reporting companies will be required to provide and tag the disclosures after an additional six-month transition period.

Compliance Dates

The final amendments are effective on February 27, 2023. The SEC provided the following compliance schedule for the final rules:

- Section 16 reporting persons will be required to comply with the amendments to Forms 4 and 5 for beneficial ownership reports filed on or after April 1, 2023;

- Issuers that are smaller reporting companies will be required to comply with the new disclosure and tagging requirements in Exchange Act periodic reports on Forms 10-Q, 10-K and 20-F and in any proxy or information statements that are required to include the Item 408, Item 402(x), and/or Item 16J disclosures in the first filing that covers the first full fiscal period that begins on or after October 1, 2023; and
- All other issuers will be required to comply with the new disclosure and tagging requirements in Exchange Act periodic reports on Forms 10-Q, 10-K and 20-F and in any proxy or information statements that are required to include the Item 408, Item 402(x), and/or Item 16J disclosures in the first filing that covers the first full fiscal period that begins on or after April 1, 2023.

The amendments to Rule 10b5-1(c)(1) would not affect the affirmative defense available under an existing Rule 10b5-1 plan that was entered into prior to the revised rule's effective date, except to the extent that such a plan is modified or changed as specified in Rule 10b5-1(c)(1)(iv) after the effective date of the final rules. In that case, the modification or change would be equivalent to adopting a new trading arrangement, and, thus, amended Rule 10b5-1(c)(1) would be the applicable regulatory affirmative defense that would be available for that modified arrangement.

Share Repurchase Disclosure

On December 15, 2021, the SEC proposed amendments which would require that an issuer provide more timely disclosure on a new Form SR regarding purchases of its equity securities for each day that it, or an affiliated purchaser, makes a repurchase of its equity securities. The proposed amendments would also expand the existing periodic disclosure requirements relating to share repurchases.

Proposed Form SR

The SEC proposes new Rule 13a-21 under the Exchange Act, and new Form SR, which would require an issuer, including a foreign private issuer and certain registered closed-end funds, to report any purchase made by or on behalf of the issuer or any affiliated purchaser of shares or other units of any class of the issuer's equity securities that is registered by the issuer pursuant to Exchange Act Section 12.

The issuer would have to furnish a new Form SR before the end of the first business day following the day on which the issuer executes a share repurchase. The Form SR would require the following disclosure in tabular format, by date, for each class or series of securities:

- Identification of the class of securities purchased;

- The total number of shares (or units) purchased, including all issuer repurchases whether or not made pursuant to publicly announced plans or programs;
- The average price paid per share (or unit);
- The aggregate total number of shares (or units) purchased on the open market;
- The aggregate total number of shares (or units) purchased in reliance on the safe harbor in Exchange Act Rule 10b-18; and
- The aggregate total number of shares (or units) purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c).

Proposed Form SR would be required to be furnished electronically on the SEC's EDGAR system. The SEC proposes to require that issuers "furnish," rather than "file," Form SR; accordingly, issuers would not be subject to liability under Section 18 of the Exchange Act for the disclosure in the Form SR, and the information would not be deemed incorporated by reference into filings under the Securities Act of 1933, as amended (the "Securities Act"), and thus would not be subject to liability under Securities Act Section 11, unless the issuer expressly elects to incorporate such information.

Proposed Revisions to Item 703 of Regulation S-K, Form 20-F, and Form N-CSR

The SEC proposes to revise and expand the disclosure requirements in Item 703 (with corresponding changes to Form 20-F and Form N-CSR) to require the following additional disclosure about an issuer's share repurchases:

- The objective or rationale for its share repurchases and process or criteria used to determine the amount of repurchases;
- Any policies and procedures relating to purchases and sales of the issuer's securities by its officers and directors during a repurchase program, including any restriction on such transactions;
- Whether the issuer made its repurchases pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c), and if so, the date that the plan was adopted or terminated; and
- Whether repurchases were made in reliance on the Rule 10b-18 non-exclusive safe harbor.

The SEC is also proposing to require that issuers disclose if any of their officers or directors subject to the reporting requirements under Exchange Act Section 16(a) purchased or sold shares or other units of the class of the issuer's equity securities that is the subject of an issuer's share repurchase plan or program within 10 business days before or after the announcement of an purchase plan or program by checking a box before the tabular disclosure of issuer purchases of equity securities.

In addition to these proposed amendments, the SEC is proposing clarifying amendments to Item 703, Form 20-F, and Form N-CSR, including:

- To relocate certain guidance in the Instruction 1 to paragraph (b)(1) to a new paragraph (c);
- To consistently refer to "issuer" instead of "company;"
- To remove Instruction 1 and 2 in the Instructions to paragraphs (b)(3) and (b)(4) and effectuate those instructions by adding "aggregate" to total number of shares for all plans or programs publicly announced in paragraph (b)(3) in lieu of Instruction 1 and adding proposed paragraph (c) to replace Instruction 2; and
- To delete the Instruction to the affected requirements as they are clear that all purchases, including those that do not satisfy the conditions of Rule 10b-18, are included.

Inline XBRL Requirement

The SEC proposes to require that issuers tag information disclosed pursuant to Item 703 of Regulation S-K, Item 16E of Form 20-F, Item 9 of Form N-CSR, and Form SR in Inline XBRL in accordance with Rule 405 of Regulation S-T and the EDGAR Filer Manual. The proposed requirements would include detail tagging of quantitative amounts disclosed within the tabular disclosures in each of the forms, as well as block text tagging and detail tagging of narrative and quantitative information disclosed in the footnotes to the tables required by Item 703 of Regulation S-K, Item 16E of Form 20-F, and Item 9 of Form N-CSR.

Cybersecurity Disclosure

On March 9, 2022, the SEC proposed amendments to its rules to require real-time disclosure of material cybersecurity incidents, as well as disclosures regarding cybersecurity risk management, strategy and governance.

Current Reporting of Cybersecurity Incidents on Form 8-K

Based on a growing concern that "material cybersecurity incidents are under-reported and that existing reporting may not be sufficiently timely," the SEC proposes to require that issuers disclose material cybersecurity incidents in a Current Report on Form 8-K within four business days after the issuer determines that it has experienced a material cybersecurity incident.

The SEC proposes to amend Form 8-K by adding new Item 1.05, which would require a issuer to disclose the following information about a material cybersecurity incident, to the extent the information is known when the issuer files the Form 8-K:

- 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 issuer's operations; and
- Whether the issuer has remediated or is currently remediating the incident.

In the Cybersecurity Proposing Release, the SEC notes that while issuers would be required to provide disclosure responsive to the enumerated items to the extent known at the time of filing of the Item 1.05 Form 8-K, the SEC "would not expect a registrant to publicly disclose specific, technical information about its planned response to the incident or its cybersecurity systems, related networks and devices, or potential system vulnerabilities in such detail as would impede the registrant's response or remediation of the incident."

The SEC notes that the proposed trigger for an Item 1.05 Form 8-K is the date on which a issuer determines that a cybersecurity incident it has experienced is material, rather than the date of discovery of the incident. The SEC indicates that, in some cases, the date of the issuer's materiality determination could coincide with the date of discovery of the cybersecurity incident, while in other situations the materiality determination could occur after the discovery date. In order to address the concern that some issuers may delay making such a determination to avoid triggering a disclosure obligation, Instruction 1 to proposed Item 1.05 states: "a registrant shall make a materiality determination regarding a cybersecurity incident as soon as reasonably practicable after discovery of the incident."

The SEC also notes that what constitutes "materiality" for purposes of this disclosure item would be consistent with the established principles of materiality articulated in numerous court decisions. In this regard, information is considered material if there is a substantial likelihood that a reasonable shareholder would consider it important in making an investment decision, or if it would have significantly altered the "total mix" of information made available.

The SEC provides a non-exclusive list of examples of cybersecurity incidents that may, if determined by the issuer to be material, trigger the disclosure requirement in proposed Item 1.05 on Form 8-K:

- An unauthorized incident that has compromised the confidentiality, integrity, or availability of an information asset (data, system, or network), or violated the issuer's security policies or procedures. Incidents may stem from the accidental exposure of data or from a deliberate attack to steal or alter data;

- An unauthorized incident that caused degradation, interruption, loss of control, damage to, or loss of operational technology systems;
- An incident in which an unauthorized party accessed, or a party exceeded authorized access, and altered, or has stolen sensitive business information, personally identifiable information, intellectual property, or information that has resulted, or may result, in a loss or liability for the issuer;
- An incident in which a malicious actor has offered to sell or has threatened to publicly disclose sensitive issuer data; or
- An incident in which a malicious actor has demanded payment to restore issuer data that was stolen or altered.

The SEC notes that proposed Item 1.05 would not provide for a delay in filing the required Form 8-K when there is an ongoing internal or external investigation related to the cybersecurity incident. Consistent with the guidance that the SEC provided in the 2018 Interpretive Release, the SEC is of the view that while an ongoing investigation might affect the specifics of the disclosure that is provided, the ongoing internal or external investigation is not, on its own, a basis to avoid disclosure of a material cybersecurity incident. The SEC continues to recognize that a delay in reporting may facilitate law enforcement investigations aimed at apprehending the perpetrators of the cybersecurity incident and preventing future cybersecurity incidents, but, on balance, the SEC believes that that the importance of timely disclosure of cybersecurity incidents for investors justifies not providing for a reporting delay.

The SEC also observes that an issuer may have obligations to report incidents at the state or federal level, which are distinct from the issuer's obligations to disclose material information under the federal securities laws. As a result, there is a possibility that an issuer would be required to disclose a cybersecurity incident pursuant to Item 1.05 of Form 8-K, even when the issuer could delay reporting the incident under other applicable laws.

Recognizing the difficult materiality judgments that would need to be made in determining whether an Item 1.05 Form 8-K would be required, the SEC proposes to add Item 1.05 to the list of Form 8-K items specified in General Instruction I.A.3.(b) of Form S-3 and General Instruction I.A.2 of Form SF-3, so that the untimely filing of an Item 1.05 Form 8-K would not result in a loss of Form S-3 or Form SF-3 eligibility, so long as Form 8-K reporting is current at the time the Form S-3 or SF-3 is filed. The SEC has also proposed amendments to Rules 13a-11(c) and 15d-11(c) under the Exchange Act to include Item 1.05 in the list of Form 8-K items eligible for a limited safe harbor from liability under Exchange Act Section 10(b) and Exchange Act Rule 10b5-1.

Disclosures about Cybersecurity Incidents in Periodic Reports

The SEC proposes to require periodic disclosures (*e.g.*, in Annual Reports on Form 10-K and Quarterly Reports on Form 10-Q) about updates regarding previously reported cybersecurity incidents and individually immaterial cybersecurity incidents that become material in the aggregate.

Updates to Previously Filed Form 8-K Disclosure

Proposed Item 106(d)(1) of Regulation S-K would require issuers to disclose any material changes, additions, or updates to information required to be disclosed pursuant to Item 1.05 of Form 8-K in an issuer's Quarterly Report on Form 10-Q or Annual Report on Form 10-K for the period (the issuer's fourth fiscal quarter in the case of an annual report) in which the material change, addition, or update occurred. For example, the SEC notes a situation where, after filing the initial Form 8-K disclosure about a material cybersecurity incident, the issuer becomes aware of additional material information about the scope of the cybersecurity incident and whether any data was stolen or altered. Under the proposed Item 106(d)(1) disclosure requirement, the issuer would need to provide updates that allow investors to stay informed about those developments. The SEC also notes that an issuer may be able to provide information under proposed Item 106(d)(1) about the effect of the previously reported cybersecurity incident on its operations, as well as a description of remedial steps it has taken, or plans to take, in response to the incident when that information was not available at when the issuer filed the initial Form 8-K.

Proposed Item 106(d)(1) of Regulation S-K provides the following non-exclusive examples of the type of disclosure that should be provided, if applicable:

- Any material impact of the incident on the issuer's operations and financial condition;
- Any potential material future impacts on the issuer's operations and financial condition;
- Whether the issuer has remediated or is currently remediating the incident; and
- Any changes in the issuer's policies and procedures as a result of the cybersecurity incident, and how the incident may have informed such changes.

The SEC indicates that, notwithstanding the disclosure requirement in proposed Item 106(d)(1) of Regulation S-K, there may be situations where an issuer would need to file an amended Form 8-K to correct disclosure from the initial Item 1.05 Form 8-K, such as where that disclosure becomes inaccurate or materially misleading as a result of subsequent developments regarding the incident. For example, the SEC notes that if the impact of the incident is determined after the initial Item 1.05 Form 8-K filing to be significantly more severe than previously disclosed, an amended Form 8-K may be required.

Disclosure of Cybersecurity Incidents That Have Become Material in the Aggregate

Proposed Item 106(d)(2) of Regulation S-K would require disclosure when a series of previously undisclosed individually immaterial cybersecurity incidents become material in the aggregate. As a result of this proposed disclosure requirement, issuers would be required to analyze related cybersecurity incidents for materiality, both individually and in the aggregate. If the related cybersecurity incidents become material in the aggregate, an issuer would need to disclose:

- When the incidents were discovered and whether they are ongoing;
- A brief description of the nature and scope of such incidents;
- Whether any data was stolen or altered;
- The impact of such incidents on the issuer's operations and the issuer's actions; and
- Whether the issuer has remediated or is currently remediating the incidents.

In the proposing release, the SEC provides an example where one malicious actor engages in a number of smaller (but continuous) cyber-attacks, related in time and form, against the same issuer and collectively these attacks are either quantitatively or qualitatively material, or both. The SEC notes that such incidents would need to be disclosed in the periodic report for the period in which an issuer has made a determination that the incidents are material in the aggregate.

Disclosure of Risk Management, Strategy and Governance Regarding Cybersecurity Risks

The SEC is proposing to require periodic disclosures about an issuer's policies and procedures to identify and manage cybersecurity risks, management's role in implementing cybersecurity policies and procedures and oversight of cybersecurity risk by the board of directors.

Risk Management and Strategy

The SEC proposes Item 106(b) of Regulation S-K to require issuers to provide disclosure regarding their cybersecurity risk management and strategy. Proposed Item 106(b) would require issuers to disclose their policies and procedures, if they have any, to identify and manage cybersecurity risks and threats, including: (i) operational risk; (ii) intellectual property theft; (iii) fraud; (iv) extortion; (v) harm to employees or customers; (vi) violation of privacy laws and other litigation and legal risk; and (vii) reputational risk. Specifically, proposed Item 106(b) of Regulation S-K would require disclosure, as applicable, of whether:

- The issuer has a cybersecurity risk assessment program and, if so, a description of such program;
- The issuer engages assessors, consultants, auditors, or other third parties in connection with any cybersecurity risk assessment program;
- The issuer has policies and procedures to oversee and identify the cybersecurity risks associated with its use of any third-party service provider, including, but not limited to, those providers that have access to the issuer's customer and employee data, and including whether and how cybersecurity considerations affect the selection and oversight of these providers, and contractual and other mechanisms the issuer uses to mitigate cybersecurity risks related to these providers;
- The issuer undertakes activities to prevent, detect, and minimize effects of cybersecurity incidents;
- The issuer has business continuity, contingency, and recovery plans in the event of a cybersecurity incident;
- Previous cybersecurity incidents have informed changes in the issuer's governance, policies or and procedures, or technologies;
- Cybersecurity related risk and incidents have affected or are reasonably likely to affect the issuer's results of operations or financial condition and, if so, how; and
- Cybersecurity risks are considered to be part of the issuer's business strategy, financial planning, and capital allocation and, if so, how.

Governance

The SEC is proposing that Item 106(c) of Regulation S-K would require disclosure of a issuer's cybersecurity governance, including the board's oversight of cybersecurity risk and a description of management's role in assessing and managing cybersecurity risks, the relevant expertise of such management, and its role in implementing the issuer's cybersecurity policies, procedures, and strategies.

With respect to the board's oversight of cybersecurity risk, disclosure required by proposed Item 106(c)(1) would include a discussion, as applicable, of the following:

- Whether the entire board, specific board members or a board committee is responsible for the oversight of cybersecurity risks;

- The processes by which the board is informed about cybersecurity risks, and the frequency of its discussions on this topic; and
- Whether and how the board or board committee considers cybersecurity risks as part of its business strategy, risk management, and financial oversight.

Proposed Item 106(c)(2) of Regulation S-K would require a description of management's role in assessing and managing cybersecurity-related risks and in implementing the issuer's cybersecurity policies, procedures, and strategies, including, but not be limited to, the following information:

- Whether certain management positions or committees are responsible for measuring and managing cybersecurity risk, specifically the prevention, mitigation, detection, and remediation of cybersecurity incidents, and the relevant expertise of such persons or members;
- Whether the issuer has a designated a chief information security officer, or someone in a comparable position, and if so, to whom that individual reports within the issuer's organizational chart, and the relevant expertise of any such persons (proposed Instruction 2 to Item 106(c) provides guidance that "expertise" may include, for example: prior work experience in cybersecurity; any relevant degrees or certifications; any knowledge, skills, or other background in cybersecurity);
- The processes by which such persons or committees are informed about and monitor the prevention, mitigation, detection, and remediation of cybersecurity incidents; and
- Whether and how frequently such persons or committees report to the board of directors or a committee of the board of directors on cybersecurity risk.

Definitions

Proposed Item 106(a) of Regulation S-K would define the terms "cybersecurity incident," "cybersecurity threat," and "information systems," as used in proposed Item 106 and proposed Form 8-K Item 1.05, as follows:

- "Cybersecurity incident" means an unauthorized occurrence on or conducted through an issuer's information systems that jeopardizes the confidentiality, integrity, or availability of an issuer's information systems or any information residing therein;
- "Cybersecurity threat" means any potential occurrence that may result in an unauthorized effort to adversely affect the confidentiality, integrity, or availability of an issuer's information systems or any information residing therein; and

- “Information systems” means information resources, owned or used by the issuer, including physical or virtual infrastructure controlled by such information resources, or components thereof, organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of the issuer’s information to maintain or support the issuer’s operations.

The SEC notes that these definitions are derived from a number of pre-existing sources identified in the proposing release. The SEC also notes that what constitutes a “cybersecurity incident” for purposes of the proposed rules “should be construed broadly and may result from any one or more of the following: an accidental exposure of data, a deliberate action or activity to gain unauthorized access to systems or to steal or alter data, or other system compromises or data breaches.”

Disclosure Regarding the Board of Directors’ Cybersecurity Expertise

The SEC proposes to amend Item 407 of Regulation S-K by adding paragraph (j) to require disclosure about the cybersecurity expertise of members of the board of directors of the issuer, if any. If any member of the board has cybersecurity expertise, the issuer would be required to disclose the name(s) of any such director(s) and provide such details as necessary to fully describe the nature of the expertise. These proposed disclosure requirements would build upon the existing disclosure requirements in Item 401(e) of Regulation S-K (business experience of directors) and Item 407(h) of Regulation S-K (board risk oversight). The proposed Item 407(j) disclosure would be required in a issuer’s proxy or information statement when action is to be taken with respect to the election of directors, and in the issuer’s Annual Report on Form 10-K (either directly or through incorporation by reference from the proxy statement).

Proposed Item 407(j)(1)(ii) would include the following non-exclusive list of criteria that an issuer should consider when determining whether a director has expertise in cybersecurity:

- Whether the director has prior work experience in cybersecurity, including, for example, prior experience as an information security officer, security policy analyst, security auditor, security architect or engineer, security operations or incident response manager, or business continuity planner;
- Whether the director has obtained a certification or degree in cybersecurity; and
- Whether the director has knowledge, skills, or other background in cybersecurity, including, for example, in the areas of security policy and governance, risk management, security assessment, control evaluation, security architecture and engineering, security operations, incident handling, or business continuity planning.

Proposed Item 407(j)(2) would state that a person who is determined to have expertise in cybersecurity will not be deemed an expert for any purpose, including, without limitation, for purposes of Section 11 of the Securities Act of 1933, as amended (the "Securities Act"), as a result of being designated or identified as a director with expertise in cybersecurity pursuant to proposed Item 407(j). This proposed safe harbor "is intended to clarify that Item 407(j) would not impose on such person any duties, obligations, or liability that are greater than the duties, obligations, and liability imposed on such person as a member of the board of directors in the absence of such designation or identification."

Disclosure by Foreign Private Issuers

Foreign private issuers are not required to file Current Reports on Form 8-K, and instead must furnish on Form 6-K copies of all information that the foreign private issuer: (i) makes, or is required to make, public under the laws of its jurisdiction of incorporation; (ii) files, or is required to file, under the rules of any stock exchange; or (iii) otherwise distributes to its security holders. The SEC proposes to amend General Instruction B of Form 6-K to reference material cybersecurity incidents among the items that may trigger a current report on Form 6-K. The SEC notes that, as with proposed Item 1.05 of Form 8-K, the proposed change to Form 6-K "is intended to provide timely cybersecurity incident disclosure in a manner that is consistent with the general purpose and use of Form 6-K."

Where a foreign private issuer has previously reported an incident on Form 6-K, the SEC's proposed amendments would require disclosure of material changes, additions, or updates regarding such incident, consistent with proposed Item 106(d)(1) of Regulation S-K. The SEC proposes to amend Form 20-F to require that foreign private issuers disclose on an annual basis information regarding any previously undisclosed material cybersecurity incidents that have occurred during the reporting period, including a series of previously undisclosed individually immaterial cybersecurity incidents that has become material in the aggregate.

The SEC proposes to amend Form 20-F to add Item 16J, which would require a foreign private issuer to include in its Annual Report on Form 20-F the same type of disclosure that the SEC proposes to require in Items 106 and 407(j) of Regulation S-K.

Inline XBRL

The SEC proposes to require that issuers tag the information specified by Item 1.05 of Form 8-K and Items 106 and 407(j) of Regulation S-K in Inline XBRL in accordance with Rule 405 of Regulation S-T and the EDGAR Filer Manual. The proposed tagging requirements would include block text tagging of narrative disclosures, as well as detail tagging of quantitative amounts disclosed within the narrative disclosures.

Climate-Related Disclosures

On March 21, 2022, the SEC proposed rules that would require comprehensive disclosure about a wide range of climate change matters.

Governance

Under the proposed rules, an issuer would be required to describe the board of directors' oversight of climate-related risks, including the identity of the board members or board committee responsible for oversight of climate-related risks, whether any director has expertise in climate-related risks and, if so, a description of that expertise. Specific disclosure would also be required regarding the governance processes for discussing climate-related risks, as well as whether and how the board sets climate-related targets or goals and oversees progress against those targets or goals, including the establishment of any interim targets or goals. The proposed rules would also require disclosure regarding management's role in climate-related risk oversight, including whether specific management positions or committees have responsibilities for assessing and managing climate-related risks, as well as details about the relevant expertise of individuals holding those positions or the committee members, how they are informed about and monitor climate-related risks, and whether and how frequently they report to the board.

Strategy, Business Model and Outlook

The proposed rules would require detailed disclosure concerning climate-related risks that are reasonably likely to have a material impact on the issuer over the short, medium and long term, as well as disclosure regarding the impact of material physical risks and transitional risks. An issuer would be required to specify whether each of the risks it faces involve physical or transitional risks and the nature of the risk presented. Disclosure concerning whether and how these impacts are considered as part of the issuer's business strategy, financial planning and capital allocation also would be required. The proposed disclosure would include current and forward-looking information necessary to understand whether the issuer has integrated the implications of those climate-related risks into its business model or strategy. The SEC's proposal also calls for a narrative discussion of whether and how the identified climate-related risks have affected or are reasonably likely to affect the issuer's consolidated financial statements. Under the proposed rules, an issuer would be required to describe the resilience of its business strategy in light of potential future changes in climate-related risks, and to describe any analytical tool, such as scenario analysis, it uses to assess the impact of climate-related risks to support the resilience of its strategy and business model.

Risk Management

The proposed rules would require disclosure relating to the processes the issuer has implemented for identifying, assessing and managing climate-related risks. In describing these processes, an issuer would be required to disclose how it determines the relative significance of climate-related risks compared with the other risks it faces, how it considers existing or likely regulatory requirements, shifts in customer or counterparty preferences, technological changes or changes in market prices in assessing transition risks and how it determines the materiality of climate-related risks. An issuer would also be required to disclose how it decides whether to mitigate, accept or adapt to a particular risk, how it prioritizes whether to address climate-related risks and how it determines to mitigate high priority risks. Further, issuers would be required to disclose whether and how any processes for identifying, assessing and managing climate-related risks are integrated into its overall risk management program. If the issuer has a separate board or management committee with responsibility for assessing and managing climate-related risks, the disclosure would need to address how that committee interacts with the board or management committee governing risks. If an issuer has adopted a transition plan to help manage climate-related risks, under the proposed rules the issuer would have to describe the plan and any relevant metrics and targets used to identify and manage any physical and transition risks. Disclosure of specific plans to mitigate or adapt to any identified physical or transition risks also would be required under the proposed rules.

Greenhouse Gas Emissions

The SEC's proposed rules would require disclosure of an issuer's greenhouse gas emissions for the most recent fiscal year and the historical periods included in its consolidated financial statements. The proposed rules would require disclosure of the methodology, significant inputs and significant assumptions used to calculate greenhouse gas emissions. Issuers would be required to provide the disclosures on a disaggregated basis based on constituent greenhouse gases, as well as in the aggregate. All issuers subject to the rules would be required to disclose their Scope 1 and Scope 2 greenhouse gas emissions, and some would be required to disclose Scope 3 greenhouse gas emissions. Disclosure of Scope 3 emissions would be required under the proposed rules if those emissions are material to the issuer or if it has set a greenhouse gas emissions reduction target that includes Scope 3 emissions. Larger issuers that would be required to provide Scope 1 and Scope 2 greenhouse gas emissions disclosure also would be required to provide a third-party attestation report covering their greenhouse gas emissions disclosure, subject to a phase-in period related to the required level of assurance that is necessary in making such attestation. The SEC's proposed rules would also specify the attestation report requirements, standards for acceptable attestation frameworks and the qualifications that an attestation provider must meet.

Goals and Targets

If an issuer has set targets or goals for reducing greenhouse gas emissions, the SEC's proposed rules would require that the issuer provide detailed information about those targets or goals. Required disclosures would include: (i) the scope of activities and emissions included in the target; (ii) how the target is measured; (iii) the time horizon for achievement of the target and its relationship with any goals established by a climate-related treaty, law, policy or organization; and (iv) the baseline time period and the emissions against which progress will be tracked. Interim targets established by an issuer also would have to be disclosed, as well as relevant data to indicate whether the issuer is making progress toward meeting the target and how that progress has been achieved.

Financial Statement Impacts

Under the proposed rules, issuers would be required to address several climate-related financial metrics in a footnote to their financial statements, including: (i) financial impacts of severe weather events and other natural conditions; (ii) financial impacts related to transition activities; (iii) expenditures to mitigate risks of severe weather events and other natural conditions; (iv) expenditures related to transition activities; (v) financial estimates and assumptions impacted by severe weather events and other natural conditions; (vi) financial estimates and assumptions impacted by transition activities; and (vii) the impact of identified climate-related risks.

CHAPTER 2

SAY-ON-PAY

ADVISORY VOTES ON EXECUTIVE COMPENSATION—RULES AND GUIDANCE

Introduction

Say-on-Pay was one of the most highly anticipated corporate governance developments in the United States. Say-on-Pay has been utilized in other jurisdictions, such as in the United Kingdom, where Say-on-Pay encouraged greater engagement between issuers and institutional investors over compensation and governance issues. Advocates of Say-on-Pay in the United States hoped that the advisory votes will encourage greater accountability for executive compensation decisions through a direct shareholder referendum, more focused disclosure in proxy statements and significantly expanded shareholder engagement.

The Say-on-Pay and Say-on-Frequency requirements were effective for larger public companies for annual meetings on or after January 21, 2011. The SEC's implementing rules, adopted on January 25, 2011, became effective on April 4, 2011 (with the exception of golden parachute requirements, which became effective for filings made on or after April 25, 2011). Smaller reporting companies were exempt from the Say-on-Pay and Say-on-Frequency vote requirements until the first annual meeting or other meeting of shareholders occurring on or after January 21, 2013.

The Dodd-Frank Act specified that an issuer must conduct a Say-on-Frequency vote for its first annual or other meeting of shareholders occurring on or after January 21, 2011, and that such Say-on-Frequency vote must occur thereafter no later than the annual or other meeting of shareholders held in the sixth calendar year after the immediately preceding Say-on-Frequency vote. Say-on-Frequency votes were first held in the 2011 proxy season, and issuers held a second Say-on-Frequency vote six years later in 2017. Now that six years have passed since 2017, many issuers will be required to conduct a Say-on-Frequency vote again in the 2023 proxy season.

The Dodd-Frank Act Requirements

Section 951 of the Dodd-Frank Act, which added Section 14A to the Exchange Act, requires that issuers include a resolution in their proxy statements (at least once every three years) asking that shareholders approve, in a nonbinding vote, the compensation of the executive officers, as disclosed under Item 402 of Regulation S-K, the Say-on-Pay vote.

A separate resolution is required (at least once every six years) to determine whether the Say-on-Pay vote takes place every one, two, or three years—the Say-on-Frequency vote.

If golden parachute compensation has not been approved as part of a Say-on-Pay vote, then issuers must solicit shareholder approval of golden parachute compensation through a separate nonbinding vote at the meeting where the shareholders are asked to approve a merger or similar extraordinary transaction that would trigger payments under the "golden parachute" provisions, the Say-on-Golden Parachute vote.

Section 14A also requires that any proxy statement used for soliciting the Say-on-Golden Parachute vote must include "clear and simple" disclosure of the golden parachute arrangements or understandings and the amounts payable.

In order to implement these requirements, the SEC adopted, in SEC Release No. 33-9178 (January 25, 2011) (the "Adopting Release"), new Exchange Act Rule 14a-21, which governs advisory votes on executive compensation going forward (with the exception of those issuers that have indebtedness outstanding under the TARP program, who must solicit annual Say-on-Pay votes under the Emergency Economic Stabilization Act, as amended ("EESA"), and Exchange Act Rule 14a-20). The SEC also adopted a number of additional rule, form and schedule changes to accommodate the new Say-on-Pay, Say-on-Frequency and Say-on-Golden Parachute votes.

Say-on-Pay Votes

Rule 14a-21(a) provides that if a solicitation is made by an issuer relating to an annual or other meeting of shareholders at which directors will be elected and for which the SEC's rules require executive compensation disclosure pursuant to Item 402 of Regulation S-K, then the issuer must conduct a Say-on-Pay vote, and a Say-on-Pay vote must occur thereafter no later than the annual or other meeting of shareholders held in the third calendar year after the immediately preceding Say-on-Pay vote. The Say-on-Pay vote relates to the executive compensation disclosure required to be included in the proxy statement, which generally includes the CD&A, the compensation tables, and the narrative disclosure on executive compensation.

The SEC states in footnote 18 of the Adopting Release that it views Section 951 of the Dodd-Frank Act as requiring a separate shareholder vote on executive compensation only with respect to "an annual meeting of shareholders for which proxies will be solicited for the election of directors, or a special meeting in lieu of such annual meeting." Accordingly, Rules 14a-21(a) and 14a-21(b) (governing the Say-on-Frequency vote, as discussed below) are intended to apply in connection with the election of directors when the related proxy materials must include executive compensation disclosure.

The key Say-on-Pay rules and interpretations are as follows:

- Director Compensation and Risk Disclosure Not Covered. Instruction 1 to Rule 14a-21 provides that the Say-on-Pay vote does not cover director compensation disclosed pursuant to paragraphs (k) and (r) of Item 402 of Regulation S-K, as well as any disclosure pursuant to Item 402(s) of Regulation S-K about the issuer's compensation policies and practices as they relate to risk management and risk-taking incentives. However, if risk considerations are a material aspect of the issuer's compensation policies or decisions for named executive officers, then the Instruction indicates that the company must discuss these considerations as part of the CD&A, and such disclosure will then be subject to the Say-on-Pay vote.
- Wording of the Say-on-Pay Resolution. Rule 14a-21(a) does not require that issuers use a specific form of resolution. However, the Instruction to Rule 14a-21(a) provides the following nonexclusive example that would satisfy the requirements of the rule: "RESOLVED, that the compensation paid to the company's named executive officers, as disclosed pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis, compensation tables and narrative discussion, is hereby APPROVED."

  While the SEC has provided this nonexclusive example of a form of resolution, the SEC states in the Adopting Release that issuers "should retain the flexibility to craft the resolution language." Issuers have adopted differing language in order to present their Say-on-Pay vote, including language that is not presented as a resolution to be adopted by shareholders.

  In Exchange Act Rules Compliance and Disclosure Interpretations Question 169.05, the Staff has indicated that it is permissible for the Say-on-Pay vote to omit the words, "pursuant to Item 402 of Regulation S-K," and to replace those words with a plain English equivalent, such as "pursuant to the compensation disclosure rules of the Securities and Exchange Commission, including the compensation discussion and analysis, the compensation tables and any related material disclosed in this proxy statement."
- Wording of the Description of the Say-on-Pay Proposal on the Proxy Card. In Exchange Act Rules Compliance and Disclosure Interpretations Ques-tion 169.07, the Staff notes that an issuer's proxy card and voting instruction form should not describe the advisory vote to approve executive compensation with the language "to hold an advisory vote on executive compensation," and should rather use formulations such as: "to approve the company's executive compensation;" "advisory approval of the company's executive compensation;" "advisory resolution to approve executive compensation;" or "advisory vote to approve named executive officer compensation." The Staff states that impermissible example referenced above would not be consistent with Rule 14a-21 because it is not clear from the description as to what shareholders are being asked to vote on.

Say-on-Frequency Votes

Rule 14a-21(b) provides that if a solicitation is made by an issuer relating to an annual or other meeting of shareholders at which directors will be elected, and for which the SEC's rules require executive compensation disclosure pursuant to Item 402 of Regulation S-K, then that issuer must conduct a Say-on-Frequency vote for its first annual or other meeting of shareholders occurring on or after January 21, 2011, and that such Say-on-Frequency vote must occur thereafter no later than the annual or other meeting of shareholders held in the sixth calendar year after the immediately preceding Say-on-Frequency vote. An issuer could hold a Say-on-Frequency vote more frequently than every six years if it elects to do so.

The key Say-on-Frequency rules and interpretations are as follows:

- Say-on-Frequency Choices. Under Rule 14a-21(b), the required Say-on-Frequency resolution must ask shareholders to indicate whether future Say-on-Pay votes should occur every one, two or three years. As a result, shareholders are given four choices on the proxy card: whether the Say-on-Pay vote will take place every one, two, or three years, or to abstain from voting on the resolution. In order to implement the voting choices for the Say-on-Frequency vote, the SEC amended Exchange Act Rule 14a-4 to specifically allow proxy cards to reflect the choices of one, two, or three years, or abstain.
- Wording of the Say-on-Frequency Resolution. Rule 14a-21(b) does not require that issuers use a specific form of resolution. Unlike the Say-on-Pay vote requirement in Rule 14a-21(a), the SEC does not provide a nonexclusive example of a Say-on-Frequency resolution. Exchange Act Rules Compliance and Disclosure Interpretations Question 169.04 indicates that the Say-on-Frequency vote need not be set forth as a resolution. Separately, the Staff has informally cautioned that the Say-on-Frequency vote must be clearly stated, and that in this regard it must be clear that shareholders can vote on the options of every one, two or three years (or abstain from voting), rather than solely following management's recommendation (if any is provided). Issuers relied on this Staff guidance to provide more Say-on-Frequency votes in a "proposal" format, such as by simply referencing the four choices that are available on the proxy card. The Staff also indicates in Exchange Act Rules Compliance and Disclosure Interpretations Question 169.06 that it is permissible for the Say-on-Frequency vote to include the words "every year, every other year, or every three years, or abstain" in lieu of "every 1, 2, or 3 years, or abstain."
- Recommendations. Neither Rule 14a-21(b) nor the SEC's other proxy rules require that an issuer make a recommendation with respect to the Say-on-Frequency vote; however, the SEC notes that proxy holders may vote uninstructed proxy cards in accordance with management's recommendation only if the company follows the existing requirements of Rule 14a-4, which

include specifying how proxies will be voted (i.e., in accordance with management's recommendations) in the absence of instruction from the shareholder. Most proxy statements filed in the 2011 proxy season with mandatory Say-on-Frequency votes included a recommendation as to the preferred frequency of future Say-on-Pay votes, with the majority of those recommendations favoring Say-on-Pay votes annually.

Additional Requirements

The SEC adopted other changes to rules and forms relating to Say-on-Pay and Say-on-Frequency, including:

- No Preliminary Proxy Statement. The SEC amended Exchange Act Rule 14a-6(a) to add any shareholder advisory votes on executive compensation, including the Say-on-Pay or Say-on-Frequency votes, to the list of items that will not trigger the requirement to file a preliminary proxy statement with the SEC. This amendment contemplates an advisory vote on executive compensation that is not required by Section 14A of the Exchange Act.
- Proxy Statement Disclosures. Item 24 to Schedule 14A requires disclosure, in the proxy statement in which the issuer is providing a Say-on-Pay, Say-on-Frequency or Say-on-Golden Parachute vote, that the issuer is providing such vote as required pursuant to Section 14A of the Exchange Act. Further, the issuer must explain the general effect of such vote, such as that the vote is non-binding. Issuers also must disclose, when applicable, the current frequency of Say-on-Pay votes and when the next Say-on-Pay vote will occur.
- CD&A Disclosure. Amended Item 402(b)(1) of Regulation S-K requires an issuer to address in its CD&A whether and, if so, how the issuer has considered the results of the most recent shareholder advisory vote on executive compensation in determining compensation policies and decisions and, if so, how that consideration has affected the issuer's compensation decisions and policies. This requirement is included among the "mandatory" CD&A disclosure items specified by Item 402(b)(1) of Regulation S-K.
- Item 5.07 Form 8-K. Item 5.07 of Form 8-K, as amended, requires that an issuer must disclose its decision as to how frequently the issuer will conduct Say-on-Pay votes following each Say-on-Frequency vote. If an issuer does not disclose the issuer's frequency determination in its initial Item 5.07 Form 8-K, then the issuer must file an amendment to its prior Form 8-K filing (or filings) that disclose the preliminary and final results of the Say-on-Frequency vote. The Form 8-K amendment is due no later than 150 calendar days after the date of the end of the annual meeting in which the Say-on-Frequency vote occurred, but in no event later than 60 calendar days prior to the deadline for the submission of shareholder proposals as disclosed in the proxy materials for the meeting at which the Say-on-Frequency vote occurred. An issuer must disclose in

Item 5.07 of Form 8-K the number of votes cast for each of the choices of every one, two or three years, as well as the number of abstentions.

- Substantially Implemented Shareholder Proposals. The SEC added a Note to Exchange Act Rule 14a-8(i)(10) to permit the exclusion of a shareholder proposal as "substantially implemented" if the proposal would provide for a Say-on-Pay vote, seek future Say-on-Pay votes, or relate to the frequency of Say-on-Pay votes. Such shareholder proposals may be excluded under the new Note if, in the most recent Say-on-Frequency vote, a single frequency received a majority of the votes cast and the issuer adopted a policy for the frequency of Say-on-Pay votes that is consistent with that choice. The Staff has noted that this Note will also apply to shareholder proposals seeking votes on matters that are already "subsumed" within the Say-on-Pay or Say-on-Frequency vote, not just a Section 14A-compliant Say-on-Pay/Say-on-Frequency proposal.

Say-on-Golden Parachute Vote

Rule 14a-21(c) provides that if a solicitation is made by the issuer for a meeting of shareholders at which the shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all of the assets of the issuer, then the issuer must provide a separate shareholder vote to approve any agreements or understandings and compensation disclosed pursuant to Item 402(t) of Regulation S-K. However, if such agreements or understandings have been subject to a shareholder advisory vote under Rule 14a-21(a) (the Say-on-Pay vote), then a separate shareholder vote is not required. Consistent with Exchange Act Section 14A(b), any agreements or understandings between an acquiring company and the named executive officers of the issuer, where the issuer is not the acquiring company, are not required to be subject to the separate shareholder advisory vote. The SEC did not adopt any specific form of the Say-on-Golden Parachute resolution and has clarified the advisory nature of the Say-on-Golden Parachute vote.

The rule provides as follows:

- Item 402(t) of Regulation S-K requires disclosure of named executive officers' golden parachute arrangements in a proxy statement for shareholder approval of a merger, sale of a company's assets or similar transactions. This Item 402(t) disclosure is only required in annual meeting proxy statements when an issuer is seeking to rely on the exception from a separate merger proxy shareholder vote by including the proposed Item 402(t) disclosure in the annual meeting proxy statement soliciting a Say-on-Pay vote.
- Golden parachute compensation must be disclosed in a table along with accompanying footnotes and narrative disclosure. This table is set forth below:

Golden Parachute Compensation

Name (a)	Cash ($) (b)	Equity ($) (c)	Pension/ NQDC ($) (d)	Perquisites/ Benefits ($) (e)	Tax Reimbursement ($) (f)	Other ($) (g)	Total ($) (h)
PEO							
PFO							
A							
B							
C							

- The table requires quantification of:
  - cash severance payments;
  - the value of equity awards that are accelerated or cashed out;
  - pension and nonqualified deferred compensation enhancements;
  - perquisites and other personal benefits;
  - tax reimbursements; and
  - in the “Other” column, any additional compensation that is not included in any other column.
- Separate footnote identification is required for amounts attributable to “single-trigger” and “double-trigger” arrangements.
- The table requires quantification with respect to any type of compensation, whether present, deferred or contingent, that is based on or relates to an acquisition, merger, consolidation, sale or other disposition of all or substantially all of the assets.
- Item 402(t) of Regulation S-K also requires issuers to describe any material conditions or obligations applicable to the receipt of payment, including but not limited to non-compete, non-solicitation, non-disparagement or confidentiality agreements, their duration, and provisions regarding waiver or breach.
- Disclosure of the specific circumstances that would trigger payment, whether the payments would be lump sum, or annual, and their duration, and by whom the payments would be provided, and other material factors regarding each agreement is also required.

- Separate disclosure or quantification with respect to compensation disclosed in the Pension Benefits Table and Nonqualified Deferred Compensation Table (unless such benefits are enhanced in connection with the transaction), previously vested equity awards and compensation from bona fide post-transaction employment agreements entered into in connection with the merger or acquisition is not required.

In Regulation S-K Compliance and Disclosure Interpretations Question 128B.01, the Staff provides the following guidance regarding the application of Item 402(t):

> **Question**: Instruction 1 to Item 402(t)(2) provides that Item 402(t) disclosure will be required for those executive officers who were included in the most recently filed Summary Compensation Table. If a company files its annual meeting proxy statement in March 2011 (including the 2010 Summary Compensation Table), hires a new principal executive officer in May 2011 and prepares a merger proxy in September 2011, may the company rely on this instruction to exclude the new principal executive officer from the merger proxy's say-on-golden parachute vote and Item 402(t) disclosure?
>
> **Answer**: No. Instruction 1 to Item 402(t) specifies that Item 402(t) information must be provided for the individuals covered by Items 402(a)(3)(i), (ii) and (iii) of Regulation S-K. Instruction 1 to Item 402(t)(2) applies only to those executive officers who are included in the Summary Compensation Table under Item 402(a)(3)(iii), because they are the three most highly compensated executive officers other than the principal executive officer and the principal financial officer. Under Items 402(a)(3)(i) and (ii), the principal executive officer and the principal financial officer are, per se, named executive officers, regardless of compensation level. Consequently, Instruction 1 to Item 402(t)(2) is not instructive as to whether the principal executive officer or principal financial officer is a named executive officer. This position also applies to Instruction 2 to Item 1011(b), which is the corresponding instruction in Regulation M-A.

Additional forms, schedules and disclosure requirements address golden parachute compensation, such as Schedule 14A, Schedule 14C, Forms S-4 and F-4, Schedule 14D-9, Schedule 13E-3 and Item 1011 of Regulation M-A. Schedule TO provides that Item 402(t) disclosure is not required in a third-party bidders' tender offer statement, so long as the subject transaction is not also Rule 13e-3 going private transaction. Issuers filing solicitation/recommendation statements on Schedule 14D-9 in connection with third-party tender offers will be obligated to provide the disclosure required by Item 402(t) of Regulation S-K.

Smaller Reporting Companies and Emerging Growth Companies

"Smaller reporting companies," as defined in SEC rules, were not subject to the Say-on-Pay or Say-on-Frequency requirements and the SEC's related rules until their first annual meeting or other meeting of shareholders at which directors will be elected, and for which executive compensation disclosure is required, occurring on or after January 21, 2013.

Background Regarding Smaller Reporting Company Rules

A "smaller reporting company" is generally, a company qualifies as a "smaller reporting company" if: (i) it has public float of less than $250 million; or (ii) it has less than $100 million in annual revenues and (a) no public float or (b) public float of less than $700 million. Public float is calculated by multiplying the number of the company's common shares held by non-affiliates by the market price and, in the case of an IPO, adding to that number the product obtained by multiplying the common shares covered by the registration statement by their estimated public offering price. A company may have no public float because it has no public common shares outstanding or because there is no market price for its common shares. The rules contemplate an annual testing of smaller reporting company status, consistent with the annual testing for non-accelerated filer, accelerated filer and large accelerated filer status.

In general, smaller reporting companies are not required to provide as much executive compensation disclosure as is required for companies that do not qualify for the smaller reporting company reporting regime. The following differences exist between the smaller reporting company requirements and the requirements applicable to larger issuers in Items 402 and 407 of Regulation S-K:

- The number of named executive officers that is required to be disclosed is reduced, in that smaller reporting companies only have to report in the Summary Compensation Table the compensation for the principal executive officer and the two most highly compensated executive officers other than the principal executive officer who are serving at the end of the last completed fiscal year and whose total compensation exceeds $100,000, as well as two additional individuals for whom disclosure would have been provided, except for the fact that they were not serving as executive officers at the end of the fiscal year;
- The smaller reporting company requirements require information in the Summary Compensation Table for the last two completed fiscal years, rather than the last three completed fiscal years as required for larger issuers; in addition, the Summary Compensation Table under the smaller reporting company requirements does not require the inclusion of the change in actuarial pension plan value;
- The smaller reporting company requirement mandates additional narrative requirements with regard to the Summary Compensation Table to explain some of the items of compensation;
- The Outstanding Equity Awards at Fiscal Year-End Table is required under the smaller reporting company rules, and some additional narrative disclosure is required about items such as

retirement benefits and the material terms of contracts that would provide for benefits upon termination and change of control;

- The CD&A, the Grants of Plan-Based Awards Table, the Option Exercises and Stock Vested Table, the Non-Qualified Deferred Compensation Table, the Pension Benefits Table and the Compensation Committee Report are not required under the smaller reporting company rules;
- The disclosure required by Item 402(s) regarding the relationship of compensation and risk is not required for smaller reporting companies; and
- The Director Compensation Table is required under both the rules applicable to smaller reporting companies and the rules applicable to larger issuers.

No changes were made to the scaled disclosure requirements as a result of the Say-on-Pay and Say-on-Frequency votes, and thus smaller reporting companies are not required to include a CD&A in order to comply with Rule 14a-21. Pursuant to Item 402(o) of Regulation S-K, however, smaller reporting companies are required to provide a narrative description of any material factors necessary to an understanding of the information in the Summary Compensation Table; therefore, if consideration of prior Say-on-Pay votes is such a factor, disclosure would be required.

Emerging Growth Company Status

Title I of the JOBS Act established process and disclosures for IPOs by issuers referred to as "emerging growth companies." Title I was retroactively effective to December 9, 2011 for qualifying issuers.

An "emerging growth company" (an "EGC") is defined as an issuer (including a foreign private issuer) with total annual gross revenues of less than $1.07 billion (subject to inflationary adjustment by the SEC every five years) during its most recently completed fiscal year. In its Frequently Asked Questions of General Applicability on Title I of the JOBS Act issued on April 16, 2012, the Staff of the SEC's Division of Corporation Finance specified that the phrase "total annual gross revenues" means total revenues of the issuer (or a predecessor of the issuer, if the predecessor's financial statements are presented in the registration statement for the most recent fiscal year), as presented on the income statement in accordance with U.S. generally accepted accounting principles ("GAAP"). For financial institutions, the SEC Staff has indicated that total annual gross revenues should be determined in the manner consistent with the approach used for determining status as a "smaller reporting company," which looks to all gross revenues from traditional banking activities. If a foreign private issuer is using International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board ("IASB") as its basis for presentation, then the IFRS revenue number is used for this test. Because an issuer must determine its EGC status based on revenues as expressed in U.S. dollars, the SEC Staff indicates that a foreign private issuer's conversion of revenues should be based on the exchange rate as of the last day of the fiscal year. In Question 51 of the Frequently Asked Questions of General Applicability on Title I of the JOBS Act issued on September 28, 2012, the Staff provides that, in applying the revenue test for determining EGC status, a calendar year-end issuer that would like to file a registration statement for an initial public offering of common equity securities in January 2013 (which would present financial statements for 2011 and 2010 and the nine months ended September 30, 2012 and 2011) should look to its most recently completed fiscal year, which would be the most recent annual period completed, regardless of whether financial statements for the period are presented in the registration statement. In this example, the most recent annual period completed would be 2012.

An issuer can qualify as an EGC if it first sold its common stock in a registered offering on or after December 9, 2011. The Staff notes in its April 16 Frequently Asked Questions that this eligibility determination is not limited to initial public offerings that took place on or prior to December 8, 2011, in that it could also include an offering of common equity securities under an employee benefit plan on Form S-8, as well as a selling shareholder's registered secondary offering. The Staff does note that just having a registration statement go effective on or before December 8, 2011 is not a bar to EGC status, as long as no common equity securities were actually sold off of the registration statement on or before December 8, 2011.

The Staff notes in its May 3 Frequently Asked Questions that an issuer that succeeds to a predecessor's Exchange Act registration or reporting obligations under Rule 12g-3 and 15d-5 will not qualify for EGC status if the predecessor's first sale of common equity securities occurred on or before December 8, 2011, as the predecessor was not eligible for that EGC status. This FAQ left unanswered the more common circumstance where an issuer may have gone private in the past and is going public again, either as the same entity or through a parent or subsidiary of that entity, where there is no Exchange Act succession. This is particularly an issue for those companies that were taken private through private equity or management buyouts with the expectation of a liquidity event or exit through an IPO in the future, which have made up a relatively significant portion of the IPO market in recent years.

In Question 54 of the September 28 Frequently Asked Questions, the Staff addresses the EGC status of an issuer that was once an Exchange Act reporting company but is not currently required to file Exchange Act reports. The Staff notes that such an issuer can take advantage of the benefits of EGC status, even though its initial public offering of common equity securities occurred on or before December 8, 2011. In this regard, the Staff notes that if an issuer would otherwise qualify as an EGC but for the fact that its initial public offering of common equity securities occurred on or before December 8, 2011, and such issuer was once an Exchange Act reporting company but is not currently required to file Exchange Act reports, then the Staff would not object if such issuer takes advantage of all of the benefits of EGC status for its next registered offering and thereafter, until it triggers one of the disqualification provisions in Sections 2(a)(19)(A)-(D) of the Securities Act. This position is not available to an issuer that has had the registration of a class of its securities revoked pursuant to Exchange Act Section 12(j). The Staff goes on to note that, based on the particular facts and circumstances, the EGC status of an issuer may be questioned if it appears that the issuer ceased to be a reporting company for the purpose of conducting a registered offering as an EGC. The Staff recommends that issuers with questions relating to these issues should contact the Division of Corporation Finance's Office of the Chief Counsel.

In Question 53 of the September 28 Frequently Asked Questions, the Staff addresses EGC status in the context of spin-offs. The Staff addresses the situation where a parent decides either to spin-off a wholly owned subsidiary, register an offer and sale of the wholly-owned subsidiary's common stock for an initial public offering, or transfer a business into a newly-formed subsidiary for purposes of undertaking an initial public offering of that subsidiary's common stock. In each such case, the subsidiary's total annual gross revenues for its most recently completed fiscal year are less than $1 billion, the subsidiary would not trigger any of the disqualification provisions in Sections 2(a)(19)(A)-(D) of the Securities Act, and the parent does not qualify as an EGC because its first sale of common equity securities occurred on or before December 8, 2011. The Staff notes that the subsidiary would qualify as an EGC, based on an analysis which focuses on whether the issuer, and not its parent, meets the EGC requirements. The Staff notes that, based on the particular facts and circumstances, the EGC status of an issuer may be questioned if it appears that the issuer or its parent is engaging in a transaction for the purpose of converting a non-EGC into an EGC, or for the purpose of obtaining the benefits of EGC status indirectly when it is not entitled to do so directly. The Staff recommends that issuers with questions relating to these issues should contact the Division of Corporation Finance's Office of the Chief Counsel.

Status as an EGC is maintained until the earliest of: (i) the last day of the fiscal year in which the issuer's total annual gross revenues are $1 billion or more; (ii) the last day of the issuer's fiscal year following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act (for an debt-only issuer that never sold its common equity pursuant to an Exchange Act registration statement, this five-year period will not run); (iii) any date on which the issuer has, during the prior three-year period, issued more than $1 billion in non-convertible debt; or (iv) the date on which the issuer becomes a "Large Accelerated Filer," as defined in the SEC's rules. If an EGC loses its status, it cannot be regained by the issuer.

With regard to the $1 billion debt issuance test, the Staff indicated in its Frequently Asked Questions that the three-year period covers any rolling three-year period, which is not in any way limited to completed calendar or fiscal years. The Staff also noted that it reads “non-convertible debt” to mean any non-convertible security that constitutes indebtedness (whether issued in a registered offering or not), thereby excluding bank debt or credit facilities. The debt test references debt “issued,” as opposed to “issued and outstanding,” so that any debt issued to refinance existing indebtedness over the course of the three-year period could be counted multiple times. However, the Staff indicated in its May 3 Frequently Asked Questions that they will not object if an issuer does not double count the principal amount from a private placement and the principal amount from the related Exxon Capital exchange offer.

Scaled Disclosures for EGCs

Among other areas of scaled disclosure available to EGCs (including reduced financial statement requirements), an EGC may comply with the executive compensation disclosures applicable to a “smaller reporting company” as defined in the SEC’s rules, which means that an EGC need provide only a Summary Compensation Table (with three rather than five named executive officers and limited to two fiscal years of information), an Outstanding Equity Awards Table, and a Director Compensation Table, along with some narrative disclosures to augment those tables. EGCs are not required to provide a Compensation Discussion and Analysis, or disclosures about payments upon termination of employment or change in control.

Say-on-Pay and Other Relief for EGCs

Title I of the JOBS Act provides relief from a number of requirements for EGCs following an initial public offering. An EGC will not be subject to the Say-on-Pay, Say-on-Frequency or Say-on-Golden Parachute vote required by the Dodd-Frank Act, for as long as the issuer qualifies as an EGC. An issuer that was an EGC, but lost that status, will be required to comply with the Say-on-Pay vote requirement as follows: (i) in the case of an issuer that was an EGC for less than two years, by the end of the three-year period following its IPO, and (ii) for any other issuer, within one year of having lost its EGC status. An EGC also is not subject to any requirement to disclose the relationship between executive compensation and the financial performance of the company (should such requirement be adopted), or the requirement to disclose the CEO’s pay relative to the median employee’s pay. The Staff has indicated that a former EGC’s first Say-on-Frequency vote cannot be delayed to coincide with its first required Say-on-Pay vote. The disconnect between the timing of the two votes results from the fact that Section 102(a)(2) of Title I of the JOBS Act (codified as Section 14A(a)(2) of the Exchange Act), which exempts EGCs from the Say-on-Pay and Say-on-Frequency voting requirements, allows an issuer that loses its EGC status a transition period before having to comply with the Say-on-Pay requirement, but does not extend the same transition period for the Say-on-Frequency vote.

Other than the provisions for extended transition to new or revised accounting standards, an EGC may decide to follow only some of the scaled disclosure provisions and corporate governance relief available for EGCs.

The Say-on-Pay Experience

The implementation of Say-on-Pay votes was one of the most widely anticipated corporate governance developments in the United States over the past decade.

Advocates for Say-on-Pay in the United States hoped that the advisory votes on executive compensation would serve to encourage greater accountability for executive compensation decisions, as well as more focused compensation disclosure in proxy statements and expanded shareholder engagement. The high level of shareholder support for Say-on-Pay resolutions over the history of the mandatory Say-on-Pay vote is similar to the experience in the past with respect to those companies who held Say-on-Pay votes on a voluntary basis, or because the company was required to hold a Say-on-Pay vote because it had outstanding indebtedness under TARP. In the vast majority of those situations, shareholders have provided strong support for Say-on-Pay proposals, absent some significant concerns with the company's executive compensation programs. Even with the likelihood of shareholder support relatively high for Say-on-Pay resolutions, companies have paid very close attention to the message communicated through their CD&A and other disclosures, while at the same time seeking to engage with key shareholder constituencies.

Disclosure For Say-on-pay

In many ways, the disclosure that is provided in the proxy statement remains the key point of engagement with shareholders on executive compensation issues. The Say-on-Pay vote caused many companies to streamline and clarify their CD&A disclosure to facilitate utilizing the CD&A to explain why shareholders should support the Say-on-Pay vote. In addition, issuers have sought to emphasize the overall "pay for performance" message in the CD&A and throughout the executive compensation disclosure in the proxy statement. To this end, many issuers began the CD&A with an "Executive Summary" or "Overview" section. The Executive Summary has proven to be an effective way of communicating the key executive compensation information that shareholders need to make an informed decision on the Say-on-Pay votes. An effective Executive Summary should include:

- A brief description of the company's financial and business results for the last completed fiscal year, focusing in particular on measures of performance that are relevant to determining the compensation for the named executive officers, while complying with any applicable requirements with respect to the use of non-GAAP measures (see Non-GAAP Financial Measures Compliance and Disclosure Interpretations Question 108.01);

- A discussion of how the issuer's results have impacted executive compensation decisions in the last fiscal year;
- A list of important compensation actions during the last completed fiscal year, including the actions with respect to the CEO and the other named executive officers; and
- A discussion of significant compensation policies and practices implemented or revised, as well as any pre-existing governance and compensation-setting procedures, which demonstrate the issuer's "pay for performance" philosophy and commitment to compensation and corporate governance best practices.

Issuers have also been utilizing graphic presentations in the Executive Summary and in the rest of the CD&A as a means of effectively highlighting the issuer's business results and relating those results to the compensation decisions.

An overriding theme has been the relationship between pay and performance. As a result, the Executive Summary and the remainder of the CD&A often focused on how the compensation programs have aligned pay and performance, which necessitated fulsome disclosure about the performance target measures used to determine the level of performance, as well as more detailed disclosure concerning the individual achievements of the named executive officers when such performance is an element pursuant to which compensation is determined.

Disclosures also include more discussion of how the compensation committee considered the relationship between compensation programs and risks arising for the company in the course of making decisions and taking actions with respect to compensation. This area of focus will likely continue to drive more detailed disclosure in proxy statements about the relationship between compensation and risk.

Many companies addressed the adoption or revision of some key compensation policies, including stock ownership and equity holding policies, compensation recovery policies, policies limiting perquisites and other personal benefits and policies with respect to limiting severance and post-retirement benefits.

Some companies have utilized alternative pay measures, such as "realized pay" and "realizable pay," as part of their overall disclosure approach to Say-on-Pay, either as part of the pay-for-performance discussion in the CD&A or in supplemental soliciting material responding to a negative Say-on-Pay recommendation from ISS or Glass Lewis. These alternative measures are used to compare pay to the company's performance, and to compare an executive officer's reported and/or target pay to the realized or realizable pay. While there is no uniform approach to these measures, formulations of "realized pay" typically include: (i) actual earned cash compensation (including salary and bonuses); (ii) actual payouts under performance share or performance cash awards; and (iii) the value of exercised or taxable equity awards, essentially including any equity awards that vested, were exercised or were otherwise earned during the relevant measurement period, and excluding those awards that remain outstanding and have not yet vested or have not been exercised, while "realizable pay" usually differs from "realized pay" by including the intrinsic value of all (or a portion of) equity awards that are outstanding at the end of the relevant period, regardless of whether the awards have been exercised (with respect to options or SARs) or paid or vested (with respect to restricted stock, RSUs and other full-value equity awards). For this purpose, the equity awards are valued using the company's stock price at the end of the fiscal year-end. Realizable pay is often compared directly to the total compensation reported in the Summary Company Table, and changes in realizable pay are compared to changes in total shareholder return and other issuer performance metrics over a specified long-term performance period, such as three years.

With the adoption of the requirement in Item 402(v) of Regulation S-K to require disclosure of the relationship between compensation actually paid and various measures of performance that are prescribed by the SEC, issuers will need to consider in the 2023 proxy season how best to address the SEC-mandated pay versus performance disclosure in light of the discussion of the relationship between compensation and performance in the CD&A.

Say-on-Pay Engagement

Active engagement with shareholders on executive compensation and corporate governance issues is one of the expected results of a Say-on-Pay vote. Companies have explored a variety of approaches to accomplish effective engagement with shareholders.

Direct Interaction with Shareholders

Some issuers elected to conduct a "road show" focused on (or including as a component) executive compensation and corporate governance matters. These road shows typically took place in advance of the filing of the proxy statement (*e.g.*, 30-60 days before the proxy statement filing) and were conducted in person or via teleconference, typically involving both portfolio managers and voting analysts at institutional investors and senior level management, and in some cases, a director from the company. The road shows are largely designed to be informational, rather than serving to actively solicit any vote on expected proposals for the annual meeting, which could present solicitation issues under the SEC's proxy rules. Participants in these engagement activities usually address publicly-disclosed corporate governance and executive compensation initiatives demonstrating the company's responsiveness to shareholders, pay-for-performance considerations and the issuer's continuing attention to shareholder concerns (if any) on corporate governance and executive compensation issues. Participants typically avoid discussing material non-public information about the issuer's performance or plans for corporate governance and executive compensation program changes.

In the 2011 proxy season, a group of large institutional investors requested that some large companies hold a "fifth analyst call" to focus on executive compensation and corporate governance issues. The fifth analyst call would take place after a company mailed its proxy statement, but before the annual meeting. The institutional investor proposal for a fifth analyst call sought board member involvement in the call, such as the chairman of the board or the lead independent director. This fifth analyst call has not become a common practice.

The Use of Additional Soliciting Material

Say-on-Pay voting sometimes leads to the filing of additional soliciting material (filed as under the submission type "DEFA14A" on the SEC's EDGAR filing system) by issuers during the period of time between the mailing of the proxy statement and the annual meeting. In many of these situations, the additional soliciting material responds to an adverse Say-on-Pay recommendation made by a proxy adviser, either ISS or Glass Lewis. Issuers used the additional soliciting material to identify errors or flaws in the analysis underlying the proxy adviser's recommendation, while at the same time providing arguments as to why the Say-on-Pay proposal should be supported. The use of the additional soliciting material, along with active engagement efforts, most often led to a successful Say-on-Pay vote.

Say-on-Frequency Recommendations and Voting

Most proxy statements filed in the 2011 proxy season with mandatory Say-on-Frequency votes included a recommendation as to the preferred frequency of future Say-on-Pay votes, with the majority of those recommendations favoring Say-on-Pay votes every year. In approximately half of those cases where issuers recommended a once every three years frequency, shareholders supported an annual Say-on-Pay vote, notwithstanding the once every three years recommendation. In the relatively few situations where the board recommended a Say-on-Pay vote once every two years, an annual frequency for Say-on-Pay voting was favored in approximately 65 percent of those cases. In the few circumstances where no recommendation from the board was provided, shareholders mostly supported an annual Say-on-Pay vote.

Proxy advisory firms ISS and Glass Lewis will only recommend voting for an annual Say-on-Pay vote frequency. Some institutional investors that do not follow ISS or Glass Lewis recommendations also adopted policies supporting annual Say-on-Pay votes. However, a few institutional investors adopted policies providing support for Say-on-Pay votes that occur once every three years. Given these circumstances, obtaining the plurality or majority support of shareholders for an "every three years" or an "every two years" Say-on-Pay voting interval became increasingly difficult as the 2011 proxy season unfolded.

Smaller reporting companies conducted Say-on-Frequency votes for the first time in 2013.

The Dodd-Frank Act requires that the Say-on-Frequency vote occur every six years. As a result of this requirement, issuers who were first required to conduct a Say-on-Frequency vote in 2011 conducted a second Say-on-Frequency voted in 2017 and will be required to conduct a third Say-on-Frequency vote in 2023.

Considerations for the Frequency of the Say-on-Pay Vote

The following summarizes some of the key considerations for determining what Say-on-Pay voting frequency to recommend to shareholders.

A Vote of Once Every Year—Positive Considerations:

- With a Say-on-Pay vote occurring once every year, shareholders are able to express their views on an annual basis, which may mean that they will be less concerned with the issuer's compensation policies, practices and decisions than if they were only able to vote once every two or three years.
- ISS and Glass Lewis will only recommend for an annual Say-on-Pay vote frequency.
- Proxy advisers such as ISS, most investors, and commentators view an annual vote on executive compensation as a good corporate governance practice and may therefore be less likely to target issuers that provide for an annual Say-on-Pay vote.
- Experience with annual Say-on-Pay votes has made many comfortable with the annual approach.

A Vote of Once Every Year – Negative Considerations:

- Engagement with institutional investors on compensation issues may be difficult to do on an annual basis, given that so many issuers seek to engage with institutional investors in advance of a Say-on-Pay vote.
- In the event that an issuer gets a negative vote, it typically must very quickly adjust its compensation policies and practices in order to have the changes take effect and be considered in advance of the next Say-on-Pay vote.

A Vote of Once Every Two or Three Years—Positive Considerations:

- A Say-on-Pay vote occurring once every two or three years allows proxy advisers and institutional investors more time to review and analyze the executive compensation program and practices between votes, so that those parties can better formulate their views on an issuer's executive compensation.
- The frequency of once every two or three years could potentially provide the issuer with more time to address compensation concerns through the engagement process with shareholders and through changes to compensation policies and practices.
- A Say-on-Pay vote occurring once every two or three years allows institutional investors to better evaluate the effectiveness of long-term incentive components of compensation, given that the interval between votes more closely aligns with performance cycles and allows a more meaningful comparison between compensation and performance.
- A Say-on-Pay vote occurring once every two or three years allows an issuer the option to bring a Say-on-Pay vote on a more frequent basis if it wants to do so, because the vote on the frequency of voting is non-binding.

A Vote of Once Every Two or Three Years—Negative Considerations:

- A vote of once every two or three years may be portrayed negatively in the press, because it does not provide investors with an annual voice with respect to compensation issues and thereby may be seen as implying that an issuer is attempting to hide something from shareholders.
- A Say-on-Pay vote occurring once every two or three years is less likely to receive institutional investor support.
- ISS and Glass Lewis will only recommend for an annual Say-on-Pay vote frequency.
- A Say-on-Pay vote occurring once every two or three years could expose members of the compensation committee to recommendations against them in a year when no Say-on-Pay vote is on the ballot.
- A vote occurring every two or three years may be viewed by some proxy advisers, investors and commentators as a poor corporate governance practice because it does not provide investors with an annual voice on compensation issues.

Say-on-Golden Parachute Compensation Disclosure and Voting

A company seeking to avoid an advisory vote on golden parachute compensation in connection with a future vote on a merger or similar extraordinary transaction may voluntarily include the Item 402(t) tabular and narrative disclosures in the proxy statement for an annual meeting at which a Say-on-Pay vote will be held under the Dodd-Frank Act and the SEC's rules. However, if there are changes to the arrangements after the date of the vote or if new arrangements are entered into that were not subject to a prior Say-on-Pay vote, then a separate shareholder advisory vote on the golden parachute compensation is still required. In that case, the Say-on-Golden Parachute vote is required only with respect to the amended golden parachute payment arrangements. Other than changes that result only in a reduction in the amount of golden parachute compensation or that arise because of a change in the stock price, any other change to the golden parachute arrangements after the Say-on-Pay vote will trigger the requirement for a new vote.

A relatively small number of issuers have included the golden parachute compensation disclosure in annual meeting proxy statements where no vote was taking place with respect to a merger or similar transaction. It appears likely that issuers will avoid such "advance" votes on golden parachute compensation, given concerns about how the required disclosures concerning golden parachute compensation arrangements could impact the Say-on-Pay vote. In addition, issuers may be concerned that providing such disclosures may voluntarily signal to the market that the issuer could be engaged in a significant transaction in the near future.

Issuers have generally adhered closely to the requirements of the Golden Parachute Compensation Table in merger proxies, registration statements and other transactional forms filed since the rules became effective. In some cases, the new disclosure results in an additional page of disclosure in the applicable form or schedule, while in other cases the table and footnotes extend over several pages because of the complexity of various scenarios and triggering events. In addition, many issuers that have filed merger proxies or registration statements that require a shareholder advisory vote on golden parachutes have described the relationship of the golden parachute advisory vote to other votes on the transaction, including approval of the merger or other transaction itself. While issuers are required to disclose that the golden parachute vote is nonbinding, many have gone further to disclose whether or not the golden parachute vote is a condition of the transaction and whether the results of the advisory vote on golden parachutes would affect the consummation of the merger. Approval of the golden parachute arrangements is typically not a condition of the transaction, and a lack of approval of the golden parachutes will not affect consummation of the transaction.

Many issuers have included disclosure regarding the effect of the golden parachute advisory vote on the status of the golden parachute payments. This type of disclosure typically notes that the golden parachute arrangements are contractual obligations of the issuer, and that even though the issuer values the input of shareholders as to whether such arrangements are appropriate, the issuer would nonetheless be required contractually to make, and would make, such payments even if the arrangements are not approved by the shareholders in the advisory vote.

Say-on-Pay Lawsuits

The Say-on-Pay vote is nonbinding, and the Dodd-Frank Act expressly provides that such advisory vote may not be construed as (1) overruling a decision by an issuer or its board of directors; (2) creating or implying any change to the fiduciary duties of a company or its board of directors; (3) creating or implying any additional fiduciary duties for an issuer or its board of directors; or (4) restricting or limiting the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation. Nonetheless, a few years ago plaintiffs filed derivative actions in state courts against directors of companies (and in some cases their executive officers and compensation consultants) based on the outcome of a Say-on-Pay vote. These lawsuits typically alleged that directors breached their fiduciary duties of care and loyalty in one or more of the following ways: (i) directors diverted corporate assets to executive officers, putting the interests of the executive officers ahead of the interests of stockholders; (ii) issuers that disclosed “pay-for-performance” compensation policies did not adequately disclose or misrepresented that compensation was nonetheless paid to executive officers in contravention of such policies (*i.e.*, compensation was paid even if performance goals were not met or financial performance was otherwise poor); and (iii) directors are subject to corporate waste claims based on the overall size of executive compensation awards. Further, the lawsuits alleged that executive officers were unjustly enriched by pay increases, and that in some cases compensation consultants aided and abetted the directors in their breaches of fiduciary duty and/or breached the consulting agreement with the issuer. In the lawsuits, plaintiffs have alleged that the failed Say-on-Pay vote is probative evidence that the compensation programs are not in the best interests of stockholders and that directors should not be entitled to the protections of the “business judgment rule.” In these cases, the plaintiffs sought, among other things, unspecified damages resulting from the executive compensation plans, costs and attorneys’ fees, as well as the implementation of internal controls to prevent excessive compensation in the future.

Proxy Statement Litigation

Issuers have historically been able to solicit proxies for their annual meetings without the threat of the type of shareholder litigation that usually accompanies the solicitation of votes for special meeting to approve a merger or acquisition. In past proxy seasons, plantiffs have filed lawsuits seeking to enjoin annual meetings based on alleged deficiencies in the proxy statement disclosures for proposals to approve increases in equity plan reserves or authorized shares, as well as advisory votes on executive compensation.

These types of lawsuits often alleged breaches of fiduciary duties by management and directors of issuers, as well as aiding and abetting by the issuer itself, based on purported disclosure deficiencies in the proxy statements seeking shareholder votes on an increase in the amount of shares reserved for an equity compensation plan, an increase in the authorized shares and/or advisory votes on executive compensation. These claims are not based on a failure to include disclosure required in the proxy statement by the SEC's rules, but are rather based on state law fiduciary duty concepts. Typically, the lawsuits alleged that, with respect to proposals to increase the size of an equity plan or to increase the number of authorized shares, the company has failed to adequately describe the reason for an increase in the amount of shares, as well as the projections considered and the potential dilution that may result. With regard to advisory votes on executive compensation, the plaintiffs alleged a failure to adequately describe the role and advice of compensation consultants, to provide additional disclosure regarding peer group compensation practices, and disclose the rationale for the mix of short-term and long-term compensation. The plaintiffs sought a tactical advantage by filing these lawsuits after the issuer mailed the definitive proxy statement and before the annual meeting, thus providing typically only about one month for a court to decide on the motion to enjoin the annual meeting. An issuer often first learn of these lawsuits when the plaintiffs' law firm issues a press release to announce a "pending investigation."

These lawsuits have typically been shareholder class actions that are filed in state courts where the subject issuer has sufficient contacts. These lawsuits were usually not filed in federal court or in Delaware (where many of the subject companies are incorporated), presumably because there is a higher likelihood that the disclosure-based claims would be dismissed in federal court or in the Delaware Chancery Court. The lawsuits usually did not allege that the subject issuers have failed to meet dis-closure requirements established by the SEC with regard to the proposals included in the proxy statement; rather, the lawsuits alleged that the defendants (which typically include the members of the board of directors, senior management and the company) breached their fiduciary duties to shareholders by failing to adequately disclose information when seeking a vote on the proposals.

The complaints often alleged that the individual defendants, i.e., the members of the board of directors and senior management, have breached fiduciary duties of care, loyalty, candor and good faith owed to public shareholders, and have acted to put their own personal interests ahead of the interests of shareholders. These individual defendants were alleged to have failed to disclose all material information necessary to make an informed decision regarding the advisory vote on executive compensation or an increase in shares proposal. As a result of these actions, it was alleged that the individual defendants have failed to exercise ordinary care and diligence in the exercise of their fiduciary duties. The issuer was alleged to have knowingly aided and abetted the disclosure deficiencies and therefore the breaches of fiduciary duty.

In the complaints, plaintiffs sought: (i) a declaration that the proxy statement was issued in breach of the fiduciary duties of the individual defendants and is therefore unlawful, and that the company aided and abetted the issuance of the materially misleading and incomplete proxy statement; (ii) an injunction from consummating the vote on the subject proposals until the company provides adequate disclosure regarding the proposals; (iii) an award of damages, attorneys' and experts fees and other costs, and (iv) any other further relief that the court deems appropriate.

The claims of inadequate disclosure in these lawsuits focused on information that the plaintiffs' deemed to be important details relevant to the advisory vote on executive compensation, the vote to increase the share reserve for the equity compensation plan or the vote to increase the number of authorized shares. These claims were not based on a failure to meet SEC-established requirements or applicable case law-established standards for disclosure.

The allegations in the lawsuits focused on a number of areas where the disclosure that is related to the advisory vote on executive compensation was alleged to be deficient, including:

- The disclosure does not include a fair summary of the advice, counsel and analysis performed and provided to the board of directors and/or management by a compensation consultant;
- The disclosure does not address how the board of directors or the compensation committee selected outside advisors and how much was paid to the outside advisors in connection with their engagement;
- The discussion of the peer group utilized in analyzing executive compensation does not include detailed disclosure of the data with respect to salary, short-term and long-term incentives and total direct compensation for each of the companies in the peer group;
- The disclosure does not adequately address the rationale for the mix of long-term and short-term compensation;
- The role of management in the compensation-setting process is not adequately addressed; and
- Changes in various things in the current year are not adequately addressed in terms of the rationale for the change, such as changes to the peer group or an increase in compensation.

It is possible that plaintiffs would raise any number of additional disclosure deficiencies in future lawsuits, based on the success of other claims and the individual circumstances of the proxy statements that are the subject of the claims.

Further, the allegations in the lawsuits focused on a number of areas where the disclosure related to an increase in the shares reserved for an equity compensation plan or an increase the amount of common stock authorized was alleged to be deficient, including:

- A failure to disclose the number of shares currently expected to be paid out in the year under the company's equity compensation plan, or any other projections considered by the board of directors;
- The disclosure does not describe the criteria considered by the board of directors to implement the proposal, and why the proposal would be in the best interests of the shareholders;
- The disclosure does not describe why the current share reserve is inadequate;
- The disclosure does not describe how the board of directors determined the number of additional shares requested to be authorized;
- The disclosure does not identify the potential equity value and/or the cost of issuance of the additional authorized shares;
- A failure to disclose the dilutive impact of issuing additional shares under the equity plan on existing shareholders, and any share repurchases that might be planned;
- The disclosure does not identify the expected use for the shares and how long the company expects the increased share reserve to last;
- The proxy statement does not include a fair summary of any expert's analysis or opinion obtained in connection with the proposal; and
- A lack of specificity in describing the performance goals.

It is possible that plaintiffs will raise any number of additional disclosure deficiencies in future lawsuits, based on the success of other claims and the individual circumstances of the proxy statements that are the subject of the claims.

It is difficult to determine the likelihood of the commencement of this type of litigation when an issuer files its proxy statement, however it appears that the frequency of these types of lawsuits has recently declined.

One approach to anticipating these types of lawsuits would be to include enhanced disclosure in the proxy statement as filed which fully addresses the information identified above. The addition of this disclosure would not in any way ensure that a lawsuit would not be filed, however, because the plaintiffs could identify any number of areas in which to allege that the disclosure is deficient, even if the disclosure is indeed not deficient under the standards of the SEC requirements and general principles of materiality.

Some issuers, upon learning of the pending investigation by a plaintiffs' law firm, have appeared to file supplemental proxy soliciting materials which provide the information sought in the similar lawsuits. It is possible that this disclosure would thereby prevent the plaintiffs from filing a complaint, because their claims have been rendered moot by the supplemental disclosure.

A third option would be to anticipate the possibility of the lawsuit and to be prepared to enter into settlement discussions quickly, which would likely result in the release of additional proxy soliciting material, the payment of costs and the potential for a delay in the vote on the subject proposal or proposals.

The fourth option would be to defend the lawsuit, seeking to have the court dismiss the claims prior to the issuer's annual meeting. Depending on the court system in which the issuer would be sued, this strategy could potentially lead to a delay in the annual meeting or at least a delay in the vote on the proposals as the litigation proceeds, and there is no certainty as to whether the outcome of the litigation would ultimately be favorable to the issuer.

Annotated Model Say-on-Pay and Say-on-Frequency Proposals

Annotated Model Say-on-Pay Proposal

PROPOSAL [ ]—ADVISORY VOTE ON EXECUTIVE COMPENSATION

The Dodd-Frank Wall Street Reform and Consumer Protection Act added Section 14A to the Securities Exchange Act of 1934, which requires that we provide our shareholders with the opportunity to vote to approve, on a nonbinding, advisory basis, the compensation of our named executives officers as disclosed in this proxy statement in accordance with the compensation disclosure rules of the Securities and Exchange Commission.

As described in greater detail under the heading "*Compensation Discussion and Analysis,*" we seek to closely align the interests of our named executive officers with the interests of our shareholders. [Our compensation programs are designed to reward our named executive officers for the achievement of short-term and long-term strategic and operational goals and the achievement of increased total shareholder return, while at the same time avoiding the encouragement of unnecessary or excessive risk-taking.] [*This statement should be adapted as appropriate for the issuer. In this regard, a brief statement of the issuer's philosophy with respect to executive compensation is useful in this context. Moreover, smaller reporting companies may not have a "Compensation Discussion and Analysis" section to refer to, so they may want to reference where other relevant disclosures are provided.*]

[The proposal may include a brief discussion of important compensation actions and decisions in the last completed fiscal year. In this regard, the disclosure in the proposal can provide a high-level overview of the reasons why shareholders should vote for the issuer's executive compensation. The summary included in the proposal itself can work in conjunction with the "Executive Summary" or "Overview." In some instances, issuers choose to only cross-reference the CD&A disclosure without including a statement in support of the Say-on-Pay resolution in the proposal.]

This vote is advisory, which means that the vote on executive compensation is not binding on the Company, our Board of Directors or the Compensation Committee of the Board of Directors. The vote on this resolution is not intended to address any specific element of compensation, but rather relates to the overall compensation of our named executive officers, as described in this proxy statement in accordance with the compensation disclosure rules of the Securities and Exchange Commission. [To the extent there is a significant vote against our named executive officer compensation as disclosed in this proxy statement, the Compensation Committee will evaluate whether any actions are necessary to address our shareholders' concerns.] [*The SEC's rules do not require that an issuer address what actions it will undertake in response to the Say-on-Pay vote (by contrast to the disclosure required with respect to ratification of auditors), rather requiring a discussion in subsequent CD&A disclosure of whether and, if so, how the issuer has considered the results of the most recent shareholder advisory vote on executive compensation in determining compensation policies and decisions and, if so, how that consideration has affected the issuer's compensation decisions and policies. It may, nevertheless, be useful at the time of presenting the proposal to explain how the vote will be considered as a means of clarifying the advisory nature of the vote.]*

[The affirmative vote of a majority of the shares present or represented and entitled to vote either in person or by proxy is required to approve this Proposal [   ]]. [*Issuers will have to evaluate what is the most appropriate voting standard for a Say-on-Pay proposal. Issuers should also consider describing, in this section or in the front portion of the proxy statement, the effect of abstentions and broker non-votes on the vote.*]

Accordingly, we ask our shareholders to vote on the following resolution at the Annual Meeting:

[The following is the form of resolution that the SEC includes in the Instruction to Exchange Act Rule 14a-21(a). Smaller reporting companies will need to revise the form of resolution if they elect to not provide CD&A disclosure under the scaled disclosure requirements.]

> "RESOLVED, that the compensation paid to the company's named executive officers, as disclosed pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis, compensation tables and narrative discussion, is hereby APPROVED."

[The following is an alternative form of the resolution. In Exchange Act Rules Compliance and Disclosure Interpretations Question 169.05, the SEC Staff has indicated that it is permissible for the Say-on-Pay vote to omit the words, "pursuant to Item 402 of Regulation S-K," and to replace those words with a plain English equivalent, such as, "pursuant to the compensation disclosure rules of the Securities and Exchange Commission, including the compensation discussion and analysis, the compensation tables and any related material disclosed in this proxy statement." This alternative formulation also makes clear in the language of the resolution itself that the vote is advisory. Smaller reporting companies will need to revise the form of resolution if they elect to not provide CD&A disclosure under the scaled disclosure requirements.]

> "RESOLVED, that the Company's shareholders approve, on an advisory basis, the compensation of the named executive officers, as disclosed in this Proxy Statement for the Annual Meeting of Shareholders pursuant to the compensation disclosure rules of the Securities and Exchange Commission, including the Compensation Discussion and Analysis, the Summary Compensation Table and the other related tables and disclosure."

We have determined that our shareholders should cast an advisory vote on the compensation of our named executive officers on an [annual] basis. Unless this policy changes, the next advisory vote on the compensation of our named executive officers will be at the [YEAR] annual meeting of shareholders.

THE BOARD OF DIRECTORS UNANIMOUSLY RECOMMENDS A VOTE ***FOR*** THE APPROVAL OF THE COMPENSATION OF OUR NAMED EXECUTIVE OFFICERS, AS DISCLOSED IN THIS PROXY STATEMENT.

Annotated Model Say-on-Frequency Proposal

PROPOSAL [ ]—ADVISORY VOTE ON THE FREQUENCY OF AN ADVISORY VOTE ON EXECUTIVE COMPENSATION

The Dodd-Frank Wall Street Reform and Consumer Protection Act added Section 14A to the Securities Exchange Act of 1934, which requires that we provide shareholders with the opportunity to vote, on a non-binding, advisory basis, for their preference as to how frequently to vote on future advisory votes on the compensation of our named executive officers as disclosed in accordance with the compensation disclosure rules of the Securities and Exchange Commission.

Shareholders may indicate whether they would prefer that we conduct future advisory votes on executive compensation once every one, two, or three years. Shareholders also may abstain from casting a vote on this proposal.

[The following language should be adjusted to reflect the board of directors' determination as to the recommended frequency of every year, every two years or every three years. Neither Rule 14a-21(b) nor the SEC's other proxy rules require that an issuer make a recommendation with respect to the Say-on-Frequency vote; however, the SEC notes that proxy holders may vote uninstructed proxy cards in accordance with management's recommendation only if the issuer follows the existing requirements of Rule 14a-4, which include specifying how proxies will be voted (*i.e.*, in accordance with management's recommendations) in the absence of instruction from the shareholder. Most proxy statements filed in the 2011 proxy season with mandatory Say-on-Frequency votes have included a recommendation as to the preferred frequency of future Say-on-Pay votes, with the majority of those recommendations favoring Say-on-Pay votes once every three years.]

[The Board of Directors has determined that an advisory vote on executive compensation that occurs once [every three years][every two years] is the most appropriate alternative for the Company and therefore the Board recommends that you vote for a [three-year interval][two-year interval] for the advisory vote on executive compensation. In determining to recommend that shareholders vote for a frequency of once [every three years][every two years], the Board considered how an advisory vote at this frequency will provide our shareholders with sufficient time to evaluate the effectiveness of our overall compensation philosophy, policies and practices in the context of our long-term business results for the corresponding period, while avoiding over-emphasis on short-term variations in compensation and business results. An advisory vote occurring once [every three years][every two years] will also permit our shareholders to observe and evaluate the impact of any changes to our executive compensation policies and practices which have occurred since the last advisory vote on executive compensation, including changes made in response to the outcome of a prior advisory vote on executive compensation.]

[The Board of Directors has determined that an annual advisory vote on executive compensation will permit our shareholders to provide direct input on the Company's executive compensation philosophy, policies and practices as disclosed in the proxy statement each year, which is consistent with our efforts to engage in an ongoing dialogue with our shareholders on executive compensation and corporate governance matters.]

This vote is advisory, which means that the vote on executive compensation is not binding on the Company, our Board of Directors or the Compensation Committee of the Board of Directors. The Company recognizes that the shareholders may have different views as to the best approach for the Company, and therefore we look forward to hearing from our shareholders as to their preferences on the frequency of an advisory vote on executive compensation. [*This statement is not required by the SEC's rules; however, it may be advisable to include this statement in order to clarify that the board of directors is open to considering the preferences expressed by shareholders through the vote, without necessarily committing to adopt the frequency most favored by the shareholders.*] [The Board of Directors and the Compensation Committee will take into account the outcome of the vote; however, when considering the frequency of future advisory votes on executive compensation, the Board of Directors may decide that it is in the best interests of our shareholders and the Company to hold an advisory vote on executive compensation more or less frequently than the frequency receiving the most votes cast by our shareholders.] [*The SEC's rules do not require an issuer to address in the proxy statement what actions it will undertake in response to the Say-on-Frequency vote, however, it may be useful to include this information as a means for describing the advisory nature of the vote. Moreover, issuers will have to evaluate what is the most appropriate voting standard for interpreting the Say-on-Frequency vote. In this regard, it should be noted that the SEC has added a new Note to Exchange Act Rule 14a-8(i)(10) to permit the exclusion of a shareholder proposal as "substantially implemented" if the proposal would provide for a Say-on-Pay vote, seek future Say-on-Pay votes, or relate to the frequency of Say-on-Pay votes. Such shareholder proposals may be excluded under the new Note if, in the most recent Say-on-Frequency vote, a single frequency received a majority of the votes cast and the issuer adopted a policy for the frequency of Say-on-Pay votes that is consistent with that choice. This does not mean that an issuer could not utilize a different voting standard for determining the preference of the shareholders, such as plurality (i.e., the frequency receiving the most votes cast by the shareholders).*]

[The following is an example of a resolution for the Say-on-Frequency vote. The Staff indicates in Compliance and Disclosure Interpretations Question 169.06 that it is permissible for the Say-on-Frequency vote to include the words "every year, every other year, or every three years, or abstain" in lieu of "every 1, 2, or 3 years, or abstain."]

Shareholders may cast a vote on the preferred voting frequency by selecting the option of one year, two years, or three years (or abstain) when voting in response to the resolution set forth below.

"RESOLVED, that the shareholders determine, on an advisory basis, whether the preferred frequency of an advisory vote on the executive compensation of the Company's named executive officers as set forth in the Company's proxy statement should be every year, every two years, or every three years."

[The following is an example of proposal language that does not include a resolution for the Say-on-Frequency vote. Exchange Act Rules Compliance and Disclosure Interpretations Question 169.04 indicates that the Say-on-Frequency vote need not be set forth as a resolution. Separately, the Staff has informally cautioned that the Say-on-Frequency vote must be clearly stated, and that in this regard it must be clear that shareholders can vote on the options of every one, two or three years (or abstain from voting), rather than solely following management's recommendation (if any is provided). It is likely that issuers will rely on this guidance to provide more Say-on-Frequency votes in a "proposal" format, such as by simply referencing the four choices that are available on the proxy card.]

The proxy card provides shareholders with the opportunity to choose among four options (holding the vote every one, two or three years, or abstain from voting) and, therefore, shareholders will not be voting to approve or disapprove the recommendation of the Board of Directors.

THE BOARD OF DIRECTORS RECOMMENDS THAT YOU VOTE FOR THE OPTION OF [**ONCE EVERY THREE YEARS**][**ONCE EVERY TWO YEARS**][**ONCE EVERY YEAR**] AS THE PREFERRED FREQUENCY FOR ADVISORY VOTES ON EXECUTIVE COMPENSATION.

Model Say-On-Pay and Say-On-Frequency Board Resolutions

Resolutions for the Annual Meeting

The following model resolutions can be utilized in preparing resolutions for the annual meeting:

Advisory Vote on Executive Compensation

WHEREAS, the Securities and Exchange Act of 1934, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), requires that the Corporation submit a resolution for its stockholders to approve, on an advisory basis, the compensation of the Corporation's "named executive officers" (as such term is defined in the applicable SEC rules), as disclosed in the Corporation's proxy statement under the SEC's rules, at least once every three years;

WHEREAS, in accordance with the Dodd-Frank Act, the vote to approve the compensation of the Corporation's named executive officers as disclosed in the proxy statement under the SEC's rules shall not be construed: (i) as overruling any decision by the Corporation or the Board; (ii) to create or imply any change in the fiduciary duties of the Corporation or the Board; (iii) to create or imply any additional fiduciary duties for the Corporation or the Board; and (iv) to restrict or limit the ability of the Corporation's stockholders to make proposals for inclusion in the Corporation's proxy statement relating to executive compensation except as may be provided under applicable SEC rules;

WHEREAS, the Board has determined that it is in the best interests of the stockholders of the Corporation to submit a resolution for its stockholders to approve, on an advisory basis, the compensation of the Corporation's named executive officers as disclosed in the proxy statement under the SEC's rules at least once every three years; and

WHEREAS, the Board has determined that it is in the best interests of the stockholders of the Corporation for the Board to recommend that the stockholders of the Corporation vote, on an advisory basis, "For" the compensation of the Corporation's named executive officers as disclosed in the proxy statement under the SEC's rules at least once every three years;

NOW, THEREFORE, BE IT RESOLVED, that the Corporation's stockholders shall vote on a resolution to approve, on an advisory basis, the compensation of the Corporation's named executive officers as disclosed in accordance with the SEC's rules in the proxy statement for the Annual Meeting of Stockholders; and

RESOLVED FURTHER, that the Board unanimously recommends that the Corporation's stockholders approve, on an advisory basis, the compensation of the Corporation's named executive officers as disclosed in accordance with the SEC's rules in the proxy statement for the Annual Meeting of Stockholders.

Frequency of the Advisory Vote on Executive Compensation

WHEREAS, the Dodd-Frank Act requires that the Corporation submit a resolution at least once every six years for its stockholders to determine, on an advisory basis, the frequency with which the Corporation's stockholders approve, on an advisory basis, the compensation of the Corporation's named executive officers as disclosed in the Corporation's proxy statement under the SEC's rules;

WHEREAS, in accordance with the Dodd-Frank Act, the vote on the frequency of the advisory vote on the compensation of the Corporation's named executive officers as disclosed in the proxy statement under the SEC's rules shall not be construed: (i) as overruling any decision by the Corporation or the Board; (ii) to create or imply any change in the fiduciary duties of the Corporation or the Board; (iii) to create or imply any additional fiduciary duties for the Corporation or the Board; and (iv) to restrict or limit the ability of the Corporation's stockholders to make proposals for inclusion in the Corporation's proxy statement relating to executive compensation except as may be provided under applicable SEC rules; and

[WHEREAS, the Board believes that an annual advisory vote on executive compensation will allow the Corporation's stockholders to provide the Corporation with their direct input on the Corporation's compensation philosophy, policies and practices as disclosed in the Corporation's proxy statement every year and that an annual advisory vote on executive compensation is consistent with the Corporation's general policy of seeking input from, and engaging in discussions with, the Corporation's stockholders on corporate governance matters and the Corporation's executive compensation philosophy, policies and practices;]

[WHEREAS, the Board believes that an advisory vote on executive compensation that occurs once [every three years][every two years] will provide stockholders with sufficient time to evaluate the effectiveness of the Corporation's overall compensation philosophy, policies and practices in the context of long-term business results for the corresponding period, while avoiding over-emphasis on short-term variations in compensation and business results; and that an advisory vote occurring once [every three years][every two years] will also permit the Corporation's stockholders to observe and evaluate the impact of any changes to the Corporation's executive compensation policies and practices which have occurred since the last advisory vote on executive compensation, including changes made in response to the outcome of a prior advisory vote on executive compensation;]

NOW, THEREFORE, BE IT RESOLVED, that a proposal as to whether to hold an advisory vote on executive compensation once every year, once every two years, or once every three years shall be included in the proxy statement and submitted to the stockholders of the Corporation for a vote at the Corporation's Annual Meeting of Stockholders; and

RESOLVED FURTHER, that the Board unanimously recommends that the stockholders of the Corporation vote to approve, on an advisory basis, a frequency for holding an advisory vote on executive compensation of [once every year] [once every two years] [once every three years] until the next advisory vote on the frequency of holding an advisory vote on executive compensation.

General Authority

RESOLVED, that any and all actions heretofore taken by the officers and directors of the Corporation, or any one or more of them, within the terms of the foregoing resolutions are hereby approved, adopted, ratified and confirmed in all respects and declared to be the valid and binding acts and deeds of the Corporation; and

RESOLVED FURTHER, that the officers of the Corporation are, and each of them is, hereby authorized, directed and empowered in the name and on behalf of the Corporation to take such further action, and to execute, acknowledge, certify, file, deliver and record such documents, instruments, agreements, consents and certificates, as they or any of them in their discretion deem necessary or appropriate, to carry out the purposes and intent of the foregoing resolutions, and that the execution by such officers of any such documents, instruments, agreements, consents and certificates or the doing by them of any act in connection with the foregoing matters shall conclusively establish their authority therefor from this Corporation and the approval and ratification by this Corporation of the documents, instruments, agreements, consents and certificates so executed and the actions so taken.

Resolutions for after the Annual Meeting

The following model resolutions can be utilized in preparing resolutions for the determination of the frequency of the Say-on-Pay vote following the annual meeting:

Approval of Frequency of Say-on-Pay Votes

WHEREAS, at the recently completed Annual Meeting of Stockholders of the Corporation, it was determined that, with respect to the resolution on the frequency of holding an advisory vote on executive compensation, the option of once every [one year][two years][three years] [received the highest number of votes cast by the stockholders] and, accordingly, such frequency is the preferred frequency with which the Corporation is to hold a stockholder vote, on an advisory basis, to approve the compensation of the named executive officers, as disclosed pursuant to the Securities and Exchange Commission's compensation disclosure rules (which disclosure shall include the Summary Compensation Table and the other related tables and disclosure); and

[WHEREAS, the Board believes that an annual advisory vote on executive compensation will allow the Corporation's stockholders to provide the Corporation with their direct input on the Corporation's compensation philosophy, policies and practices as disclosed in the Corporation's proxy statement every year and that an annual advisory vote on executive compensation is consistent with the Corporation's general policy of seeking input from, and engaging in discussions with, the Corporation's stockholders on corporate governance matters and the Corporation's executive compensation philosophy, policies and practices;]

[WHEREAS, the Board believes that an advisory vote on executive compensation that occurs once [every three years][every two years] will provide stockholders with sufficient time to evaluate the effectiveness of the Corporation's overall compensation philosophy, policies and practices in the context of long-term business results for the corresponding period, while avoiding over-emphasis on short-term variations in compensation and business results; and that an advisory vote occurring once [every three years][every two years] will also permit the Corporation's stockholders to observe and evaluate the impact of any changes to the Corporation's executive compensation policies and practices which have occurred since the last advisory vote on executive compensation, including changes made in response to the outcome of a prior advisory vote on executive compensation;]

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby determines that, in light of the preferred frequency determined by the Corporation's stockholders at the Annual Meeting of Stockholders, the Corporation shall include an advisory vote of the stockholders on executive compensation in the Corporation's proxy materials once every [year][two years][three years] until the next required vote on the frequency of stockholder votes on the compensation of executives of the Corporation; and

RESOLVED FURTHER, that the officers of the Corporation are, and each of them is, hereby authorized, directed and empowered in the name and on behalf of the Corporation to implement the foregoing policy of the Corporation.

General Authority

RESOLVED, that any and all actions heretofore taken by the officers and directors of the Corporation, or any one or more of them, within the terms of the foregoing resolutions are hereby approved, adopted, ratified and confirmed in all respects and declared to be the valid and binding acts and deeds of the Corporation; and

RESOLVED FURTHER, that the officers of the Corporation are, and each of them is, hereby authorized, directed and empowered in the name and on behalf of the Corporation to take such further action, and to execute, acknowledge, certify, file, deliver and record such documents, instruments, agreements, consents and certificates, as they or any of them in their discretion deem necessary or appropriate, to carry out the purposes and intent of the foregoing resolutions, and that the execution by such officers of any such documents, instruments, agreements, consents and certificates or the doing by them of any act in connection with the foregoing matters shall conclusively establish their authority therefor from this Corporation and the approval and ratification by this Corporation of the documents, instruments, agreements, consents and certificates so executed and the actions so taken.

CHAPTER 3

KEY DISCLOSURE CONSIDERATIONS FOR PROXY STATEMENTS AND ANNUAL REPORTS

KEY DISCLOSURE CONSIDERATIONS FOR PROXY STATEMENTS AND ANNUAL REPORTS

SEC Review Process

The Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act") requires the SEC to review the Form 10-K of every public issuer at least once every three years. Beginning January 1, 2012, the SEC has released filing review correspondence no earlier than 20 business days following the completion of a filing review. As a result of the public availability of these letters, the Staff has come to expect that issuers are aware of the interpretive positions taken by the SEC in their comment letters, which often reflect nuanced readings of the rules or require more detailed disclosure than might otherwise be expected. It has become increasingly important that issuers make themselves familiar with Staff comment letters that have been issued to other issuers, so that they can respond to the issues raised in those letters when preparing their own filings. The Staff has also noted that issuers should be cognizant of the information provided in response to comments from the Staff, given that the public release of those responses makes the responses a part of the issuer's public disclosures.

In addition to a shift towards a more continuous review approach, the Staff reviews documents outside of an issuer's filings. This has been made clear in the updates to the Staff's statements in connection with the non-GAAP measures guidance, discussed below. The Staff has expressed concern that issuers' SEC filings seem to have become "compliance" documents, rather than communicative tools that provide useful information to shareholders, and has indicated that the Staff reviews information outside of an issuer's filings in its review of the issuer's risk factors and MD&A. The Staff has stated that it will focus on ensuring that the story an issuer is telling in its SEC filings is consistent with the story being told elsewhere, including in earnings releases, presentations, statements, news coverage and analyst reports. As a result, issuers often see comments that reference disclosure made in other forums that raise questions or issues about the disclosures in SEC filings.

SEC Comments on Executive Compensation Disclosure

Over the past several years, the SEC has provided significant guidance with respect to its interpretation of executive compensation disclosure rules, including numerous Staff speeches, new and revised Compliance and Disclosure Interpretations, its "Staff Observations in the Review of Executive Compensation" (which was released in October 2007 following a review of the disclosure of 350 issuers), and Staff comments on individual filings. Historically, the Staff has addressed executive compensation disclosure deficiencies identified in the review process by issuing “futures” comments, which require an issuer to address any identified deficiencies in future filings. However, that approach has begun to change. In a November 2009 speech, Shelley Parratt, then the Deputy Director of the Division of Corporation Finance, stated:

> “[A]fter three years of futures comments, we expect companies and their advisors to understand our rules and apply them thoroughly. So, any company that waits until it receives Staff comments to comply with the disclosure requirements should be prepared to amend its filings if it does not materially comply with the rules.”

Under the Staff’s approach, it has become increasingly likely that the SEC will require that issuers amend disclosure if it believes that the issuer has not appropriately followed outstanding Staff guidance. Issuers should attempt to address in their disclosure the issues that are most often raised by the Staff during the review process.

In her November 2009 speech, Ms. Parratt urged issuers to focus on several key areas of executive compensation disclosure, as well as consider the comments, reports and speeches on CD&A provided by the Staff over the years. In particular, Ms. Parratt provided the following recommendations for preparing proxy statement disclosures:

- Explain *why* compensation decisions were made in the context of addressing the decision-making processes;
- Disclose any material performance targets used in determining executive compensation for the named executive officers for the periods covered by the disclosure, as well as the actual achievement level against the targets;
- In the event of Staff review, be prepared to explain how disclosure of material performance targets would cause competitive harm when that is the basis for omitting the performance target disclosure;
- Provide meaningful disclosure regarding the degree of difficulty in achieving performance targets when those targets are omitted;
- Disclose the names of any peer group companies used for benchmarking purposes, how those companies were selected, and how the actual awards compared to the benchmarks; and
- In addition to addressing the examples provided in Item 402(b) of Regulation S-K, provide additional disclosure in the CD&A that would be material to an understanding of an issuer’s compensation policies or decisions.

Trends In Executive Compensation Comments

There are a number of significant areas of focus in Staff comments and other interpretive guidance on executive compensation disclosure. For example, the Staff has repeatedly stated that an issuer's CD&A should focus on *how* and *why* the issuer arrived at specific executive compensation decisions and policies and should address why specific compensation decisions were made. Issuers frequently receive comments on this issue during the review process. Other principal areas of SEC comment in the CD&A have related to the disclosure of incentive plan performance targets, individual performance goals and benchmarking practices or processes.

Meaningful Analysis in the Compensation Discussion & Analysis

The Staff has repeatedly requested that issuers provide more detailed, meaningful analysis in the CD&A. Issuers should discuss both *how* and *why* they arrived at specific compensation decisions. In addition to identifying what the goals of the compensation program are, issuers should also identify the reasons for individual awards to named executive officers, as well as how those awards fit into the issuer's overall compensation objectives. The Staff expects issuers to provide detailed, specific analysis.

The Staff generally views as insufficient any discussion of award decisions that addresses all named executive officers as a group and does not address each named executive officer's individual circumstances. In addition, as part of the analysis of the reasons for each element of compensation (e.g., base salary, cash incentive award or equity award) for each named executive officer, the Staff expects a discussion of why the compensation committee decided to award specific amounts or make changes in an element of compensation from period to period. For example, this discussion should include the reasons the compensation for a named executive officer increased or decreased as compared to prior periods, as well as how the compensation committee arrived at its decision.

Disclosure of Performance Targets

Another focus of Staff comments on CD&A is on the disclosure of performance targets as they relate to executive compensation. Issuers are required to disclose any specific items of corporate performance that are taken into account in setting compensation policies and making compensation decisions. In addition to disclosing any material performance targets, issuers are expected to disclose the extent to which those performance targets were achieved. However, they are not required to disclose any performance targets that are not material or that would cause competitive harm to the issuer.

Some issuers have chosen not to disclose performance targets in reliance on the argument that this disclosure would cause competitive harm to the issuer. However, the Staff has focused significant attention on the competitive harm argument in its comments and has limited the extent to which issuers may rely on it. The Staff has required issuers to justify their use of the standard, sometimes going beyond the standards generally applied to confidential treatment requests. Issuers have been asked to specifically identify the nature of the competitive harm that they would suffer if the performance targets were to be disclosed, including how the issuer's competitors would actually use the information. If the Staff accepts the competitive harm argument, performance targets are not disclosed based on the competitive harm exception, then the issuer must disclose the level of difficulty associated with achieving the undisclosed goal.

The Staff is more likely to accept that disclosure of a performance target would cause competitive harm in the context of non-financial operational performance targets or performance goals related to specific business units. The Staff will generally not accept the argument that the disclosure of financial information or financial targets for a completed fiscal year will cause competitive harm. If the performance target relates to a completed fiscal year, the Staff position is that, because the issuer's financial results have already been publicly disclosed, no competitive harm should arise from the disclosure in the CD&A of the financial performance target and the extent to which it was met. However, the Staff generally does not require disclosure of financial performance targets for the current or a future period, if the issuer is able to argue that those current or future period targets are not material to an understanding of compensation policies and decisions with respect to the fiscal year being discussed in the CD&A.

If issuers use non-GAAP performance targets, the Staff requires that the non-GAAP performance targets be disclosed in the CD&A, together with an explanation of how it is calculated. However, a full-scale reconciliation to GAAP is not required.

Individual Performance Goals

Staff comments on CD&A have also focused on disclosure of individual performance goals for named executive officers. Issuers often provide general disclosure that states that some percentage or component of executive compensation is based on achievement of individual performance goals. However, the Staff raises a concern if sufficient disclosure of how the level of individual achievement affects the actual compensation received by the executive, or why the compensation committee adopted the performance goal and how achievement is measured.

The Staff has requested that issuers provide more specific disclosure in this area. Issuers must identify the extent to which achievement of individual performance goals impacts compensation for each named executive officer. If individual performance goals were a material factor in determining compensation, issuers must disclose the specific performance goals and achievements, even if the performance targets are subjective and not quantifiable. Disclosure of specific performance targets may not be required if the performance target was not a material factor in determining compensation, for example if it was just one factor among many taken into account by the compensation committee. However, formulaic, objective or quantifiable performance targets should generally be disclosed in the Staff's view.

The Staff has also requested that issuers provide additional disclosure when the compensation committee has approved compensation in excess of or less than what is provided for in the issuer's compensation plans, or when the overall amount to which the executive is entitled under the program has been increased or decreased as a result of the executive's individual performance. In those situations, issuers have been asked to disclose the activities or individual performance standards that were applied in making that decision, as well as how the compensation committee considered those standards when making its decision.

Benchmarking

The use of benchmarking in the CD&A is another area of Staff focus throughout the comment process. It is important to note that many issuers use the term "benchmarking" in their CD&As when they are not in fact benchmarking as that term is understood by the SEC. For purposes of the CD&A, benchmarking refers to the tying of specific elements of compensation to a benchmark, as opposed to, for example, simply using comparable company data as a market check after arriving at compensation decisions based on some other method. As another example, a company is benchmarking when it ties base salaries to a certain targeted range (for example, the median level) within a set of peer companies. Issuers that do not engage in benchmarking should modify their disclosure in the CD&A to clarify how they use comparative issuer information.

For issuers that do engage in benchmarking, the Staff has consistently requested that all of the companies comprising the peer group or survey be listed and that the issuer describe the methodology it uses for assessing and utilizing the information. The issuer must also identify where its compensation plan falls within the targeted parameters. If its compensation falls outside of the targeted range, the issuer is asked to provide an explanation of the change.

The Staff has provided the following guidance regarding the term “benchmarking” in the Regulation S-K Compliance and Disclosure Interpretations Question 118.05:

> **Question:** Item 402(b)(2)(xiv) provides, as an example of material information to be disclosed in the Compensation Discussion and Analysis, depending on the facts and circumstances, “[w]hether the registrant engaged in any benchmarking of total compensation, or any material element of compensation, identifying the benchmark and, if applicable, its components (including component companies).” What does “benchmarking” mean in this context?
>
> **Answer:** In this context, benchmarking generally entails using compensation data about other companies as a reference point on which — either wholly or in part — to base, justify or provide a framework for a compensation decision. It would not include a situation in which a company reviews or considers a broad-based third-party survey for a more general purpose, such as to obtain a general understanding of current compensation practices. [July 3, 2008]

Comments and Interpretations on Corporate Governance Disclosure

Background

On December 16, 2009, the SEC adopted, in SEC Release No. 33-9089 (December 16, 2009), rule changes that mandate more disclosure in proxy and information statements regarding risk, compensation and corporate governance matters. Specifically, the changes require disclosure concerning:

- The relationship of an issuer’s compensation policies and practices to risk management, when those compensation policies and practices create risks that are reasonably likely to have a material adverse effect on the issuer;
- The grant date fair value of equity awards in the Summary Compensation Table, replacing the prior approach of requiring disclosure of the amounts of compensation expense recognized for financial reporting purposes;
- The potential conflicts of interest that compensation consultants may have when performing services for the issuer, focusing on disclosure of fees paid (subject to a $120,000 threshold) for executive compensation services and for additional services;
- The background and qualifications of directors and nominees for director, describing the experience and skills that led the issuer to choose the director or nominee for the board;
- Other public company directorships held by each director or nominee over the past five years;

- Legal proceedings involving an issuer's executive officers, directors, and nominees for director, including disclosure covering the past ten years and covering a significantly expanded list of relevant proceedings;
- The board of directors' consideration of diversity in the process by which directors are considered for nomination to the board;
- The leadership structure of the board, including whether the issuer has combined or separated the roles of chairman and principal executive officer, and why the issuer believes that its leadership structure is appropriate for the issuer, as well as a discussion, in some circumstances, of whether and why an issuer has a lead independent director;
- The extent of the board's role in the oversight of risk; and
- Voting results, which are to be provided on a significantly accelerated basis under cover of Form 8-K.

These rule changes were effective on February 28, 2010, and were first included in proxy statements for annual meetings occurring in 2010.

The Relationship between Compensation and Risk

The SEC adopted Item 402(s) of Regulation S-K, which elicits disclosure about the relationship of risk to the compensation policies and practices for *all* employees, not just the executive officers of the issuer. This disclosure is limited to compensation policies and practices, however, such that no further disclosure regarding the specific amounts of compensation paid to employees would be required under the rule. In response to commenters' concerns that this disclosure may be confusing if included as part of the CD&A, the SEC decided to require the disclosure outside of the CD&A, under a discrete disclosure requirement. Nonetheless, disclosure concerning the relationship between compensation and risk may be required in the CD&A specifically with regard to the named executive officers, consistent with the guidance that the SEC provided in both the proposing and adopting releases for this rule change, which both stated that "[t]o the extent … such risk considerations are a material aspect of the company's compensation policies or decisions for named executive officers, the company is required to discuss them as part of its CD&A under the current rules."

Requirements of Item 402(s) of Regulation S-K

As adopted, the disclosure is triggered if compensation policies and practices create risks that are "reasonably likely to have a material adverse effect" on the issuer. The standard of "reasonably likely to have a material adverse effect" tracks the requirements in Item 303 of Regulation S-K. In response to concerns expressed by commenters, the SEC decided to adopt this higher standard relative to the proposed standard, which looked to whether the compensation policies or practices "may have a material effect" on the issuer. In discussing these changes between the proposed rule and the final rule, the SEC noted that this standard would be more familiar to issuers, given that it is applied in determining whether known material trends, demands, events, and uncertainties must be disclosed. Focusing the standard on whether the risk may have a material adverse effect on the issuer also permits issuers to consider compensation policies and practices that mitigate or balance incentives. Further, the addition of the term "adverse" to the test clarifies that issuers do not have to discuss ways in which compensation policies and practices may encourage risk taking that is beneficial to the issuer.

The final rule includes a non-exclusive list of situations where compensation programs may have the potential to cause material adverse risks for issuers. These include compensation policies and practices:

- At a business unit of the issuer that carries a significant portion of the issuer's risk profile;
- At a business unit with compensation structured significantly differently than other units within the issuer;
- At a business unit that is significantly more profitable than others within the issuer;
- At a business unit where the compensation expense is a significant percentage of the unit's revenues; and
- That vary significantly from the overall risk and reward structure of the issuer, such as when bonuses are awarded upon accomplishment of a task, while the income and risk to the issuer from the task extend over a significantly longer period of time.

Further, the final rule includes a non-exclusive list of illustrative examples of the type of issues that an issuer may need to address if it has determined that compensation policies and practices create risks that are reasonably likely to have a material adverse effect on the issuer. These issues include:

- The general design philosophy of the issuer's compensation policies and practices for employees whose behavior would be most affected by the incentives established by the policies and practices, as such policies and practices relate to or that affect risk taking by those employees on behalf of the issuer, and the manner of their implementation;
- The issuer's risk assessment or incentive considerations, if any, in structuring its compensation policies and practices or in awarding and paying compensation;

- How the issuer's compensation policies and practices relate to the realization of risks resulting from the actions of employees in both the short term and the long term, such as through policies requiring clawbacks or imposing holding periods;
- The issuer's policies regarding adjustments to its compensation policies and practices to address changes in its risk profile;
- Material adjustments the issuer has made to its compensation policies and practices as a result of changes in its risk profile; and
- The extent to which the issuer monitors its compensation policies and practices to determine whether its risk management objectives are being met with respect to incentivizing its employees.

This disclosure regarding the relationship between compensation and risk is not required for those issuers that qualify for scaled disclosure as a smaller reporting company.

The rule does not require an issuer to make an affirmative statement that it has determined that risks arising from compensation policies and practices are not reasonably likely to have a material adverse effect on the issuer, although issuers may need to consider whether to add such a statement, as well as an explanation of the issuer's process for evaluating risks arising from compensation policies and practices, in order to address the inevitable concerns of shareholders and proxy advisors.

SEC Staff Interpretations and Comments

During 2010, the Staff asked issuers what was done and what conclusion was reached in response to this disclosure item, most likely as a first-year check on compliance with the new rule. The Staff asked for a supplemental explanation if the issuer included no disclosure in the proxy statement regarding the evaluation of the relationship between employee compensation and risk; or if the issuer included only a state-ment of a conclusion without a description of the process; or where an issuer did include some discussion of the process undertaken, but did not include a fulsome discussion of the process.

In each of these situations, the Staff asked for a supplemental explanation of the process undertaken to reach the conclusion that compensation policies are not reasonably likely to have a material adverse effect on the issuer. In many of the responses, issuers describe a process whereby compensation programs were reviewed, particularly focusing on incentive compensation programs and program features which could potentially encourage risk taking. These processes involved identifying the specific business risks that related to these compensation features, as well as "mitigating" factors that offset the risks. Issuers consistently undertook an analysis to determine the potential effects of the risks and the impact of the other factors considered, and whether any of the particular situations described in Item 402(s) applied to the issuer. In most cases, issuers indicated that the compensation committee was involved in some capacity with the analysis; responses often noted that the analysis was conducted by management with the concurrence of or consultation with the compensation committee.

The findings that companies often reached were similar, focusing on:

- The mix of compensation, which tended to be balanced with an emphasis toward rewarding long-term performance;
- The use of multiple performance metrics that are closely aligned with strategic business goals;
- The use of discretion as a means to adjust compensation downward to reflect performance or other factors;
- Caps on incentive compensation arrangements;
- The lack of highly leveraged payout curves;
- Multi-year time vesting on equity awards which requires long-term commitment on the part of employees;
- The governance, code of conduct, internal control and other measures implemented by the company;
- The role of the compensation committee in its oversight of pay programs;
- Frequent business reviews;
- The existence of compensation recovery policies;
- The implementation of stock ownership or stock holding requirements;
- The use of benchmarking to ensure the compensation programs are consistent with industry practice;
- The uniformity of compensation programs across business units and geographic regions, or alternatively, the differences employed to reflect specific business unit or geographic considerations; and
- The immaterial nature of some plans.

Changes to the Summary Compensation Table and the Director Compensation Table

In the 2006 changes to the executive compensation disclosure rules, the SEC required disclosure in the Summary Compensation Table of the compensation expense associated with equity awards (which included expensed amounts related to awards granted in prior fiscal years), rather than the grant date fair value of the awards made in the subject fiscal year covered in the Summary Compensation Table.

This approach created difficulties for issuers when presenting their executive compensation disclosure, because the presentation in the Summary Compensation Table of equity award values did not necessarily correspond with decisions that the compensation committee made in the fiscal year covered by the CD&A. In order to address this disconnect, some issuers began including "alternative summary compensation tables" and taking other approaches to try to clarify how the decisions addressed in the CD&A related to the amounts presented for the named executive officers.

Accordingly, as part of the December 2009 amendments, the SEC adopted changes that now require the disclosure of the grant date fair value of the equity awards made during the fiscal year in the "Option Awards" and "Stock Awards" columns of the Summary Compensation Table and the Director Compensation Table. These numbers reflect the grant date fair values calculated in accordance with the Financial Accounting Standards Board's Accounting Standards Codification Topic 718 (formerly known as FAS 123R and referred to here as "ASC Topic 718"). For performance-based awards, the SEC requires reporting of the fair value at the grant date based on the probable outcome of the performance conditions (rather than the maximum potential value of the award), which should be consistent with the estimate of aggregate compensation cost to be recognized over the service period determined as of the grant date under ASC Topic 718. The maximum potential value of the awards is disclosed in a footnote to the Summary Compensation Table and the Director Compensation Table.

Issuers are required to report the full grant date fair value of each equity award in the Grants of Plan-Based Awards Table. Performance-based equity awards reported in the Grants of Plan-Based Awards Table are reported based on the probable outcome of meeting the performance condition, as with the Summary Compensation Table.

The SEC decided not to adopt a proposed change to its rules that would have permitted issuers to report salary and bonus foregone at the named executive officer's election in the appropriate column for the award elected. As a result, salary and bonus is reported in the "Salary" and "Bonus" columns even when foregone at the named executive officer's election, with footnote disclosure indicating receipt of the non-cash compensation and referring to the Grants of Plan-Based Awards Table where the stock, option, or non-equity incentive plan compensation is reported.

Compensation Consultant Conflicts

The rules require disclosure about fees paid to compensation consultants and their affiliates in specified circumstances.

In particular, if the board, compensation committee, or other persons performing an equivalent function (referred to in this section as the "board") has engaged its own compensation consultant to provide advice or recommendations regarding the amount or form of executive and director compensation, and this same consultant or the consultant's affiliates provide other consulting services to the issuer (which consulting services do not involve executive compensation) in an amount that exceeds $120,000 during the last fiscal year, then the issuer must disclose:

- The aggregate fees paid for services provided either to the board or the issuer with regard to determining or recommending the amount or form of executive and director compensation;
- The aggregate fees paid for any additional services provided by the consultant or its affiliates; and
- Whether the decision to engage the compensation consultant or its affiliates for the non-executive compensation consulting services was made, or recommended by, management and whether the board approved such other services.

In situations where the board has not engaged its own consultant, then disclosures are required if a consultant is engaged to provide both executive compensation consulting services and non-executive compensation consulting services to the issuer, provided that the fees for the non-executive compensation consulting services exceed $120,000 during the issuer's fiscal year. In this situation, disclosure is required of:

- The aggregate fees paid to the consultant or its affiliates for determining or recommending the amount or form of executive and director compensation; and
- The aggregate fees paid for any additional services provided by the consultant or its affiliates.

If the board and management have different compensation consultants, then no fee disclosure is required even if management's compensation consultant provides additional services to the issuer, recognizing that when the board engages its own compensation consultant, it mitigates the risks for the conflicts of interest that the SEC is seeking to address with the additional fee disclosure. Moreover, disclosure is not required when the compensation consultant's only role in recommending the amount or form of executive or director compensation is limited to consulting on broad-based plans that do not discriminate in favor of executive officers or directors of the issuer. Disclosure is also not required when the compensation consultant's services are limited to providing information, such as surveys, that is not customized for a particular issuer, or that is customized based on parameters that were not developed by the compensation consultant.

The SEC did not adopt a proposed requirement to disclose the nature and extent of additional services provided by the compensation consultant or its affiliates, given the potentially competitive nature of this information. Issuers still may provide some explanation of the types of services provided, if the additional information is necessary to an understanding of a potential conflict of interest.

Director and Nominee Qualifications

Requirements

The SEC adopted revisions to Item 401 of Regulation S-K, which sets forth disclosure requirements for the backgrounds of executive officers, directors, and nominees for director, to require pursuant to Item 401(e)(1) of Regulation S-K, for each director and any nominee for director, disclosure of the particular experience, qualifications, attributes, or skills that led the board to conclude that the person should serve as a director of the issuer, as of the time that the filing is made with the SEC. The disclosure is required for all nominees for director (including nominees put forward by a proponent other than the issuer), as well as for all existing directors, even if not subject to re-election at the meeting to which the proxy statement relates. This director and nominee disclosure requirement augments, but does not replace, specific disclosure required regarding the consideration by the nominating committee of minimum director qualifications, or specific qualities or skills.

The disclosure requirement does not mandate the particular information that must be disclosed. Rather, the SEC indicated that it wanted to provide issuers with flexibility to determine what information concerning a director's or nominee's skills, qualifications, or particular area of expertise should be disclosed to shareholders.

The SEC did not adopt a proposal to require disclosure of the specific experience, qualifications or skills that qualify a director to serve as a member of a particular committee. However, the SEC has noted in the adopting release that if the director or a nominee has been chosen to join the board because of particular expertise that is relevant to a specific committee, then that fact should be disclosed in response to the disclosure item.

SEC Staff Interpretations and Comments

In Regulation S-K Compliance and Disclosure Interpretations Question 116.05, the Staff made clear that it intended for issuers to disclose why the person's *particular* and *specific* experience, qualifications, attributes or skills led the board to conclude that such person should serve as a director of the issuer, so that disclosures made on a group basis would be unacceptable, even if the directors or nominees share similar characteristics.

Further, in Regulation S-K Compliance and Disclosure Interpretations Question 116.06, the Staff noted that an issuer with a classified board needs to provide the Item 401(e)(1) disclosure for the entire board, focusing on the evaluation of the director's particular and specific experience, qualifications, attributes or skills, and the conclusion on why the director should continue serving on the board, as of the time that a filing containing the disclosure is made. The Staff noted that this interpretation may necessitate adding in additional disclosure controls and procedures to ensure that such information about directors who are not up for re-election at the upcoming shareholders' meeting is recorded, processed, summarized and reported in a timely manner.

The Staff raised a number of comments on the director qualifications disclosure provided in the 2010 proxy season, including the following:

- Omission of Required Disclosure. One consistent Staff comment on the governance disclosures, including the director qualification disclosures, was a comment asking the issuer to include the disclosure when it was not included. Perhaps because the rules became effective immediately before the proxy season, a surprising number of issuers did not comply with some or all of the new governance disclosure requirements in 2010. Given that it was the first year the disclosure was required, the Staff generally did not request that the issuers file an amendment to the Form 10-K to include the required disclosure, but rather allowed issuers to remedy the situation in future filings.
- Specificity of the Disclosure. In June 2010, then SEC Chair Mary Schapiro made a speech at the Stanford Directors' College where she discussed the adequacy of compliance with the new director qualifications disclosure item. She gave examples of actual good and bad disclosures (without identifying the issuers) to demonstrate the point that the disclosure should be individualized for each director and should avoid over-generalizations such as "our directors each have integrity, sound business judgment and honesty, which are important characteristics of a good board member." Chair Schapiro's viewpoint was borne out through the Staff comment process, where the Staff frequently asked for an explicit description of the qualifications and experience over and above the basic biographical description that has been required by Item 401 of Regulation S-K, emphasizing that the disclosure needed to communicate how the specific qualifications, attributes or skills *led to the conclusion* that the director should serve on the particular issuer's board.

- Location of the Disclosure. The Staff did not typically raise comments concerning where issuers actually placed the director qualification disclosure. In many instances, the director qualification disclosure was included as a separate paragraph following each director's biographical information; in other cases, the disclosure was incorporated directly into the biography paragraph or included in a separate section entirely.
- Directors Serving Under a Shareholder Agreement. Many issuers have directors who serve because a shareholder has appointed the director to serve pursuant to some contractual or other arrangement, or particular shareholders nominate and elect certain directors under the terms of the issuer's charter, bylaws or other governing documents. In cases where issuers sought to reference only the shareholder agreement or arrangement as the basis for the conclusion as to why the director serves on the board, the Staff asked for the more complete description of the director's qualifications, even if that information had to be obtained from the shareholder.

Outside Directorships

The SEC also adopted a requirement for disclosure regarding other public company directorships held by directors or nominees over the past five years (even if a director is no longer serving as a director of the other public company). This requirement expands upon previously required disclosure regarding current director positions at other public companies.

Legal Proceedings

Item 401(f) of Regulation S-K previously required disclosure regarding a director's, nominee's, or executive officer's involvement in specific legal proceedings that are material to an evaluation of the integrity of such person. The SEC has extended the "look back" provision in Item 401(f) from five years to ten years, and now requires disclosure regarding the following additional legal proceedings:

- Any judicial or administrative proceedings resulting from involvement in mail or wire fraud or fraud in connection with any business entity;
- Any judicial or administrative proceedings based on violations of federal or state securities, commodities, banking, or insurance laws and regulations, or any settlement of such actions; and
- Any disciplinary sanctions or orders imposed by stock, commodities, or derivatives exchanges or other self-regulatory organizations.

The rules do not require disclosure of a settlement of a civil proceeding among private parties. As is the case before these amendments, the disclosure of specific legal proceedings (including the newly added proceedings specified above) are not required to be disclosed if the proceeding is not material to an evaluation of the ability or integrity of the director or director nominee.

Director Diversity

Requirements

The rules require disclosure of whether and, if so, how the nominating committee considers diversity in identifying director nominees. Further, if the nominating committee or the board has a policy with regard to the consideration of diversity in identifying director nominees, then disclosure is required of how the policy is implemented and monitored for effectiveness. In adopting this new requirement, the SEC has not defined the term "diversity," leaving it to each issuer to define diversity in the way that the issuer deems appropriate. The SEC noted that some issuers may define diversity to include "differences of viewpoint, professional experience, education, skill and other qualities or attributes that contribute to board heterogeneity," while other issuers may define diversity to include race, gender and national origin.

SEC Staff Interpretations and Comments

In some cases, issuers expressly disclaimed any policy on diversity, but the Staff consistently raised a comment requesting the "policy" disclosure whenever diversity is mentioned in a filing. In many cases, issuers have addressed diversity in the context of the director qualifications considered in the nomination process, and even if the word "diversity" is not used directly, but the disclosure implies the consideration of a broad range of skills and qualifications, the Staff will raise a comment asking for the complete diversity disclosure. As a result, the Staff's interpretation contemplates the policy disclosure whenever diversity (however defined) is considered, even if no such policy is actually articulated in writing. The additional disclosure required once it is determined that a diversity "policy" exists involves discussing how the policy has been implemented (i.e., through the nominating committee process) and how it is monitored (i.e., typically through the annual committee and/or board self-evaluation process).

On February 6, 2019, the Staff issued new Regulation S-K Compliance and Disclosure Interpretations that relate to director diversity disclosure. These interpretations apply to both Item 401 of Regulation S-K and Item 407 of Regulation S-K and are found in Questions 116.11 and 133.13. The question in the interpretation asks what type of disclosure is required under Item 401 and Item 407 where directors or nominees have voluntarily provided "self-identified specific diversity characteristics, such as their race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background," and consented to disclosure of these diversity characteristics.

Item 401(e) of Regulation S-K requires a company to "briefly discuss the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director for the registrant at the time that the disclosure is made, in light of the registrant's business and structure." Pursuant to the guidance, to the extent those self-identified diversity characteristics were considered by the board or nominating committee in assessing whether the person's "experience, qualifications, attributes or skills" were appropriate for the board, the Division expects the discussion required by Item 401 to include, among other things, "identifying those characteristics and how they were considered." The Staff expects the description of diversity policies under Item 407 to "include a discussion of how the company considers the self-identified diversity attributes of nominees as well as any other qualifications its diversity policy takes into account, such as diverse work experiences, military service, or socio-economic or demographic characteristics."

Reconsideration of the Diversity Disclosure Requirements

In January 2016, then SEC Chair Mary Jo White asked the Staff of the Division of Corporation Finance to review board diversity disclosures and formulate recommendations for the Commission. At around the same time, a GAO report requested by Rep. Carolyn Maloney (D-NY) called for increased public disclosure requirements as one of several approaches toward increasing board gender diversity, and Rep. Maloney asked Chair White to pursue a rulemaking to require expanded disclosure concerning a director nominee's gender, race and ethnicity In response to the former Chair's request in January, the Staff has reviewed the state of disclosure under Item 407(c)(2)(vi) and generally has observed that it is less clear from the disclosures reviewed how issuers have considered diversity. The SEC has recently reiterated that disclosure regarding diversity is an area that it continues to review for the purpose of considering potential rulemaking proposals. No rule changes have been proposed to date.

Board Leadership Structure

Requirements

Under Item 407(h) of Regulation S-K, an issuer must disclose whether and why it has chosen to combine or separate the principal executive officer and board chairman positions, as well as the reasons why the issuer believes that this board leadership structure is the most appropriate structure for the issuer at the time of the applicable filing. In those situations where there is a combined principal executive officer and board chairman, but also a lead independent director, then the issuer must disclose whether and why the issuer has a lead independent director and the specific role that the lead independent director plays in the leadership of the issuer. Further, the issuer must explain the effect that the board's role in the oversight of risk has on the leadership structure.

SEC Staff Interpretations and Comments

The Staff's main focus in the comment process has been on eliciting a specific discussion of why the leadership structure is appropriate given the specific characteristics or circumstances of the issuer. In some cases, issuers did not explain why either the combined or separate Chairman/CEO made particular sense in light of an issuer's particular circumstances. This problem was particularly evident for issuers with a separate Chairman/CEO leadership structure, because that structure has historically been seen as a "good" governance practice. Nonetheless, the Staff has raised the comment asking for a more detailed explanation, even in those situations where the separate Chairman/CEO structure was in place. Issuers tended to not always include disclosures responsive to the requirement to explain the effect that the board's role in the oversight of risk has on the leadership structure, so the Staff frequently raised a comment seeking full compliance with Item 407(h). Some issuers chose to say that the board's role in the oversight of risk had no effect on the board leadership structure, while others focused on the interaction of the interested committees with the Chairman and/or CEO in the course of overseeing the issuer's risk management.

In Summer 2022, the Staff sent comment letters to issuers suggesting that issuers improve the board leadership disclosure required pursuant to Item 407(h) of Regulation S-K. The Staff's comments address a concern that disclosures required under Item 407(h) may have become too standardized and are not tailored to how the board leadership structure is unique to the issuer's particular characteristics or circumstances. Examples of some of the Staff's comments are as follows:

- Please expand upon the role that your lead independent director plays in the leadership of the board. For example, please enhance your disclosure to address whether or not your lead independent director may:
    - Represent the board in communications with shareholders and other stakeholders;
    - Require board consideration of, and/or override your CEO on, any risk matters; or
    - Provide input on design of the board itself.
- Please expand your discussion of the reasons you believe that your leadership structure is appropriate, addressing your specific characteristics or circumstances. In your discussion, please also address the circumstances under which you would consider having the chair and CEO roles filled by a single individual, when shareholders would be notified of any such change, and whether you will seek prior input from shareholders. Please also disclose how the experience of your lead independent director is brought to bear in connection with your board's role in risk oversight.

The Board's Oversight of Risk

The SEC mandates disclosure about the board's involvement in the oversight of the issuer's risk management process. Issuers have flexibility under this disclosure requirement to describe how the oversight role is exercised, i.e., whether it is through the activities of the entire board, a risk committee of the board, or another committee of the board, such as the audit committee. The SEC also indicates that, where relevant, issuers may want to address whether the individuals who supervise risk management report to the board or a board committee, or otherwise how the board or the appropriate committee receives information from risk managers.

In Summer 2022, the Staff sent comment letters to issuers suggesting that issuers improve the risk oversight disclosure required pursuant to Item 407(h) of Regulation S-K. The Staff's comments address a concern that disclosures required under Item 407(h) may have become too standardized and are not tailored to how the board oversees risk. An example of the Staff's comment is as follows:

- Please expand upon how your board administers its risk oversight function. For example, please disclose:
  - Why your board elected to retain direct oversight responsibility for strategic risks and other risk areas not delegated to a committee, including cybersecurity matters, rather than assign oversight to a board committee;
  - The timeframe over which you evaluate risks (e.g., short-term, intermediate-term or long-term) and how you apply different oversight standards based upon the immediacy of the risk assessed;
  - Whether you consult with outside advisors and experts to anticipate future threats and trends, and how often you reassess your risk environment;
  - How the board interacts with management to address existing risks and identify significant emerging risks;
  - Whether you have a chief compliance officer and to whom this position reports; and
  - How your risk oversight process aligns with your disclosure controls and procedures.

Accelerated Disclosure of Voting Results

Prior to the SEC's action in 2009, voting results from annual or special meetings were required to be disclosed in periodic reports on Form 10-Q or 10-K, which resulted in a significant delay in the time between when the meeting occurred and when shareholders learned of the results from their voting decisions. The SEC moved the requirement for disclosure of voting results from Forms 10-Q and 10-K to Form 8-K. Now, voting results are filed under Item 5.07 of Form 8-K within four business days after the end of the meeting at which the vote was held.

In order to accommodate situations where it may be difficult to determine final voting results within the four-day filing window, the SEC provided an Instruction to Item 5.07 which indicates that an issuer is required to file preliminary voting results within four days after the end of the shareholders' meeting, and then file an amended Form 8-K within four business days after the final voting results are known. If definitive voting results are obtained within the initial four day filing window, then those definitive results may be filed and no preliminary results need be filed.

Areas of Focus in SEC Comments on Annual Reports

Recent Staff comments reflect the trend of Staff review of both legal and accounting or financial disclosures in the Form 10-K. Recent areas of frequent Staff comment have addressed disclosure of goodwill impairment charges, liquidity, debt covenants, disclosure controls and procedures, risk factors and exhibits. Each of these areas is further discussed below.

Impairments

One of the most frequent areas of Staff comment on Form 10-Ks relates to disclosure of goodwill impairment. The Staff may request additional supplemental information or disclosure if an issuer has taken an impairment charge, but it has also raised comments if no impairment charge has been taken but goodwill accounts for a significant portion of total assets and there are downward trends in revenue, income or stock price. In situations where the issuer has already taken a goodwill impairment charge, the Staff may request that issuers discuss the primary drivers in assumptions that resulted in the charge. For example, the issuer may be asked whether it significantly reduced projected future revenues or net cash flows or increased the discount rates, or whether it considered an economic recovery in its cash flow projections. In addition, issuers are frequently asked to disclose expectations regarding future operating results and liquidity as a result of the impairment charge, including a discussion of whether they expect historical operating results to be indicative of future operating results.

If an issuer has not taken an impairment charge but goodwill accounts for a significant portion of total assets and there are downward trends in revenue, income or stock price, the Staff may issue comments related to the issuer's goodwill impairment analysis. For example, the issuer may be asked to provide a more detailed description of the steps it performs to review goodwill for recoverability, describe the nature of the valuation techniques and significant estimates and assumptions employed to determine the fair value in the impairment analysis and discuss whether there have been any changes to the assumptions and methodologies used since the last impairment test. In addition, the issuer may be asked to discuss its estimates of future cash flows, including disclosures related to the cash flow growth rate used to determine the future cash flow projections.

The Staff may also ask issuers to break down goodwill by reporting unit. Issuers may be requested to disclose any changes to reporting units or allocations of goodwill by reporting unit, as well as the reasons for these changes. The Staff may perform a detailed review of documentation related to the reporting structure in order to determine whether there is a basis for the allocation decisions.

Liquidity

Another area of increased Staff comments in Form 10-Ks has been in the liquidity disclosure of MD&A. The primary focus of Staff comments has been on how the economy has impacted the availability of cash and credit. Comments have reflected a concern that an issuer's risk factors and MD&A disclosure be consistent, and that the MD&A disclosure provide a sufficient level of detail about known trends, demands, events and uncertainties. The SEC has also released interpretive guidance related to liquidity disclosure in MD&A, which is described below in "Additional SEC Interpretive Guidance—Liquidity and Capital Resource Disclosure."

Staff comments related to liquidity also address the disclosure of financial covenants related to debt instruments. Issuers have been asked to disclose the specific terms of material financial covenants in both the footnotes to financial statements and MD&A. Typically, this disclosure must include any required ratios, as well as actual ratios as of the end of the period. As described below, the SEC has also issued interpretive guidance that provides that when management believes a financial covenant is material to the issuer's financial condition and/or liquidity, the financial covenant should be disclosed even if it relies on a non-GAAP measure. The disclosure around the non-GAAP measure should address the material terms of the credit agreement, the amount or limit required for compliance with the covenant, and the actual or reasonably likely effects of compliance or non-compliance with the covenant on the issuer's financial condition and liquidity. Issuers must also provide a reconciliation to GAAP.

Loss Contingency Disclosures

The standard for loss contingency accounting and disclosure is Accounting Standards Codification 450-20 (referred to as "ASC 450-20," formerly known as Statement of Financial Accounting Standards No. 5). At the end of 2010, the Staff of the Division of Corporation Finance announced an increased focus on disclosures made in financial statements, financial statement footnotes and in related disclosures when the Staff reviews Form 10-Ks in its regular review process.

Under ASC 450-20, each loss contingency must be classified as either a "probable" loss contingency, a "reasonably possible" loss contingency, or a "remote" loss contingency. Then, each loss contingency must be classified as either "reasonably estimable" or "not reasonably estimable." For probable loss contingencies, if the loss can be reasonably estimated, an issuer must record an accrual in the financial statements, disclose the nature of the accrued loss contingency in a footnote to the financial statements, and, if necessary for the financial statements to not be misleading, disclose the amount of the accrued loss contingency in a footnote to the financial statements. For reasonably possible loss contingencies (where it is determined that the contingency is less than probable but more than remote), no accrual is recorded in the financial statements, however, the issuer must disclose the nature of the loss contingency in a footnote to the financial statements. In addition, an issuer must disclose the reasonable estimate of the possible loss in a footnote to the financial statements or, if that amount is not reasonably estimable, the issuer must include a statement in a footnote to the financial statements that such an estimate cannot be made.

Although not required by ASC 450-20, through the comment process the Staff has sought further disclosure with regard to why a contingency is not reasonably estimable. With regard to remote loss contingencies (where there is only a slight chance that the contingency will occur), no accrual is recorded in the financial statements, and no disclosure regarding the loss contingency is required in a footnote to the financial statements. No accrual or disclosure is required for loss contingencies that are immaterial to the issuer's financial statements, and when disclosure is required, reasonable aggregation has been permitted.

The Staff has focused on often generic risk factor disclosure regarding the potential material adverse effects of pending or future litigation, as well as legal proceedings disclosure which states that the issuer has no pending material litigation and no disclosure regarding contingencies in their financial statements or the footnotes to those financial statements. In these circumstances, the Staff has requested an explanation as to how these disclosures are consistent. Moreover, the Staff has raised comments where issuers do not use the specific language of ASC 450-20, and as a result, issuers should specifically include disclosures regarding "contingencies," rather than "liabilities" or "results," and issuers should indicate that management believes that any contingencies would not have a material effect on "the issuer's financial statements," rather than "the issuer's results of operations" or "the issuer's financial condition."

The Staff's comments have also focused on announcements of significant settlements of litigation or regulatory actions and the Staff will review loss contingency disclosures in the periods prior to those settlements. The Staff will under these circumstances review the disclosures of the issuer, as well as any disclosures made by the co-parties or counter-parties to the litigation. The Staff also regularly seeks background information regarding the basis for "not reasonably estimable" determinations.

Disclosure Controls and Procedures

The Staff has continued to issue comments requiring issuers to include the entire definition of disclosure controls and procedures in their filings, as the definition is set forth in Exchange Act Rule 13a-15(e). Rule 13a-15(e) defines the term disclosure controls and procedures, then goes on to add "disclosure controls and procedures include, without limitation, controls and procedures designed to ensure that information required to be disclosed by an issuer in the reports that it files or submits under the Act is accumulated and communicated to the issuer's management, including its principal executive and principal financial officers, or persons performing similar functions, as appropriate to allow timely decisions regarding required disclosure." Issuers including part, but not all, of the above language will be asked to expand their disclosure to include it in its entirety. However, issuers may also limit their disclosure to state simply that their disclosure controls and procedures are effective (or not effective). Issuers using the shortened term "disclosure controls" are asked to refer to "disclosure controls and procedures." In addition, the Staff continues to focus on whether references to "reasonable assurance" are included in the disclosure controls and procedures section, and, if so, whether the issuer has indicated that the principal executive officer and principal financial officer have concluded that disclosure controls and procedures were effective at that reasonable assurance level.

Risk Factors

Recent Staff comments on risk factor disclosure in periodic reports have focused on the following areas: reliance on customers, suppliers, governments and key employees; the market for an issuer's products and services; the impact of regulatory changes; cybersecurity risks; hypothetical risk factor disclosure; ineffective disclosure and internal controls; legal exposures and reliance on legal positions; conflicts of interest and related party transactions; a history of operating losses; and going concern issues. Issuers should review their risk factors to ensure that they provide adequate disclosure of these issues, to the extent they are applicable. In addition, issuers should ensure that they updated their forward-looking statements disclaimer in conjunction with changes to their risk factors.

When reviewing filings under its selective review program, the Staff has often asked that companies break out cybersecurity risks into a separate risk factor, rather than including the risk in a broader risk factor that addresses a variety of other concerns that the company faces. A frequent area of Staff comment on cybersecurity risk factor disclosure has been to ask that the company address any actual or attempted attacks or breaches in order to put the risk factor disclosure in context, even if those breaches or attacks did not have a material adverse impact on the company's business. Some of the other areas that the cybersecurity risk factor should address include:

- The risk that a cybersecurity breach might go undetected for long periods of time and that upon detection the company may not immediately recognize the full impact of the breach;
- Particular risks that may be raised by third-party access to a company's information technology systems, including the ways in which access by vendors, joint venture partners, outsourcing parties or others might expose the company to an attack or a breach; and
- Whether the company has insurance coverage for cyber incidents and the extent to which costs of an attack or breach could exceed that insurance coverage.

Companies are increasingly presenting data privacy considerations in a separate risk factor, even though cybersecurity incidents often involve a breach of a company's data privacy protections. The GDPR, which extended the scope of EU data protection laws to companies processing data of EU residents, as well as the California Consumer Privacy Act and other data privacy laws adopted in other jurisdictions around the world, have created new risks and uncertainties for companies that obtain, store, and process data of employees, customers, suppliers, contractors, etc. Companies have also faced an increasingly active enforcement environment, as regulatory authorities increase investigations and actions related to data security incidents and privacy violations. In light of these developments, companies are increasingly addressing specific data privacy risks in their risk factor disclosure.

The SEC and the Staff have expressed concern with risk factor disclosure that is hypothetical and therefore does not put the risk described in appropriate context. In the SEC's 2018 interpretive release on cybersecurity, the SEC states that, "[i]n meeting their disclosure obligations, companies may need to disclose previous or ongoing cybersecurity incidents or other past events in order to place discussions of these risks in the appropriate context." The SEC indicates that a company may need to discuss the occurrence of that cybersecurity incident and its consequences as part of the company's broader discussion of the types of cybersecurity incidents that could occur and impact the company's business and operations. The Staff has raised comments on risk factor disclosure expressing the concern that the risk is only presented in a hypothetical context when the company has in fact experienced the matters discussed in the risk.

The SEC addressed the concerns with hypothetical risk factors in two recent enforcement actions. In one action, the SEC alleged that a company's risk factor disclosures misleadingly suggested that the company faced merely the hypothetical risk of the misuse of user data, which created the false impression that the company had not in fact suffered a significant episode of misuse of user data by a developer. In another action, the SEC alleged that the company's risk factor disclosure was misleading because the disclosure identified risks as merely potential risks, when in fact events had occurred which made the risks a reality. In the enforcement actions, the SEC highlighted the need for disclosure controls and procedures that can identify situations where a risk that is described as hypothetical has actually occurred, so that the disclosure can be revised to properly reflect the risk in context.

Restatements

Some filing reviews have focused on issues arising in connection with little "r" restatements, which generally occur in situations where an immaterial error that is not corrected over multiple periods eventually grows large enough to become material and thus must be corrected. The Staff appears to be concerned in some cases with whether a little "r" restatement should in fact have been a big "R" restatement, based on the issuer's assessment of materiality. Further, the Staff is concerned that issuers should address the extent to which the prior errors impact the conclusions that the issuer has made with regard to internal control over financial reporting and disclosure controls and procedures, and whether any material changes in internal control over financial reporting must be disclosed.

The Staff's typical comment regarding a little "r" restatement will point out the guidance in both SAB 108 and SAB 99. Among other guidance, SAB 99 points issuers to both the quantitative and qualitative considerations that must go into evaluating materiality. Among the qualitative factors that issuers will consider in connection with little "r" restatements are: (1) the errors were capable of precise measurement and resulted from the misapplication of accounting policy; (2) the misstatements did not result from an attempt to mask a change in earnings or other trends, nor to hide a failure to meet analysts' consensus expectations; (3) there was no change in loss to income in any period (or vice-a-versa); (4) the errors do not relate to a particular segment or other important aspect of the business; (5) there is no impact on compliance with any regulatory requirements as a result of the errors; (6) there is no impact to debt covenants or any other contractual requirements as a result of the errors; (7) there is no impact on management's compensation; and (8) the errors do not result from an attempt to conceal an unlawful transaction.

The Staff appears to be concerned that, while the errors prompting a little "r" restatement do not lead to non-reliance on previously issued financial statements, the fact of a little "r" restatement nonetheless means that errors did occur in the prior periods, and the existence of such errors may have an impact on the conclusions as to the effectiveness of the issuer's disclosure controls and procedures and internal control over financial reporting. This concern arises because, from an evaluation of internal controls perspective, an issuer must demonstrate that the internal control deficiencies related to the errors did not result in a reasonable possibility that a material misstatement would not be prevented, or detected and corrected on a timely basis. In the event that the Staff cannot be convinced that the errors did not affect the conclusions as to effectiveness of disclosure controls and procedures and internal control over financial reporting, the issuer may find itself in the situation of having to go back and revisit those conclusions in amended filings.

In evaluating whether the past deficiencies should be considered a significant deficiency or a material weakness, the issuer must consider the following indicators: (1) there were no indications of fraud on the part of senior management; (2) the deficiencies did not result in a restatement of previously issued financial statements to reflect the correction of a material misstatement due to error or fraud; (3) the deficiencies were not identified by the auditor under circumstances that indicate the misstatement would not otherwise have been detected by the entity's internal control; and (4) the deficiencies were not the result of ineffective oversight of the issuer's financial reporting and internal control by those charged with governance.

Issuers who receive a comment from the Staff will point to compensating controls which prevented the deficiency causing the error from becoming a material weakness (*e.g.*, monthly reconciliations and income statement and balance sheet reviews). Further, issuers sometimes point out the extent to which control issues that may have led to the errors were later corrected before the controls were evaluated for effectiveness, in which case the Staff may ask whether such changes to internal control over financial reporting were material and were required to be disclosed. In this regard, issuers often note that while changes to internal controls have occurred as a result of identifying the errors, no disclosure of such changes is required because the changes in internal control over financial reporting did not materially affect, and are not reasonably likely to materially affect, the issuer's internal control over financial reporting.

Segment Disclosure

The Staff has indicated that it is not using the chief operating decision maker ("CODM") reports as a litmus test for segment reporting. The Staff looks at the issue of segment reporting more holistically in accordance with the accounting standards. Without as much emphasis on the CODM reports, the Staff typically seeks a more detailed analysis from the issuer as to how all of the factors in ASC 280 have been considered in determining the issuer's operating segments, and whether the issuer's operating segments are appropriately aggregated (focusing on the standard of having similar economic characteristics and how the issuer has analyzed the five areas specified in ASC 280). In many instances, the Staff's comments have been focused on how the issuer is considering its segment presentation in light of changes to the business over time.

Additional SEC Interpretive Guidance

The SEC and its Staff have also provided interpretive guidance outside of the comment process in several areas relevant to preparing Form 10-Ks and proxy statements.

Crypto Assets

On December 8, 2022, the Division of Corporation issued a sample letter to companies with disclosure obligations under the federal securities laws asking them to evaluate how the distress among crypto asset market participants may impact such companies' disclosures.

The Staff indicates that companies should evaluate their disclosures given recent market events so that the disclosures can provide investors with specific, tailored disclosure explaining how such events and conditions may, directly or indirectly, impact the company's business and the potential impact to investors. In meeting their disclosure obligations, companies should consider the need to address: (i) disclosure of an issuer's exposure to counterparties and other market participants; (ii) whether an issuer has experienced excessive redemptions or withdrawals, or has suspended redemptions or withdrawals, of crypto assets and the potential effects on your financial condition and liquidity; (ii) risks related to a company's liquidity and ability to obtain financing; and (iii) risks related to legal proceedings, investigations or regulatory impacts in the crypto asset markets. The comments included in the Sample Letter request more disclosure concerning:

- Risks to the business from possibility of regulatory developments related to crypto assets and crypto asset markets;
- Risks resulting from assertion of jurisdiction by U.S. and foreign regulators and other government entities over crypto assets and crypto asset markets;
- Risks a company faces from unauthorized or impermissible customer access to its products and services;
- Risks related to legal proceedings, investigations or regulatory impacts in the crypto asset markets;
- Risks related to reputational harm from involvement in crypto markets;
- Measures taken to restrict access of U.S. persons to an issuer's products and services and any related risks;

- An issuer’s exposure to counterparties and other market participants that have experienced financial distress or compliance failures;
- Protective measures taken to safeguard customers’ crypto assets and controls in place to prevent self-dealing or conflicts of interest;
- Whether, to the extent material, the issuer’s crypto assets serve as collateral for any other person’s or entity’s loan, margin, rehypothecation or similar activity and whether the current crypto asset market disruption has impacted the value of the underlying collateral, raising the issuer’s liquidity risk;

The Staff notes that the sample comments do not address an exhaustive list of the issues that issuers should consider. The Staff urges issuers to take these sample comments into consideration as they prepare disclosure documents that may not typically be subject to review by the Division of Corporation Finance before their use, such as automatically effective registration statements and prospectus supplements for takedowns from existing shelf registration statements. The Staff encourages issuers to contact the industry office responsible for the issuer’s filings with any questions regarding the company’s proposed disclosure.

Russia’s Invasion of Ukraine

In May 2022, the Division of Corporation Finance published a sample comment letter regarding the impact of Russia’s invasion of Ukraine. The Division identifies several topics for which issuers should provide detailed disclosure, to the extent material or otherwise required: (i) direct or indirect exposure to Russia, Belarus, or Ukraine through their operations, employee base, investments in Russia, Belarus or Ukraine, securities traded in Russia, sanctions against Russian or Belarusian individuals or entities, or legal or regulatory uncertainty associated with operating in or exiting Russia or Belarus; (ii) direct or indirect reliance on goods or services sourced in Russia or Ukraine or, in some cases, in countries supportive of Russia; (iii) actual or potential disruptions in the company’s supply chain; or (iv) business relationships, connections to, or assets in, Russia, Belarus or Ukraine.

The Division notes that financial statements of issuers may also need to reflect and disclose the impairment of assets, changes in inventory valuation, deferred tax asset valuation allowance, disposal or exiting of a business, de-consolidation, changes in exchange rates and changes in contracts with customers or the ability to collect contract considerations.

The Division notes that since Russia’s invasion of Ukraine, many issuers have experienced heightened cybersecurity risks, increased or ongoing supply chain challenges and volatility related to the trading prices of commodities, regardless of whether they have operations in Russia, Belarus or Ukraine that may warrant disclosure in SEC filings. The Division also notes that issuers should consider how these matters affect management's evaluation of disclosure controls and procedures, management's assessment of the effectiveness of internal control over financial reporting and the role of the board of directors in risk oversight of any action or inaction related to Russia's invasion of Ukraine, including consideration of whether to continue or to halt operations or investments in Russia and/or Belarus.

Climate Change

On September 22, 2021, the Division of Corporation Finance published a sample letter to companies providing illustrative comments that the Staff may issue to issuers regarding their climate-related disclosure, or the absence of climate-related disclosure.

In February 2021, the SEC's then-Acting Chair Allison Herren Lee directed the Division of Corporation Finance to enhance its focus on climate-related disclosure in public company filings. As part of its enhanced focus in this area, the Staff has been reviewing the extent to which issuers address the topics identified in the SEC's 2010 guidance on climate change disclosure, assessing compliance with disclosure obligations under the federal securities laws, engaging with public companies on these issues, and learning how the market is currently managing climate-related risks. The February 2021 announcement by the then-Acting Chair noted that the Staff will use insights from this work to update the 2010 Guidance.

In the 2010 Guidance, the SEC identified Regulation S-K Item 101 (Description of Business), Item 103 (Legal Proceedings), Item 105 (Risk Factors), and Item 303 (Management's Discussion and Analysis of Financial Condition and Results of Operations) as items that may potentially require climate change disclosures. The SEC also noted in the guidance that, in addition to the various Regulation S-K line-item requirements, companies "must also consider any financial statement implications of climate change issues in accordance with applicable accounting standards," including ASC 450 under U.S. GAAP.

In the sample letter, the Staff notes that companies also must disclose, in addition to the information expressly required by Commission regulation, "such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading." The sample letter indicates that the sample comments do not constitute an exhaustive list of the issues that companies should consider, and "[a]ny comments issued would be appropriately tailored to the specific company and industry and would take into consideration the disclosure that a company has provided in Commission filings."

Use of Non-GAAP Measures

In May 2016, the Staff published guidance regarding the rules and regulations governing the use of non-GAAP financial measures. This guidance was issued amid increased focus on the use of non-GAAP financial measures by the SEC, as noted in speeches by the SEC Staff and former SEC Chair White, and as evidenced by comment letters from the Staff of the SEC's Division of Corporation Finance. The Staff's new guidance addressed a number of practices which the Staff believes can make non-GAAP financial measure disclosures potentially misleading: the lack of equal or greater prominence with respect to GAAP measures; the exclusion of normal, recurring cash operating expenses; individually tailored non-GAAP revenue measures; a lack of consistency; "cherry-picking;" and the presentation of liquidity measures on a per share basis. The Staff indicated that it expected issuers to "self-correct" practices in quarterly earnings releases and SEC filings made after the guidance was issued. In speeches on the topic, the Staff and former SEC Chair White have emphasized the need for appropriate controls with respect to non-GAAP financial measures, as well as the need for audit committee involvement in the oversight of an issuer's use of non-GAAP financial measures.

After issuing the May 2016 guidance, the Staff of the Division of Corporation Finance launched a targeted review program designed to monitor compliance with the new guidance. The Staff's review of earnings communications and filings following the release of the guidance was largely completed by the end of 2016. The Staff issued over 100 comment letters through the late summer and fall as part of this effort. In general, the Staff noted that a high number of issuers had made "self-correcting" changes in the quarterly disclosures that were released after the issuance of the May 2016 non-GAAP financial measures guidance.

Comments regarding equal or greater prominence of non-GAAP financial measures as compared to the most directly comparable GAAP financial measures have constituted the largest proportion of Staff's comments to date. The Staff also focused on situations where it believes that issuers are presenting non-GAAP financial measures based on individually-tailored accounting principles, which are deemed to be misleading under Rule 100(b) of Regulation G, and therefore may not be presented in documents filed or furnished with the SEC or provided elsewhere. The Staff has consistently pointed out that its interpretation is meant to more broadly address any situations where measures are derived through the use of individually-tailored accounting principles that differ from what is required under GAAP. Situations that the Staff has identified in the comment process have included the method by which an issuer determined the number of shares for EPS purposes, changes to the method by which inventory is accounted for, the adjustment for straight-line rents in the REIT industry, adjustments involving the accounting for equity compensation, as well as efforts to address volatility within the energy industry. The Staff has said that this area is one that continues to evolve, and it will be considering these issues on a case-by-case basis.

The Staff has expressed concerns with the presentation of certain pro rata financial information, which is provided by many REITs that invest in joint ventures. NAREIT worked with the Staff to establish an approach for reporting relevant information regarding investments in joint ventures without violating non-GAAP restrictions, resolving the issue on an industry-wide basis. The Staff agreed that issuers could present both pro rata information for an issuer's share of unconsolidated ventures as well as the non-controlling interest share of consolidated ventures on a schedule, without providing totals for the amounts presented or a presentation which provides a full non-GAAP income statement. To date, no further guidance on the topic has been published. The Staff has also noted that recurring adjustments to non-GAAP financial measures can potentially be misleading if they occur over multiple periods and relate to normal, recurring cash operating expenses necessary to operate an issuer's business. A particular area of focus in this regard has been recurring adjustments for restructuring charges.

In early September 2016, some issuers began receiving letters from the SEC's Division of Enforcement with the heading "Re: Certain Non-GAAP Financial Measure Disclosure Deficiencies." The letters served as a request for information and documents and are not subpoenas. The letters generally appeared to be focused on compliance with the SEC's "equal or greater prominence" rules in earnings releases and SEC filings. The letters typically sought an extensive range of documents related to earnings releases and SEC filings over several years, and request that issuers identify any instances of non-compliance with applicable SEC rules regarding the presentation of non-GAAP financial measures, as well as any mitigating circumstances that the Staff should consider. It was likely that these letters are part of a coordinated sweep effort conducted by the Division of Enforcement's Financial Reporting and Audit ("FRAud") Group. The FRAud Group was established in July 2013 and is tasked with identifying securities law violations in the preparation of financial statements and the disclosure of financial information, as well as exploring areas susceptible to fraudulent financial reporting.

In addition to the SEC's focus on non-GAAP financial measures, at a 2016 meeting of the PCAOB's Investor Advisory Group, the topic of auditing non-GAAP financial measures was discussed in detail. While some audit oversight of "other information" included in an issuer's annual report is contemplated in existing PCAOB auditing standards, the group considered whether any more specific approaches for addressing non-GAAP financial measures may be necessary.

In December 2022, the Staff released new and revised Non-GAAP Financial Measures Compliance and Disclosure Interpretations that are addressed in the following summary.

The SEC's May 2016 guidance (as supplemented by the December 2022 guidance) generally addresses the following areas of the non-GAAP financial measure rules:

The Presentation of GAAP Measures with Equal or Greater Prominence. Item 10(e)(1)(i)(A) of Regulation S-K requires that when an issuer presents a non-GAAP financial measure, it must present the most directly comparable GAAP measure with "equal or greater prominence." While Item 10 of Regulation S-K is generally applicable to filings that are made with the SEC such as periodic reports, Item 10(e)(1)(i)(A) of Regulation S-K is applicable to earnings releases because Instruction 2 to Item 2.02 of Form 8-K states that "the requirements of paragraph (e)(1)(i) of Item 10 of Regulation S-K… shall apply to disclosures under this Item 2.02." In Non-GAAP Financial Measures Compliance and Disclosure Interpretations Question 102.10(a) (revised in December 2022), the Staff notes that whether a non-GAAP financial measure is more prominent than the comparable GAAP financial measure generally depends on the facts and circumstances in which the disclosure is made. Examples of the presentation of non-GAAP financial measures as more prominent than the comparable GAAP measures are:

- Presenting an income statement of non-GAAP financial measures;
- Presenting a non-GAAP financial measure before the most directly comparable GAAP measure or omitting the comparable GAAP measure altogether, including in an earnings release headline or caption that includes a non-GAAP measure;
- Presenting a ratio where a non-GAAP financial measure is the numerator and/or denominator without also presenting the ratio calculated using the most directly comparable GAAP measure(s) with equal or greater prominence;
- Presenting a non-GAAP financial measure using a style of presentation (e.g., bold, larger font, etc.) that emphasizes the non-GAAP financial measure over the comparable GAAP measure;
- Describing a non-GAAP financial measure as, for example, "record performance" or "exceptional" without at least an equally prominent descriptive characterization of the comparable GAAP measure;
- Presenting charts, tables, or graphs of a non-GAAP financial measures without presenting charts, tables, or graphs of the comparable GAAP measures with equal or greater prominence or omitting the comparable GAAP measures altogether; and
- Providing discussion and analysis of a non-GAAP financial measure without a similar discussion and analysis of the comparable GAAP measure in a location with equal or greater prominence.

In Non-GAAP Financial Measures Compliance and Disclosure Interpretations Question 102.10(b) (revised in December 2022), the Staff notes the following examples of disclosure of non-GAAP financial measure reconciliations that give undue prominence to a non-GAAP financial measure:

- Starting the reconciliation with a non-GAAP financial measure;
- Presenting a non-GAAP income statement when reconciling non-GAAP measures to the most directly comparable GAAP measures (as discussed in Non-GAAP Financial Measures Compliance and Disclosure Interpretations Question 102.10(c)); and
- When presenting a forward-looking non-GAAP measure, a company may exclude the quantitative reconciliation if it is relying on the exception provided by Item 10(e)(1)(i)(B) of Regulation S-K. A measure would be considered more prominent than the comparable GAAP measure if it is presented without disclosing reliance upon the exception, identifying the information that is unavailable, and its probable significance in a location of equal or greater prominence.

In Non-GAAP Financial Measures Compliance and Disclosure Interpretations Question 102.10(c) (revised in December 2022), the Staff indicates that a non-GAAP income statement is one that is comprised of non-GAAP financial measures and includes all or most of the line items and subtotals found in a GAAP income statement.

Non-GAAP Adjustments. In Non-GAAP Financial Measures Compliance and Disclosure Interpretation Question 100.01, the Staff notes that certain adjustments may violate Rule 100(b) of Regulation G because they cause the non-GAAP financial measure to be misleading, even though those adjustments are not explicitly prohibited by the non-GAAP rules. The Staff provides the example of presenting a performance measure that excludes normal, recurring, cash operating expenses necessary to operate an issuer's business. This interpretation targets those situations where non-recurring cash operating expenses are being excluded in order to improve the perception of the issuer's operating performance. The Staff notes in Non-GAAP Financial Measures Compliance and Disclosure Interpretations Question 100.01 (as revised in December 2022) that, when evaluating what constitutes a normal operating expense, the Staff considers the nature and effect of the non-GAAP adjustment and how it relates to the company's operations, revenue generating activities, business strategy, industry, and regulatory environment. The Staff would view an operating expense that occurs repeatedly or occasionally, including at irregular intervals, as recurring.

The Staff further notes in Non-GAAP Financial Measures Compliance and Disclosure Interpretation Question 100.02 that a non-GAAP financial measure can be misleading if it is presented inconsistently between periods, such as when an issuer presents a non-GAAP financial measure that adjusts for a particular charge or gain in the current period and for which other, similar charges or gains were not also adjusted in prior periods, unless the change between periods is disclosed and the reasons for it explained. The Staff notes that, depending on the significance of the change, it may be necessary to recast prior non-GAAP financial measures in order to conform to the current presentation and "place the disclosure in the appropriate context."

Labeling Non-GAAP Financial Measures. In Non-GAAP Financial Measures Compliance and Disclosure Interpretations Question 100.05 (added in December 2022), the Staff notes that a non-GAAP financial measure can be misleading if it, and/or any adjustment made to the measure, is not appropriately labeled and clearly described. The Staff notes that non-GAAP financial measures are not always consistent across, or comparable with, non-GAAP financial measures disclosed by other companies. Without an appropriate label and clear description, a non-GAAP financial measure and/or any adjustment made to arrive at that measure could be misleading to investors.

Disclosure Surrounding a Non-GAAP Financial Measure. In Non-GAAP Financial Measures Compliance and Disclosure Interpretations Question 100.06 (added in December 2022), the Staff notes that a non-GAAP measure can be misleading, and therefore violate Rule 100(b) of Regulation G, even if it is accompanied by disclosure about the nature and effect of each adjustment made to the most directly comparable GAAP measure. The Staff believes that a non-GAAP financial measure could mislead investors to such a degree that even extensive, detailed disclosure about the nature and effect of each adjustment would not prevent the non-GAAP measure from being materially misleading.

Performance and Liquidity Non-GAAP Financial Measures. Over the past several years, the Staff has focused on whether information that is presented on a per share basis represents a performance or a liquidity measure. In the 2010 revisions to the Non-GAAP Financial Measures Compliance and Disclosure Interpretations, Question 102.05 clarified that, while the SEC continues to prohibit per share non-GAAP liquidity measures in any documents filed with or furnished to the SEC, the Staff will not object to a per share non-GAAP measure used to present financial performance. In the years since that guidance, the Staff has generally shown deference to how management of the issuer wanted the non-GAAP financial measure to be characterized for these purposes. The restrictions in Item 10(e) of Regulation S-K on adjusting for charges or liabilities that required or will require cash settlement and presenting non-GAAP liquidity measures on a per share basis make the characterization of non-GAAP financial measure as a liquidity measure unattractive. The Staff revised Non-GAAP Financial Measures Compliance and Disclosure Interpretation Question 102.05 to now include the language: "[w]hether per share data is prohibited depends on whether the non-GAAP measure can be used as a liquidity measure, even if management presents it solely as a performance measure. When analyzing these questions, the staff will focus on the substance of the non-GAAP measure and not management's characterization of the measure." With this new approach, the Staff is focused on the adjustments that an issuer is making and the directly comparable GAAP measure selected when assessing whether the non-GAAP financial measure can be presented on a per-share basis. While the Staff continues to consider management's explanation of the measure and how management is using the particular measure in the course of the Staff's analysis, the Staff will likely look beyond that information to determine the correct approach based on the nature of the measure.

In Non-GAAP Financial Measures Compliance and Disclosure Interpretation Question 102.07, the Staff clarifies that free cash flow is a liquidity measure that must not be presented on a per share basis. Further, in Non-GAAP Financial Measures Compliance and Disclosure Interpretation Question 103.02, the Staff notes that the measures EBIT and EBITDA must not be presented on a per share basis. The Staff continues to recognize, however, that EBIT and EBITDA can be used as both performance and liquidity measures, and how management chooses to characterize these measures should guide the GAAP measures used for reconciliation purposes.

Income Tax Effects. New Non-GAAP Financial Measures Compliance and Disclosure Interpretation Question 102.11 clarified the Staff's expectations regarding the calculation and presentation of tax effects on non-GAAP Financial Measures. In the Compliance and Disclosure Interpretation, the Staff notes the example indicating that a non-GAAP liquidity measure which includes income taxes could adjust GAAP taxes to show taxes paid in cash. On the other hand, adjustments to a non-GAAP performance measure should not be presented "net of tax;" rather, income taxes should be shown as a separate adjustment and should be clearly explained. In addition, issuers should include in a non-GAAP performance measure "current and deferred income tax expense commensurate with the non-GAAP measure of profitability."

This guidance clarifies that issuers can use cash taxes for liquidity measures, but should not use cash taxes for performance measures. The Staff is also concerned with situations where issuers present significant non-GAAP earnings that are well in excess of their GAAP earnings, but assume the same tax implications on the non-GAAP earnings as with the GAAP earnings. The Staff often cites its comment letters to Valeant Pharmaceuticals International in explaining how the Staff views the extent to which tax outcomes may need to be considered in presenting non-GAAP financial measures. In the comment letters, the Staff expressed the concern that the non-GAAP financial measures that Valeant used seemed to assume a low tax rate, which gave the impression that Valeant could generate large pre-tax profits without paying any significant amount of taxes.

Funds from Operations. The real estate investment trust ("REIT") industry has utilized Funds from Operations ("FFO") as an accepted and widely-used non-GAAP financial measure, and the SEC accepted that definition when it adopted the non-GAAP financial measure rules. In Non-GAAP Financial Measures Compliance and Disclosure Interpretation Question 102.01, the Staff reiterated that, as of the date of the new and revised Compliance and Disclosure Interpretations, it accepts the NAREIT definition of FFO as a performance measure, and as a result does not object to the presentation of such measure on a per share basis. However, in Non-GAAP Financial Measures Compliance and Disclosure Interpretation Question 102.02, the Staff indicates that, while an issuer can further adjust a measure from the accepted FFO definition, when making any such adjustments, the issuer must abide by all of the other requirements and interpretations that would apply under the non-GAAP financial measures rules, including those provisions with respect to whether or not the measure could be presented on a per-share basis.

Individually Tailored Accounting Principles. Non-GAAP Financial Measures Compliance and Disclosure Interpretation Question 100.04 (as revised in December 2022) notes that a non-GAAP financial measure can violate Rule 100(b) of Regulation G if the recognition and measurement principles used to calculate the measure are inconsistent with GAAP. By definition, a non-GAAP financial measure excludes or includes amounts from the most directly comparable GAAP measure. However, non-GAAP adjustments that have the effect of changing the recognition and measurement principles required to be applied in accordance with GAAP would be considered individually tailored and may cause the presentation of a non-GAAP measure to be misleading. In Non-GAAP Financial Measures Compliance and Disclosure Interpretation 100.04, the Staff provides a list of examples that may be considered misleading due to the use of individually tailored accounting principles:

- Changing the pattern of recognition, such as including an adjustment in a non-GAAP performance measure to accelerate revenue recognized ratably over time in accordance with GAAP as though revenue was earned when customers were billed;
- Presenting a non-GAAP financial measure of revenue that deducts transaction costs as if the company acted as an agent in the transaction, when gross presentation as a principal is required by GAAP, or the inverse, presenting a measure of revenue on a gross basis when net presentation is required by GAAP; and
- Changing the basis of accounting for revenue or expenses in a non-GAAP performance measure from an accrual basis in accordance with GAAP to a cash basis.

In public statements, the Staff has clarified that Compliance and Disclosure Interpretation Question 100.04 is not intended to foreclose the ability of issuers to present operating statistics such as “billings” or “bookings” that simply report the fact of the amount that the company billed customers or clients in a particular period. In the Staff’s view, the disclosure of billing or bookings does not represent the presentation of a non-GAAP financial measure; rather, it is a statement of fact as to the issuer's operations for the relevant period.

Other Non-GAAP Comment Areas. The Staff continues to raise comments on non-GAAP financial measure issues that go beyond the particular concerns addressed in the new and revised Compliance and Disclosure Interpretations. These comments include:

- Reasons for Non-GAAP Measures. Item 10(e)(1)(i)(e) of Regulation S-K requires "a statement disclosing the reasons why the registrant's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant's financial condition and results of operations" and Item 10(e)(1)(i)(D) of Regulation S-K requires "to the extent material, a statement disclosing the additional purposes, if any, for which the registrant's management uses the non-GAAP financial measure that are not disclosed pursuant to paragraph 10(e)(1)(i)(e) of this section." Through the comment process, the Staff has often focused on the adequacy of an issuer's disclosure about the usefulness of non-GAAP financial measures, as well as the ways in which management utilizes the non-GAAP financial measures, and will often request additional details about the usefulness and uses of each particular non-GAAP financial measure. The Staff typically objects to boilerplate statements intended to apply to all of the presented non-GAAP financial measures.
- Non-GAAP Financial Measure Titles. The Staff has historically had a concern when non-GAAP financial measures use titles that may not accurately reflect the amounts reported and, in some cases, may be the same as, or confusingly similar to, either GAAP measures, as well as commonly accepted non-GAAP measures such as free cash flow, EBIT and EBITDA. The Staff will usually request that the issuer revise the titles of the non-GAAP financial measures and address them in a way that is not confusing with the actual GAAP measures or widely-accepted non-GAAP financial measures.
- Reconciliation to Most Directly Comparable GAAP Measure. The Staff often focuses on whether the issuer is reconciling a non-GAAP financial measure to what the Staff believes is the most directly comparable GAAP measure. This comment can come up in the context of considering whether a non-GAAP financial measure is appropriately characterized as a liquidity or performance measure, as discussed above.
- Characterization of Adjustments. The Staff continues to focus on situations where an issuer characterizes adjustments as "non-recurring," "unusual" or "infrequent" when the adjustments do not meet the definitions of non-recurring, unusual or infrequent set forth in Item 10(e)(1)(ii)(B) of Regulation S-K. The Staff notes in Non-GAAP Financial Measures Compliance and Disclosure Interpretation Question 102.03 that the prohibition in Item 10(e) is based on the description of the

charge or gain that is being adjusted, and it is not appropriate to state that a charge or gain is non-recurring, infrequent or unusual unless it meets the criteria specified in the rule. The Compliance and Disclosure Interpretation notes, however, that the fact that an issuer cannot describe a charge or gain as non-recurring, infrequent or unusual does not mean that the issuer cannot adjust for that charge or gain; rather, issuers can make adjustments that they believe are appropriate, subject to Regulation G and the other requirements of Item 10(e) of Regulation S-K.

Key Performance Indicators and Metrics

On January 30, 2020, the SEC issued an interpretive release addressing Item 303 of Regulation S-K. In the interpretive release, the SEC provides guidance on disclosure of key performance indicators and metrics in MD&A. In the interpretive release, the SEC notes that disclosure of key performance indicators and metrics in MD&A is consistent with the requirement in Item 303(a) of Regulation S-K to disclose information not specifically referenced in the item that the company believes is necessary to an understanding of its financial condition, changes in financial condition, and results of operations, as well as the requirement of a discussion and analysis of "other statistical data" that, in the company's judgment, enhances a reader's understanding of MD&A, citing to prior SEC guidance on the topic.

The interpretive release indicates that, when a public company discloses a key performance indicator or metric, it should consider existing MD&A requirements and the need to include such further material information, if any, as may be necessary in order to make the presentation of the metric, in light of the circumstances under which it is presented, not misleading. Further, the SEC notes that companies should consider the extent to which an existing regulatory disclosure framework applies to the key performance indicator or metric, such as GAAP or Regulation G and Item 10(e) of Regulation S-K (the non-GAAP financial measure requirements).

The SEC states that companies should consider what additional information may be necessary to an understanding of the key performance indicator or metric presented, indicating that it would generally expect, based on the facts and circumstances, the following disclosures to accompany the key performance indicator or metric:

- A clear definition of the key performance indicator or metric and how it is calculated;
- A statement indicating the reasons why the key performance indicator or metric provides useful information to investors; and
- A statement indicating how management uses the key performance indicator or metric in managing or monitoring the performance of the business.

The SEC indicates that companies should consider whether there are estimates or assumptions underlying the key performance indicator or metric or its calculation and "whether disclosure of such items is necessary for the metric not to be materially misleading." When a company changes the methodology used to calculate or present a key performance indicator or metric, the SEC indicates that a company must consider the need to disclose, to the extent material:

- The differences in the way the metric is calculated or presented compared to prior periods;
- The reasons for such changes;
- The effects of any such change on the amounts or other information being disclosed and on amounts or other information previously reported; and
- Such other differences in methodology and results that would reasonably be expected to be relevant to an understanding of the company's performance or prospects.

The SEC notes that a company may need to recast prior metrics to conform to the current presentation to place the current disclosure in an appropriate context.

The SEC indicated in its interpretive guidance that companies must maintain effective controls and procedures with regard to the material key performance indicators or other metrics that are publicly disclosed.

Cybersecurity Disclosure

On October 13, 2011, the SEC's Division of Corporation Finance issued disclosure guidance to assist publicly-traded companies "in assessing what, if any, disclosures should be provided about cybersecurity matters in light of each registrant's specific facts and circumstances." CF Disclosure Guidance Topic No. 2 reviews the applicability of existing SEC disclosure requirements to today's cybersecurity concerns, noting that: (i) businesses increasingly focus or rely on internet communications and remote data storage; (ii) risks and potential costs associated with cyber attacks and inadequate cyber security are increasing; and (iii) as with other operational and financial risks and events, companies should on an ongoing basis review the adequacy of disclosure relating to cybersecurity risks and other cyber incidents. The Staff further notes that the guidance is meant to be consistent with disclosure considerations for any business risk, and that any disclosure should not compromise cybersecurity efforts. The Staff highlights a number of critical considerations, including: (i) potential costs and other negative consequences, such as increased protection costs (e.g., additional personnel, training, third party consultants), remediation costs, liability for stolen assets or information, the repair of damaged systems and incentives for customers to maintain business relationship after cyber attack; (ii) lost revenues arising from the unauthorized use of proprietary information, and the failure to retain or attract customers; (iii) litigation; and (iv) reputational damage.

Specifically with respect to risk factors disclosures, the Staff notes that issuers should consider the probability that cyber incidents will occur in the future, and the potential costs and other consequences that could result. In this regard, issuers must evaluate prior cyber incidents, including the severity and frequency of such incidents, as well as the probability of cyber attacks occurring. To the extent material, risk factor disclosure of potential cyber incidents may be necessary and may include aspects of a company's operations that give rise to or mitigate these cyber risks. The Staff indicates that issuers should not disclose "boilerplate" risks that generally apply to all public companies, and should not disclose any information in a risk factor that would increase a company's cybersecurity risks.

With regard to disclosures in MD&A, the Staff indicates that issuers should address cybersecurity risks or incidents if the costs or other impact of a known cyber risk or incident represents a material event, trend or uncertainty that is reasonably likely to have a material effect on the company's results of operations, financial condition or liquidity. MD&A disclosure may be required even if a past cyber incident did not have a material effect on the company's financial condition if the incident caused the company to materially increase its cybersecurity expenditures.

As for business disclosures, the Staff indicates that issuers should evaluate the impact of cyber incidents or cybersecurity risks on each reportable business segment, and if a cyber incident or cybersecurity risk materially impacts a company's (or business segment's) relationships with customers or suppliers, or materially impacts the competitive landscape, a company should summarize the cyber risk or incident and its impact in the description of that company's business. In the context of legal proceedings disclosure, issuers should discuss any material pending legal proceeding related to a cyber incident to which a company is a party.

The Staff notes that with regard to disclosure controls and procedures, issuers should evaluate the extent to which cyber incidents pose a risk to the company's ability to record, process, summarize and report information that is required to be disclosed in SEC filings. If it is reasonably possible that information would not be properly recorded, processed, summarized or reported due to a cyber incident, issuers must evaluate how cybersecurity risks impact the company's disclosure controls and procedures, whether these controls and procedures are effective and whether any remedial measures are required.

With respect to an issuer's financial statement disclosures, issuers should consider accounting principles that may be important when summarizing the impact of a cyber incident on the company's financial statements, including: (i) costs incurred to prevent cyber incidents; (ii) costs incurred to mitigate damages from a cyber incident; (iii) loss contingencies related to cyber incidents; (iv) impairment of certain assets; and (v) subsequent event disclosures.

Cybersecurity continues to be an area of interest for members of Congress, and they continue to look for opportunities to mandate disclosure or escalate the SEC Staff guidance to Commission guidance. In May 2013, Senator Rockefeller (Chairman of the Committee on Commerce, Science and Transportation) and then SEC Chair White exchanged letters on the topic of cybersecurity disclosure, and Chair White indicated that this issue continues to be a disclosure priority for the Division of Corporation Finance. She further indicated that, at that time, the Staff had issued about fifty comment letters to issuers asking about their cybersecurity disclosure.

In October 2014, the U.S. Chamber of Commerce sent a letter to then SEC Chair White requesting that the SEC not adopt regulations that would mandate specific disclosures about cybersecurity. The Chamber was reacting to calls by those in Congress who have encouraged the SEC to beef up its rules about cybersecurity disclosure.

The Staff's comments on cybersecurity risk factor disclosure address a number of areas:

- Disclosure of Cybersecurity Risks. When the Staff has found no disclosure about cybersecurity risks, the Staff has issued a comment asking whether the issuer has considered the guidance in CF Disclosure Guidance Topic No. 2. In drafting this risk factor disclosure, issuers should address the risk that cyber incidents may go undetected for a long period of time. Issuers also typically address any preventative measures that have been established for the purpose of addressing cyber risks, and the risk that such measures may not be effective to avoid an incident. Moreover, risk factor disclosure should address the particular risks that may arise as a result of third-party access to an issuer's information technology systems. Risk factor disclosure about cybersecurity also addresses when an issuer has insurance coverage for cyber incidents, and the extent to which costs of a cyber attack could exceed that insurance coverage. The risk factor disclosure will also typically highlight the potential consequences of a cyber attack, which could include things like reputational harm, costs to remediate the impact of the attack, and costs for implementing protective measures.
- Unbundling the Cybersecurity Risk. The Staff has often asked that an issuer break out cybersecurity risks into a separate risk factor, rather than including the risk in one risk factor that addresses a variety of other concerns that the issuer faces.
- Context for the Risk Factor. A frequent Staff comment has been to ask that an issuer address in the risk factor any security breaches, cyber attacks or other cyber incidents that have been experienced in the past, even if those were not major breaches or did not have a material adverse impact on the issuer's business. In the Staff's view, this disclosure is important to an understanding of the extent to which an issuer faces threats.

- Post-Breach Disclosure. In general, as outlined in CF Disclosure Guidance Topic No. 2, the Staff is looking for disclosures about the costs and consequences of the incident, including: (i) the scope and magnitude of the breach; (ii) whether the incident was material; (iii) any known or potential remediation or other costs; and (iv) preventative measures to address the risk of future incidents.

Issuers should also consider the extent to which investors will be looking for the cybersecurity topic to be addressed in the proxy statement. Proxy advisor recommendations against directors of issuers who experienced cyber attacks have focused attention on cybersecurity as a governance issue, as investors consider what role the board should play in overseeing an issuer's cybersecurity program. Issuers are increasingly disclosing in their proxy statements the extent to which the board and its committees oversee cybersecurity risks, particularly in the context of those issuers who have experienced a significant cyber incident.

On February 20, 2018, the SEC issued guidance which noted that public companies should take all required actions "to inform investors about material cybersecurity risks and incidents in a timely fashion, including those companies that are subject to material cybersecurity risks but may not yet have been the target of a cyber-attack." The SEC noted the importance of disclosure controls and procedures "that provide an appropriate method of discerning the impact that such matters may have on the issuer and its business, financial condition, and results of operations, as well as a protocol to determine the potential materiality of such risks and incidents." Additionally, the release noted that "directors, officers, and other corporate insiders must not trade a public company's securities while in possession of material nonpublic information, which may include knowledge regarding a significant cybersecurity incident experienced by the company." The SEC indicated that issuers should have policies and procedures in place to: (i) guard against directors, officers, and other corporate insiders taking advantage of the period between the issuer's discovery of a cybersecurity incident and public disclosure of the incident to trade on material nonpublic information about the incident; and (ii) help ensure that the issuer makes timely disclosure of any related material nonpublic information.

Guidance for SPACs

On December 22, 2020, the Division of Corporation Finance published *CF Disclosure Guidance: Topic No. 11, Special Purpose Acquisition Companies*. This guidance provides the Division of Corporation Finance's views about certain disclosure considerations for special purpose acquisition companies, commonly referred to as SPACs, in connection with their initial public offerings and subsequent business combination transactions.

The Staff notes that a SPAC is a company with no operations that offers securities for cash and places substantially all the offering proceeds into a trust or escrow account for future use in the acquisition of one or more private operating companies. Following its initial public offering the SPAC will identify acquisition candidates and attempt to complete one or more business combination transactions after which the company will continue the operations of the acquired company or companies as a public company.

The Staff indicates that the economic interests of the entity or management team that forms the SPAC and the directors, officers and affiliates of a SPAC often differ from the economic interests of public shareholders which may lead to conflicts of interests as they evaluate and decide whether to recommend business combination transactions to shareholders. The Staff indicates that “clear disclosure regarding these potential conflicts of interest and the nature of the sponsors’, directors’, officers’ and affiliates’ economic interests in the SPAC is particularly important because these parties are generally responsible for negotiating the SPAC’s business combination transaction.” The Staff indicates that, “unlike the traditional IPO process where a private operating company sells its securities in a manner in which the company and its offered securities are valued through market-based price discovery, these individuals are solely responsible for deciding how to value the private operating company and how much the SPAC will pay for it.”

The Staff indicates that a SPAC preparing to conduct an IPO or present a business combination transaction to shareholders “should consider carefully its disclosure obligations under the federal securities laws as they relate to conflicts of interest, potentially differing economic interests of the SPAC sponsors, directors, officers and affiliates and the interests of other shareholders and other compensation-related matters.” In this regard, the Staff sets forth a series of questions relevant to disclosure considerations at the initial public offering phase and when a SPAC engages in a subsequent business combination transaction.

On March 31, 2021, the Division of Corporation Finance issued a statement addressing certain accounting, financial reporting and governance issues that should be carefully considered before a private operating company undertakes a business combination with a SPAC. The statement noted that, as shell companies, SPACs are subject to certain limitations that should be considered by the SPAC and the private companies engaging in business combinations with SPACs before undertaking in such a transaction. These include:

- Financial statements for the acquired business must be filed within four business days of the completion of the business combination pursuant to Item 9.01(c) of Form 8-K. The registrant is not entitled to the 71-day extension of that Item;

- The combined company will not be eligible to incorporate Exchange Act reports, or proxy or information statements filed pursuant to Section 14 of the Exchange Act, by reference on Form S-1 until three years after the completion of the business combination;
- The combined company will not be eligible to use Form S-8 for the registration of compensatory securities offerings until at least 60 calendar days after the combined company has filed current Form 10 information; and
- The combined company will be an "ineligible issuer" under Securities Act Rule 405 for three years following the completion of the business combination, which has consequences during that period that include that the combined company:
  - cannot qualify as a well-known seasoned issuer;
  - may not use a free writing prospectus;
  - may not use a term sheet free writing prospectus available to other ineligible issuers;
  - may not conduct a roadshow that constitutes a free writing prospectus, including an electronic roadshow; and
  - may not rely on the safe harbor of Rule 163A from Securities Act Section 5(c) for pre-filing communications.

The statement also notes that companies with Exchange Act reporting obligations are subject to two important requirements:

- The "books and records" provision requires companies to maintain books, records, and accounts in reasonable detail that accurately and fairly reflect the company's transactions and dispositions of its assets.
- The "internal controls" provision, requires that companies must devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances about management's control, authority, and responsibility over the company's assets.

The statement further notes that management has responsibility to establish and maintain adequate internal control over financial reporting and disclosure controls and procedures. Management is also required, except for its first annual report, to evaluate the effectiveness of the company's internal control over financial reporting at the end of its fiscal year and disclose such assessment in the annual report. Management must evaluate and disclose the effectiveness of disclosure controls and procedures more frequently, quarterly for domestic issuers.

The Staff notes that these books and records and internal control requirements apply to SPACs before the business combination. These requirements generally also apply to the combined company after the business combination. The Staff indicates that it is important for a SPAC and the private operating company to consider these requirements when planning for a business combination because the private operating company may not have prior experience, among other things, with the following:

- Annual or interim reporting;
- Application of SEC rules and disclosure requirements, including reporting deadlines, filer status and its impact on disclosure, predecessor determination, the form and content of financial statements, and when other entity financial statements and pro forma financial information are required by Regulation S-X; and
- Adoption of new accounting standards in the financial statements required in the business combination filing or the subsequent Form 8-K that are not yet effective for private companies.

The Staff notes that, upon consummation of the business combination, the combined company will need the necessary expertise, books and records, and internal controls to provide reasonable assurance of its timely and reliable financial reporting. The Staff indicates that "[a] private operating company may have viewed the necessity for those capacities differently prior to the business combination, and may not be able to develop those capacities without advance planning and investment in resources."

The statements notes that if the SPAC is listed on a national securities exchange, such as the New York Stock Exchange LLC or The NASDAQ Stock Market LLC, in order to remain listed after the merger, the combined company must satisfy quantitative and qualitative initial listing standards upon consummation of the business combination, which include certain corporate governance requirements. The Staff notes that a private company merging with a SPAC should consider how it will maintain a listing throughout and after the merger. Any material risks associated with delisting, such as the likelihood of the commencement of delisting proceedings by an exchange or the failure to maintain a listing, could trigger disclosure requirements for the combined company.

The Staff notes that if the combined company fails to satisfy a listing standard or receives a notice regarding non-compliance from the national securities exchange, it will need to consider certain disclosure requirements. The combined company must file an Item 3.01 Form 8-K to report, among other things, receipt of the notice and any action or response that it has determined to take in response to the notice. The Staff indicates that non-compliance with a listing standard may also present a material risk requiring disclosure under Item 105 of Regulation S-K.

Guidance on Intellectual Property and Technology Risks

On December 19, 2019, the Division of Corporation Finance issued *CF Disclosure Guidance: Topic No. 8, Intellectual Property and Technology Risks Associated with International Business Operations*, providing the Staff's views about disclosure obligations with respect to technology, data, and intellectual property risks that could arise when operations take place outside the U.S.

The guidance notes that, for those companies that conduct business operations outside the U.S., risks can arise with regard to technology and intellectual property, particularly when operations take place in jurisdictions that do not provide protection that is comparable to the U.S. In this regard, the Staff observes that companies may be exposed to material risks of "theft of proprietary technology and other intellectual property, including technical data, business processes, data sets or other sensitive information." The Staff also states that, while there is no specific line-item requirement under the federal securities laws to disclose "information related to the compromise (or potential compromise) of technology, data or intellectual property," the SEC's disclosure requirements apply to a broad range of evolving business risks and disclosure about such matters may be necessary in risk factors, management's discussion and analysis, the business description, legal proceedings, disclosure controls and procedures, and/or financial statements.

The Staff notes that companies face the risk of theft of technology, data and intellectual property, which could occur through a direct intrusion by private parties or foreign actors (including those affiliated with or controlled by state actors). In addition, the Staff provides examples of situations where a company may be required to "compromise protections or yield rights to technology, data or intellectual property in order to conduct business or access markets in a foreign jurisdiction, either through formal written agreements or due to legal or administrative requirements in the host nation."

The Staff encourages companies "to assess the risks related to the potential theft or compromise of their technology, data or intellectual property in connection with their international operations, as well as how the realization of these risks may impact their business, including their financial condition and results of operations, and any effects on their reputation, stock price and long-term value." When these risks are material to investment and voting decisions, the Staff believes that the risks should be disclosed in a manner that allows investors to evaluate these risks "through the eyes of management." The Staff states in the guidance that disclosure about these risks should be specifically tailored to a company's unique facts and circumstances and that "hypothetical disclosure of potential risks is not sufficient to satisfy [a company's] reporting obligations."

The Staff suggests a list of questions that companies should consider when assessing and disclosing risks. Those questions relate to:

- Heightened risks to technology or intellectual property because the company maintains significant assets or earns a material amount of revenue abroad;
- Operations in an industry or foreign jurisdiction that has caused, or may cause, the company to be particularly susceptible to the theft of technology or intellectual property or the forced transfer of technology;
- Products that have been, or may be, subject to counterfeit and sale, including through e-commerce;
- Transfers or licenses of technology or intellectual property to a foreign entity or government;
- Storage of technology or intellectual property locally in a foreign jurisdiction;
- Required use of equipment or services provided by a state actor;
- Entrance into patents or technology license agreements with a foreign entity or government;
- Requirements that foreign parties must be controlling shareholders, hold a majority of shares in a joint venture in which the company is involved, or involvement in a joint venture that is subject to foreign ownership restrictions or requirements;
- State actor or regulator access to company technology or intellectual property;
- Requirements to yield rights to technology or intellectual property as a condition to conducting business in or accessing markets located in foreign jurisdictions;
- Operations in foreign jurisdictions where the ability to enforce rights over intellectual property is limited as a statutory or practical matter;
- Conducting business in a foreign jurisdiction or through a joint venture that may be subject to state secrecy or other laws;
- The ability to readily produce data or other information that is housed internationally in response to regulatory requirements or inquiries;
- Conditions in foreign jurisdiction that may cause the company to relocate or consider relocating operations (including material cost related to such a relocation, such as costs to train new employees, establish new facilities and supply chains, and of any related effects on production, manufacture, and/or export of products);
- Controls and procedures to adequately protect technology and intellectual property from potential compromise or theft; and

- The level of risk oversight and management of the board of directors and executive officers with regard to the company's data, technology, and intellectual property and how those assets may be impacted by operations in foreign jurisdictions.

Staff Statement on LIBOR Transition

On July 12, 2019, the Division of Corporation Finance issued a joint statement regarding LIBOR risks with the Division of Investment Management, the Division of Trading & Markets and the Office of the Chief Accountant to indicate that issuers should identify their exposure under contracts that extend past 2021 and consider whether future contracts should use an alternative rate. The Division of Corporation Finance indicated that, as issuers consider transition from LIBOR and address the risks presented, "it is important to keep investors informed about the progress toward risk identification and mitigation, and the anticipated impact on the issuer, if material." In this regard, the Staff provided following guidance:

- The evaluation and mitigation of risks related to the expected discontinuation of LIBOR may span several reporting periods, so issuers should consider disclosing the status of issuer efforts to date and the significant matters yet to be addressed;
- When an issuer has identified a material exposure to LIBOR but does not yet know or cannot yet reasonably estimate the expected impact, it should consider disclosing that fact; and
- Disclosures that allow investors to see this issue through the eyes of management are likely to be the most useful for investors, including information used by management and the board in assessing and monitoring the LIBOR transition, including qualitative disclosures and, when material, quantitative disclosures, such as the notional value of contracts referencing LIBOR and extending past 2021.

The Staff notes that the issuers most frequently providing LIBOR transition disclosure are in the real estate, banking, and insurance industries, and that larger issuers are more likely to include disclosure about the transition away from LIBOR. The Staff encourages every issuer, if it has not already done so, to begin planning for the transition.

Disclosure Guidance for China-Based Issuers

On November 23, 2020, the Division of Corporation Finance published *CF Disclosure Guidance Topic No. 10, Disclosure Considerations for China-Based Issuers*. This guidance provides the Division of Corporation Finance's views regarding certain disclosure considerations for companies based in, or with the majority of their operations in, the People's Republic of China ("China").

The guidance highlights a number of risks associated with China-based issuers, including (i) risks related to high-quality and reliable financial reporting; (ii) risks related to access to information and regulatory oversight; (iii) risks related to a company's organizational structure; and (iv) risks related to the regulatory environment. The guidance also outlines a number differences in shareholder rights and recourse, governance, and reporting associated with China-based issuers. The guidance notes that China-based issuers must fully disclose material risks related to their operations in China, and questions that China-based issuers should consider when assessing these risks and related disclosure obligations.

On December 20, 2021, the Division of Corporation Finance published a sample letter highlighting comments issued to companies that are based in, or that have the majority of their operations in, the People's Republic of China. The lead-in to the sample letter notes: "[T]he Division is issuing comments to China-based companies seeking more specific and prominent disclosure about the legal and operational risks associated with China-based companies. The Division's comments focus on the need for clear and prominent disclosure regarding the structure of the company, including the relationship between the entity conducting the offering and the entities conducting the operating activities, risks associated with a company's use of the VIE structure, and the potential impact on the company's operations and investors' interests if such structure were disallowed or the contracts were determined to be unenforceable. The Division's comments also focus on additional legal, regulatory, and enforcement risks that may apply to investments in China-based companies, such as the potential impact of the Holding Foreign Companies Accountable Act and related rules and any necessary PRC permissions a China-based company may need to operate its business or offer securities to foreign investors."

The Staff goes on to point out that for a SPAC with sponsors based in China, executive offices in China, a majority of its executive officers and/or directors that are located in or have significant ties with China, or that is contemplating a merger with a company incorporated in China, "specific disclosure about these circumstances is warranted to meet the company's disclosure obligations." The Staff indicates that the disclosure should address the risks associated with the SPAC's operations, as outlined in the sample letter. Also, for China-based companies with ongoing SEC periodic reporting obligations or that are engaged in capital raising transactions via takedowns from an effective shelf registration statement, the Staff expects prospectus supplements or incorporated periodic or current reports (and future periodic reports) to disclose the information and risks discussed in the Staff's sample letter.

Liquidity and Capital Resources Disclosures in MD&A

Effective September 28, 2010, the SEC provided interpretive guidance intended to improve the discussion of liquidity and funding risks in MD&A. This guidance focuses on disclosures related to liquidity, leverage ratios and the contractual obligations table. The SEC also proposed amendments to disclosure requirements related to short-term borrowings. The SEC's interpretive release, SEC Release No. 33-9144 (September 17, 2010), emphasizes that issuers are required to disclose known trends or demands, commitments, events or uncertainties that will result in, or that are reasonably likely to result in, a material change in the issuer's liquidity. The release highlights a number of trends and uncertainties relating to liquidity that issuers should consider including in their MD&A, including: difficulties in accessing the debt markets; reliance on commercial paper or other short-term financing arrangements; maturity mismatches between borrowing sources and the assets funded by those sources; changes in terms requested by counterparties; changes in the valuation of collateral; and counterparty risk. Issuers should provide disclosure of any intra-period variations if their disclosure does not otherwise adequately convey their financing arrangements. In addition, if a repurchase transaction is reasonably likely to result in the use of a material amount of cash or other liquid assets, it may be required to be disclosed in MD&A. The SEC also suggests that issuers consider describing cash management and risk management policies that are relevant to an assessment of their financial condition.

The interpretive release also addresses the inclusion of capital and leverage ratios in MD&A. If a capital or leverage ratio financial measure is presented, the issuer should clearly state why the measure is useful to understanding its financial condition and the measure should be accompanied by a clear explanation of the calculation methodology. This explanation should include a discussion of any unusual, infrequent or non-recurring inputs, or any inputs that are adjusted so that the ratio is calculated differently from directly comparable measures. Issuers should also consider whether the measure differs from other measures used in their industry; if so, additional discussion may be required to ensure that the disclosure is not misleading. Any non-GAAP financial measure, including any non-GAAP capital or leverage ratio, that is disclosed in an issuer's filing should comply with SEC rules and guidance related to the inclusion of non-GAAP financial measures.

In its interpretive release, the SEC recognizes that different approaches to the contractual obligations table have developed. The SEC declines to provide specific presentation requirements or guidance on the treatment of certain items; instead, it states that issuers should provide a presentation that is clear, understandable and not misleading, and that appropriately reflects the obligations that are meaningful to the issuer. The format and content of the disclosure should support the purpose of the disclosure in this section, which is to provide aggregated information about contractual obligations in a single location in order to improve transparency of an issuer's liquidity and capital resource needs, and to provide context for assessing the role of off-balance sheet arrangements. Issuers should use footnotes, in the SEC's view, to provide information necessary for an understanding of the timing and amount of specified contractual obligations. Additional narrative disclosure should be provided if necessary to explain what the table does and does not include and to promote understanding of the information provided in the table. The contractual obligations table and off-balance sheet arrangements disclosure requires were subsequently revised in November 2020.

Guidance on European Debt Exposures

On January 6, 2012, the SEC's Division of Corporation Finance issued guidance regarding disclosures about exposure to the debt of sovereign and non-sovereign issuers in Europe. Topic No. 4 of the SEC Staff's new "CF Disclosure Guidance" series addresses specific concerns about the adequacy of public disclosures made principally by financial institutions regarding their European debt exposures, and the potential consequences of such exposures on those issuers. The Staff encourages affected issuers to consider this guidance in preparing their SEC reports, including in the upcoming annual reports for calendar year-end issuers.

The Staff has focused its attention on disclosure about European debt exposure included (or required to be included) in risk factors, MD&A, qualitative and quantitative disclosure about market risks ("Market Risk Disclosure"), as well as Industry Guide 3 disclosures required of bank holding companies and similar lending and deposit-taking financial institutions ("Guide 3"). The Staff's guidance in Topic No. 4 is directed at both U.S. and non-U.S. financial institutions, and the Staff notes that, to date, disclosures about the nature and extent of direct or indirect exposure to European sovereign debt "have been inconsistent in both substance and presentation." For this reason, the Staff lays out a very specific structure for evaluating what disclosures may be necessary regarding the exposures, based on the Staff's own experience in commenting on those disclosures that it has, to date, found to be lacking.

In providing its guidance, the Staff has not specifically identified the countries in Europe that are of principal concern, noting the specific countries may change over time. However, the Staff does indicate that issuers should focus on those countries experiencing "significant economic, fiscal and/or political strains such that the likelihood of default would be higher than would be anticipated when such factors do not exist." The Staff encourages issuers to identify the basis for determining which countries are included in the disclosure.

In comments issued by the Staff in its review of periodic reports filed in 2011, enhanced disclosure was requested, separately by country, as to: (i) gross sovereign, financial institutions, and non-financial corporations' exposure; (ii) quantified disclosure explaining how gross exposures are hedged; and (iii) a discussion of the circumstances under which losses may not be covered by purchased credit protection.

In addition to providing the disclosure separately by country as indicated above, the Staff has requested that issuers segregate between sovereign debt and non-sovereign debt exposures, and by financial statement category, in order to arrive at the gross funded exposure. In addition, the Staff has asked that issuers consider separately providing disclosure of gross unfunded commitments made. Further, the Staff suggests that information regarding hedges be provided in order to present an amount of net funded exposure. As discussed below, the Staff has provided a wide-ranging outline for assessing what qualitative and quantitative disclosures may be necessary regarding direct or indirect exposures to the European debt crisis.

The Staff believes that the disclosures outlined in Topic No. 4 are called for under existing, principles-based disclosure requirements. In this regard, the Staff notes the following applicable disclosure requirements and how they should be interpreted when evaluating what disclosure is necessary regarding European debt exposures:

- MD&A. Issuers must identify know trends or known demands, commitments, events or uncertainties that will result, or that are reasonably likely to result, in a material increase or decrease in liquidity, and issuers must also discuss any known trends or uncertainties that have had, or that the issuer reasonably expects may have, a material favorable or unfavorable impact on income.
- Guide 3. Item III.C.3 of Guide 3 calls for issuers to identify cross-border outstandings to borrowers in each foreign country where the exposures exceed one percent of total assets, as well as disclosure where "current conditions in a foreign country give rise to liquidity problems which are expected to have a material impact on the timely repayment of principal or interest on the country's private or public sector debt," including tabular disclosure of changes in outstandings, and in some situations tabular disclosure of restructured outstandings.
- Risk Factors and Market Risk Disclosure. Issuers must provide disclosure of material risks, including in risk factors disclosure and in specific Market Risk Disclosures, and the Staff indicates that such disclosures should not be generic "boilerplate" and should rather be tailored to the issuer's specific facts and circumstances.

In Topic No. 4, the Staff provides a highly detailed outline for preparing the types of disclosure called for by the guidance. This outline provides considerations to be used when determining, in light of an issuer's specific facts, what disclosure should be provided in a manner that is consistent with the guidance. The outline is as follows:

I. Gross Funded Exposure

a. Countries

    i. The basis for the countries selected for disclosure.

    ii. The basis for determining the domicile of the exposure.

b. Type of Counterparty

    i. Separate categories of exposure to sovereign and non-sovereign counterparties.

        1. Sovereign exposures consist of financial instruments entered into with sovereign and local governments.

        2. Non-sovereign exposures comprise exposure to corporations and financial institutions. To the extent material, separate disclosure may be required between financial and non-financial institutions.

c. Categories of Financial Instruments

    i. Categories to be considered for disclosure include loans and leases, held-to-maturity securities, available-for-sale securities, trading securities, derivatives, and other financial exposures to arrive at gross-funded exposure.

        1. For loans and leases, the gross amount prior to the deduction of the impairment provision and the net amount after the impairment provision.

        2. For held-to-maturity securities, the amortized cost basis and the fair value.

        3. For available-for-sale securities, the fair value, and if material, the amortized cost basis.

        4. For trading securities, the fair value.

        5. For derivative assets, the fair value, except that amount could be offset by the amount of cash collateral applied if separate footnote disclosure quantifying the amount of the offset is provided.

        6. For credit default contracts sold, the fair value and the notional value of protection sold, along with a description of the events that would trigger payout under the contracts.

        7. For other financial exposures, to the extent carried at fair value, the fair value. To the extent carried at amortized cost, the gross amount prior to the deduction of impairment and the net amount after impairment.

II. Unfunded Exposure

a. The amount of unfunded commitments by type of counterparty and by country.

b. The key terms and any potential limitations of the counterparty being able to draw down on the facilities.

III. Total Gross Exposure (Funded and Unfunded)

a. The effect of gross funded exposure and total unfunded exposure should be subtotaled to arrive at total gross exposure as of the balance sheet date, separated between type of counterparty and by country.

b. Appropriate footnote disclosure may be provided highlighting additional key details, such as maturity information for the exposures.

IV. Effects of Credit Default Protection to Arrive at Net Exposures.

a. The effects of credit default protection purchased separately by counterparty or country.

b. The fair value and notional value of the purchased credit protection.

c. The nature of payout or trigger events under the purchased credit protection contracts.

d. The types of counterparties that the credit protection was purchased from and an indication of the counterparty's credit quality.

e. Whether credit protection purchased has a shorter maturity date than the bonds or other exposure against which the protection was purchased. If the credit protection has a shorter maturity date, clarifying disclosure should be provided about this fact, as well as the risks presented by the mismatch of the maturity.

V. Other Risk Management Disclosures

a. How management is monitoring and/or mitigating exposures to selected countries, including any stress testing that is being performed.

b. How management is monitoring and/or mitigating the effects of indirect exposure in the analysis of risk. Disclosure should explain how the issuer identifies their indirect exposures, provide examples of the identified exposures, along with the level of the indirect exposures.

c. Current developments (rating downgrades, financial relief plans for impacted countries, widening credit spreads, etc.) of the identified countries, how those developments, or changes to them, could impact the issuer's financial condition, results of operations, liquidity or capital resources.

VI. Post-Reporting Date Events

a. Significant developments since the reporting date and the effects of those events on the reported amounts.

As noted in the "Supplementary Information" section of Topic No. 4, the statements in the CF Disclosure Guidance represent views of the Staff, and do not constitute a new rule, regulation or statement of the SEC. Nonetheless, financial institutions preparing disclosure for their SEC reports should carefully consider the disclosure that should be provided in response to the Staff's expectations, as the Staff's outline included in Topic No. 4 will likely serve as a roadmap for the type of comments that the Staff will issue when reviewing the annual reports of any issuers with European credit exposure in 2012. While the Staff has not sought to provide a "one-size-fits-all" approach for these disclosures, Topic No. 4 does seek to provide key principles that need to be considered when evaluating and describing European debt exposures in upcoming SEC reports.

Guidance on Omission of the Third Year Comparison from MD&A

In March 2019, the SEC revised Instruction 1 to Item 303(a) of Regulation S-K to eliminate the reference to presenting year-to-year comparisons to explain the financial information presented in MD&A. As revised, Instruction 1 to Item 303(a) states that companies may use any presentation that, in the company's judgment, enhances a reader's understanding of the company's financial condition, changes in financial condition, and results of operations and permits companies to omit the discussion of the earliest of the three years in MD&A, if such discussion was already included in any of the company's prior filings on EDGAR that required Item 303 disclosure. When a company elects to exclude the third year comparison in reliance on Instruction 1 to Item 303(a), the company must identify the location in the prior filing where the omitted discussion can be found.

In January 2020, the Staff provided guidance regarding the omission of the third year comparison from MD&A in three Regulation S-K Compliance and Disclosure Interpretations. In Question 110.02, the Staff indicates that, when a company relies on Instruction 1 to Item 303(a) to omit a discussion of the earliest of three years and includes the required statement that identifies the location of such discussion in a prior filing, the statement merely identifies the location of the disclosure in the prior filing, and the statement does not serve to incorporate such disclosure into the filing, unless the company expressly states that the information is incorporated by reference.

In Question 110.03, the Staff states that a company may not rely on Instruction 1 to Item 303(a) of Regulation S-K to omit a discussion of the earliest of three years from its current MD&A if it believes a discussion of that year is necessary. The Staff indicates that Item 303(a) requires that the company provide such information that it believes to be necessary to an understanding of its financial condition, changes in financial condition, and results of operations. Therefore, the Staff states that "a registrant must assess its information about the earliest of three years and, if it is required by Item 303(a), include it in the current disclosure or expressly incorporate by reference its discussion from a previous filing."

In Question 110.04, the Staff addresses a situation where a company has an effective registration statement that incorporates by reference its Form 10-K for the fiscal year ended December 31, 2018. In its Form 10-K for the fiscal year ended December 31, 2019, the company will omit the discussion of its results for the fiscal year ended December 31, 2017, pursuant to Instruction 1 to Item 303(a) of Regulation S-K, and include a statement identifying the location of the discussion presented in the 2018 Form 10-K, and the filing of that 2019 Form 10-K will operate as the 1933 Act Section 10(a)(3) update to the registration statement. The Staff notes that, after the company files the 2019 Form 10-K, the company's discussion of its results for the fiscal year ended December 31, 2017, will not be incorporated by reference into the registration statement, because the filing of the 2019 Form 10-K establishes a new effective date for the registration statement. The Staff notes that, as of the new effective date, the registration statement incorporates by reference only the 2019 Form 10-K, which does not contain the company's discussion of results for the fiscal year ended December 31, 2017, unless, as indicated in Question 110.02, the information is expressly incorporated by reference.

Iran Threat Reduction AND Syria Human Rights Act Of 2012

The Iran Threat Reduction and Syria Human Rights Act of 2012 (the "ITR Act"), was enacted on August 10, 2012. This law added Exchange Act Section 13(r), requiring disclosure by issuers and the filing of a notice with the SEC. If an issuer or any of its affiliates have engaged in any of the activities referenced in Section 13(r), the issuer's periodic reports must include disclosure of: (i) the nature and extent of the activity; (ii) the gross revenues and net profits, if any, attributable to the activity; and (iii) whether the issuer or affiliate intends to continue to engage in the activity. If an issuer or an affiliate of the issuer has knowingly engaged in any of the subject activities, then, in addition to the required disclosure, the issuer must submit a publicly-available notice to the SEC under the new EDGAR form type "IRANNOTICE." The SEC must send the notice to the President and certain Congressional committees.

The activities referenced in Section 13(r) focus in particular on transactions and investments relating to the petrochemical, petroleum and marine transport industries, activities relating to weapons of mass destruction and other military capabilities, financial and other transactions with those whose assets are frozen and certain specified Iranian entities, activities relating to the transfer of goods, technologies or services likely to be used by the government of Iran (as defined in U.S. sanctions laws) to commit human rights abuses, and any transactions or dealings with the government of Iran without the specific authorization of a Federal department or agency.

Section 13(r) did not require any SEC rulemaking. On December 4, 2012, the Staff of the SEC's Division of Corporation Finance updated its Exchange Act Sections Compliance and Disclosure Interpretations to include seven interpretations that address the implementation of Section 13(r).

The Staff notes in Exchange Act Sections Compliance and Disclosure Interpretations Question 147.01 that if a periodic report is due after February 6, 2013 but the issuer chooses to file the report prior to that date, the issuer is still subject to the Section 13(r) disclosure requirements for that report, and, as noted in Exchange Act Sections Compliance and Disclosure Interpretations Question 147.02, the disclosure must cover activities that took place over the entire fiscal year (*e.g.*, January 1 through December 31, 2012), even if those activities pre-dated the August 10, 2012 enactment date of Section 13(r).

In the event an issuer has not identified any reportable activities during the relevant period, the Staff indicates in Exchange Act Sections Compliance and Disclosure Interpretations Question 147.04 that an issuer is not required to include disclosure in its periodic reports. Disclosure is only required if any of the covered activities occurred during the reporting period.

One of the requirements of Exchange Act Section 13(r) is that issuers must disclose any dealings by the issuer or its affiliates with the government of Iran, even if those activities are not sanctionable, *unless* the activity is conducted under a specific authorization from a U.S. federal government department or agency. The Staff stated in Exchange Act Sections Compliance and Disclosure Interpretations Question 147.05 that this exception is only available when the activity was authorized by a *U.S.* government agency or department, not an equivalent *foreign* governmental authority. Both general and specific licenses from the Office of Foreign Assets Control (OFAC) for transactions can qualify, so long as all of the conditions of the license are strictly observed, as noted in Exchange Act Sections Compliance and Disclosure Interpretations Question 147.06.

In Exchange Act Sections Compliance and Disclosure Interpretations Question 147.07, the Staff notes that the disclosure made under Section 13(r) is public when filed with the SEC, and the notice of the disclosure that is filed on EDGAR would also be publicly available upon filing (as noted in the SEC's notice regarding the new EDGAR form type). The SEC has not prescribed the form of the notice, other than to say that notice should be a separate document that includes the information required by Section 13(r).

The Staff stated in Exchange Act Sections Compliance and Disclosure Interpretations Question 147.03 that Section 13(r) applies to both the issuer and its affiliates, and for this purpose "affiliate" has the same meaning as in 1934 Act Rule 12b-2. Rule 12b-2's definition of affiliate is typically read to include directors and officers, therefore issuers must determine whether any such persons have engaged in the activities regarding Iran that are specified in Section 13(r). While no consensus has emerged as to whether specific questions about Iran activities should be included in the D&O questionnaire, some issuers have included questions with varying degrees of detail regarding this disclosure item.

Changes to the SEC's Review Program

In 2010, the SEC announced a restructuring of the Division of Corporate Finance that created three new offices, including an office for large and significant financial services companies. Although most public companies were not subject to review by that office, it is important to note that the office employed a "continuous review" approach that the Division of Corporation Finance has been developing over the past few years. In 2015, this office was combined with the office responsible for reviewing the filings of financial institutions.

In 2012, the Division of Corporation Finance announced the establishment of an Office of Disclosure Standards. The stated responsibilities of this office include evaluating the outcomes of the Division's selective review of various materials filed under the federal securities laws, with a view towards enhancing the standards and policies for those reviews to enhance their effectiveness and efficiency, and conducting ongoing program assessments to evaluate the effectiveness of the internal supervisory controls, and to ensure the Division's filing reviews are consistently performed with professional competence and integrity.

In September 2019, the Division of Corporation Finance announced that it had realigned the work of its disclosure program. As a result of the realignment, the disclosure program Staff focus their efforts through one of four groups:

- Disclosure Review Program. The Staff conducts the majority of its selective and required filing reviews in seven industry focused offices.
- Specialized Policy and Disclosure. The Offices of International Corporate Finance, Mergers and Acquisitions and Structured Finance continue to provide support to the Division, and the Division also established a specific function to address corporate governance policy matters across the Division.
- Office of Risk and Strategy. The office provides filing review teams with guidance on developing risks and evolving disclosures.
- Office of Assessment and Continuous Improvement. This new office evaluates the effectiveness of the Division's disclosure review program.

In 2022, the Staff announced a reorganization of the Division of Corporation Finance in which a new Office of Industrial Applications and Services was established from the existing Office of Life Sciences, as well as a new Office of Crypto Assets. Issuers were reallocated from existing disclosure review offices to these new offices.

The Division continues to assign companies and filings to review offices by their principal industry focus using Standard Industrial Classification codes.

Unbundling of Proxy Proposals

Litigation by shareholder activists alleging violations of the SEC's rules which concern the "unbundling" of separate matters that are submitted to a shareholder vote by an issuer or any other person soliciting proxy authority has focused attention on the presentation of matters in the proxy statement. Exchange Act Rule 14a-4(a)(3) requires that the form of proxy "identify clearly and impartially each separate matter intended to be acted upon, whether or not related to or conditioned on the approval of other matters." Rule 14a-4(b)(1) further requires that the form of proxy provide separate boxes for shareholders to choose between approval, disapproval or abstention "with respect to each separate matter referred to therein as intended to be acted upon." These rules are intended to provide a means for shareholders to communicate their views to the board of directors on each matter to be acted upon. In Exchange Act Rule 14a-4(a)(3) Compliance and Disclosure Interpretations published on January 24, 2014, the SEC Staff addressed a number of specific proposals and whether the matters contemplated by those proposals must be unbundled under Rule 14a-4(a)(3).

In Exchange Act Rule 14a-4(a)(3) Compliance and Disclosure Interpretations Question 101.01, the Staff addresses a situation where management of an issuer has negotiated concessions from holders of a series of its preferred stock to reduce the dividend rate on the preferred stock in exchange for an extension of the maturity date. The Staff indicates that a single proposal submitted by management to holders of the issuer's common stock to approve a charter amendment containing these modifications need not be unbundled into separate proposals under Rule 14a-4(a)(3) (i.e., one relating to the reduction of the dividend rate, and another relating to the extension of the maturity date). In this regard, the Staff notes that multiple matters that are so "inextricably intertwined" as to effectively constitute a single matter need not be unbundled. The Staff would view the matters relating to the terms of the preferred stock as being inextricably intertwined, "because each of the proposed provisions relates to a basic financial term of the same series of capital stock and was the sole consideration for the countervailing provision." The Staff notes, however, that it would not view two separate matters as being inextricably intertwined "merely because the matters were negotiated as part of a transaction with a third party, nor because the matters represent terms of a contract that one or the other of the parties considers essential to the overall bargain."

In Exchange Act Rule 14a-4(a)(3) Compliance and Disclosure Interpretations Question 101.02, the Staff addresses a situation where management of an issuer intends to present an amended and restated charter to shareholders for approval at an annual meeting, with proposed amendments that would change the par value of the common stock, eliminate provisions relating to a series of preferred stock that is no longer outstanding and is not subject to further issuance, and declassify the board of directors. The Staff indicated that under Rule 14a-4(a)(3), these individual amendments that are part of the restatement would not need to be unbundled into separate proposals. In this regard, the Staff notes that it would not ordinarily object to the bundling of any number of immaterial matters with a single material matter. The Staff indicates that while there is no bright-line test for determining materiality in the context of Rule 14a-4(a)(3), issuers should consider whether a given matter substantively affects shareholder rights. Therefore, in this particular example, while the declassification amendment would be material given its impact on shareholder rights, the amendments relating to par value and preferred stock do not substantively affect shareholder rights, and therefore both of these amendments ordinarily could be included in a single restatement proposal together with the declassification amendment. The Staff notes, however, that "if management knows or has reason to believe that a particular amendment that does not substantively affect shareholder rights nevertheless is one on which shareholders could reasonably be expected to wish to express a view separate from their views on the other amendments that are part of the restatement, the amendment should be unbundled." Further, the Staff notes that the analysis under Rule 14a-4(a)(3) is not governed by the fact that, for state law purposes, these amendments could be presented to shareholders as a single restatement proposal.

In Exchange Act Rule 14a-4(a)(3) Compliance and Disclosure Interpretations Question 101.03, the Staff addresses a single proposal covering an omnibus amendment to a registrant's equity incentive plan. The Staff indicated that the separate changes need not be unbundled into separate proposals, when those changes included: (i) an increase to the total number of shares reserved for issuance under the plan; (ii) an increase in the maximum amount of compensation payable to an employee during a specified period for purposes of meeting the requirements for qualified performance-based compensation under Section 162(m) of the Internal Revenue Code; (iii) the addition of restricted stock to the types of awards that can be granted under the plan; and (iv) an extension of the term of the plan. The Staff notes that while it generally will object to the bundling of multiple, material matters into a single proposal – provided that the individual matters would require shareholder approval under state law, the rules of a national securities exchange, or the registrant's organizational documents if presented on a standalone basis – the Staff will not object to the presentation of multiple changes to an equity incentive plan in a single proposal. See Section III of SEC Release No. 34-33229 (November 22, 1993). The Staff notes that this is the case even if the changes can be characterized as material in the context of the plan and the rules of a national securities exchange would require shareholder approval of each of the changes if presented on a standalone basis.

The Staff of the Division of Corporation Finance published revised guidance regarding the "unbundling" of matters presented for shareholder votes in connection with mergers and acquisitions. The guidance is contained in new Exchange Act Rule 14a-4(a)(3) Compliance and Disclosure Interpretations Questions 201.01 and 201.02, which replaced unbundling interpretations that the Staff issued in 2004.

Under the revised guidance, if the acquiring company is required to present a proposed amendment to its organizational documents separately on its form of proxy for shareholder approval, then a target company subject to the SEC's proxy rules also must present this proposed amendment separately on the form of its proxy for approval by its own shareholders. This vote is required even if a separate vote is not required under state law or if the proposed amendment is the only matter that the acquiring company is submitting for a shareholder vote. In the Staff's view, unbundling is required because the proposed amendment is a term of the transaction and would effect a material change to the equity securities that the target company's shareholders are receiving in the transaction. As a result, these shareholders should be allowed to express their separate views on changes that would establish their substantive shareholder rights. The Staff indicated that only material matters must be unbundled, including amendments to a classified or staggered board, limitations on the removal of directors and supermajority voting provisions. Matters that the Staff would view as immaterial (and thus would not require unbundling) include changes to the company's name, restatements of charters and technical changes. A target company also is not required to separately present a proposed amendment to increase the number of authorized shares of the acquiring company's equity securities as long as the increase is limited to the number of shares reasonably expected to be issued in the transaction. Companies are permitted to condition the completion of a transaction on shareholder approval of any separate proposals. In this case, the company must clearly disclose such conditions in the proxy materials submitted to shareholders.

The revised unbundling guidance also applies to transactions in which the parties form a new entity to act as an acquisition vehicle and issue equity securities in the transaction. Under these circumstances, the party whose shareholders are expected to own the largest percentage of equity securities of the acquisition entity following the completion of the transaction would be considered the acquiring company for purposes of the unbundling analysis. The acquiring company must separately submit for shareholder approval any material provision of the acquisition entity's organizational documents if: (1) those provisions are material changes from the acquiring company's organizational documents; and (2) the changes would require approval of the acquiring company's shareholders. This position does not apply in the context of provisions that are required by the law of the governing jurisdiction of the acquisition entity. If the acquiring company must present separately any provision of the acquisition entity's organizational documents for approval by its shareholders (or would be required to do so if it were conducting a solicitation subject to the proxy rules), then the target company must also present such provisions separately for its shareholders.

Audit Committee Disclosure

There is has been a focus on the role played by the audit committee of the board of directors and the audit committee-auditor relationship. In October 2014, then SEC Chair White announced an ongoing SEC effort to address a variety of issues raised about, e.g., the role that audit committees play and the information that issuers provide about their audit committee's efforts. In addition, the Investor Advisory Group of the PCAOB issued a report requesting that the PCAOB and SEC consider requiring that the audit committee report on its role, as well as considering whether auditors or another third party should assess and report on the duties and operational effectiveness of the audit committee. In 2013 a consortium of audit and governance groups (*e.g.*, the Center for Audit Quality, Corporate Board Member, and the NACD), calling itself the "Audit Committee Collaboration," published a report entitled "Enhancing the Audit Committee Report: A Call to Action." In December 2014, the Center for Audit Quality and Audit Analytics launched the "Audit Committee Transparency Barometer," which presented the results of an analysis of proxy statement disclosures about audit committees and auditors.

The Call to Action report noted that increased transparency through enhanced audit committee reporting about the audit committee's role and responsibilities was a means for increasing investor confidence in the work of the audit committee. That report cited instances where issuers had included expanded disclosure about the audit committee function and the audit committee's oversight of the auditor in 2013 proxy statement disclosures. The report indicated that issuers could follow those examples to provide voluntary disclosures that:

- Clarify the scope of the audit committee's duties;
- Clearly define the audit committee's composition; and
- Provide information about: (1) factors considered when selecting or reappointing an audit firm; (2) selection of the lead audit engagement partner; (3) factors considered when determining auditor compensation; (4) how the committee oversees the auditor; and (5) the evaluation of the auditor.

Issuers must carefully consider whether and how to present any voluntary additional disclosures called for by these initiatives, particularly given current investor expectations and concerns about effective governance.

On July 1, 2015, the SEC issued SEC Release No. 33-9862 (July 1, 2015), *Audit Committee Oversight*, which solicited comment regarding potential disclosures about a number of areas relating to the audit committee's relationship with the auditor. The SEC considered whether a number of new disclosure requirements should address the level of oversight that the audit committee exercises over the auditor. The SEC stated that this disclosure would provide insight into the quality of oversight, which could potentially allow investors to understand the potential differences in performance or quality of financial reporting among issuers. The areas for which the SEC sought input include:

- Communications with the Auditor. The SEC sought comment on whether disclosure might include some discussion of the audit committee's consideration of communications that are required of auditors under applicable auditing standards, such as: (1) communications regarding the auditors overall audit strategy, timing and significant risks identified; (2) the nature and extent of specialized skills used in the audit; (3) the use of other firms or other persons, including internal audit; (4) the basis for determining that the auditor is able to serve as the issuer's principal auditor; and (5) the results of the audit.
- Auditor/Audit Committee Meetings. The SEC sought comment on whether it should expand currently required disclosure about the frequency of audit committee meetings to include additional disclosure about the frequency of private meetings or topics discussed with the auditor which could serve to provide additional insight about the audit committee's oversight of the auditor.
- Audit Quality Considerations. Comments were solicited regarding additional required disclosure, which could include a description of the nature of any discussions held with the auditor regarding the results of the audit firm's internal quality review, as well as the PCAOB's most recent inspection. This disclosure could address whether the audit committee discussed with the auditor the inspection report matters that are set forth in PCAOB Rel. No. 2012-003, *Information for Audit Committees about the PCAOB Inspection Process* (2012).
- Assessing and Selecting the Auditor. The SEC sought comment on whether disclosure should be provided regarding the steps that the audit committee took in its process for assessment of the auditor, and the specific elements of the criteria considered by the committee.
- Consideration of Proposals. If an issuer has gone through a request for proposal process, the SEC sought comment on whether the disclosure should include a discussion of the number of auditors asked to make proposals, how they were selected and the information that was used by the audit committee in making its decision.
- Ratification of Auditor Selection. The SEC indicated that the disclosure provided regarding a ratification of auditor proposal should "provide useful information to shareholders as to how and

why the board is seeking ratification of the auditor, as well as the implication of the shareholder vote being solicited."

- Disclosure about the Audit Engagement Team. The concept release sought input on whether disclosure should be provided regarding the audit engagement team, including the name of the engagement partner, as well as potentially the names of the other key members of the engagement team. In addition, the disclosure might include information about how long the individuals have served in their respective roles, as well as their relevant experience (e.g., the number of prior audit engagements performed and whether they were in the same industry).
- Audit Partner Selection. The SEC indicated that disclosure could be provided regarding the involvement of the audit committee in the selection of the audit engagement partner. It is believed that any input the audit committee has in this selection could provide "transparency and insight into the exercise of the audit committee's responsibilities in overseeing the auditor."
- Auditor Tenure. The concept release solicited comment on whether auditor tenure disclosure should be required. The SEC indicates that disclosure of this information "could provide insight into the audit committee's overall decision to engage or retain the auditor."
- Involvement of Other Firms. The SEC solicited comment on whether disclosure should address the names, locations and responsibilities of accounting firms affiliated with the auditor, as well as non-affiliated accounting firms and other third party participants involved in the audit (such as actuaries, tax advisors, consultants).

The concept release also sought comment as to whether disclosure of this type should remain voluntary, where the disclosure should appear, and whether additional disclosures should be required of all issuers. The release also sought comment on whether audit committees should be required to report on other areas of oversight, such as risk governance, whistleblower complaints, cyber risk, or information technology risk.

Director Election Voting Standard Disclosure

The Staff of the Division of Corporation Finance has observed that issuers should review the disclosure in their proxy statements about the voting standard for director elections. The Staff's focus on the issue was prompted by a rulemaking petition filed by the Council of Institutional Investors ("CII"), which requested that the SEC require companies to clarify the voting standards for the election of directors because, in CII's view, issuers that use the state law default plurality rule, coupled with a policy that requires the director to submit a resignation if the director does not receive a majority of votes in favor, should not be permitted to state that their directors are elected by majority voting standards. The United Brotherhood of Carpenters previously submitted a supplement to a petition filed in 2011 which addressed a similar problem. The SEC Staff in the Division of Economic and Risk Analysis found numerous examples where companies which described their director election voting standards in a confusing manner, such as by referring to a "plurality-plus" voting standard as "majority voting" for director elections.

The SEC adopted its universal proxy rules in November 2021, and they became effective in August 2022. The SEC adopted rule changes to disclosure requirements regarding voting that will apply to proxy statements regardless of whether an election is contested:

- Rule 14a-4(b) as amended now requires the inclusion of an "against" voting option in lieu of a "withhold authority to vote" option on the form of proxy for the election of directors if state law gives legal effect to such a vote and also permits shareholders to abstain in an election governed by a majority voting standard.
- In addition, Item 21(b) of Schedule 14A as amended expressly requires the disclosure of the effect of a "withhold" vote. These disclosure provisions are independent of the adoption of the universal proxy requirement and apply to proxy statements for both contested and uncontested elections.

As a result of these changes, companies with charter provisions that provide for true majority voting in director elections will be required to include an "against" option in any proxy card involving a non-contested election. Companies that do not have majority voting bylaws (or that have implemented "plurality plus" bylaws) will still be able to use the "withhold" language in their proxy cards; however, such companies should review the relevant provisions of their applicable state corporate law to determine whether there are statutory provisions that might require them to give effect to an "against" vote in director elections.

SEC Enforcement Actions on Section 16 and Beneficial Ownership Reporting

On September 10, 2014, the SEC announced settlements with officers, directors, and significant shareholders for violating federal securities laws requiring information about their transactions in issuer stock. In addition, issuers settled charges with the SEC for contributing to filing failures by insiders and failing to report their insiders' filing delinquencies. Notable for its departure from the SEC's previous practice of generally bringing such charges only in cases in which insiders were also being charged with other violations, these actions signal increased attention by the SEC on the compliance obligations of insiders and large shareholders of reporting issuers.

Settlements by Insiders

The SEC charged insiders with violations of the federal securities laws, specifically violations of Sections 16(a), 13(d) and 13(g) of the Exchange Act. The SEC's cases naming insiders included cease-and-desist proceedings against officers, directors, and major shareholders. Such officers included CEOs, CFOs, Presidents, General Counsels, and Vice Presidents. Major shareholders charged were individuals, registered investment advisors, and entities providing investment management services to investment vehicles. The charges against these insiders revealed significant delinquencies in terms of filing the required Forms 4, Forms 5, Schedules 13D, Schedules 13G, or applicable amendments.

The details of each case and the degree of non-compliance with the beneficial ownership reporting requirements varied significantly. For example, insiders were charged with the untimely filing of between nine and 70 Forms 4 and 5, with an average number of 30 untimely filings. Regarding the degree of untimeliness, Forms 4 were generally filed approximately six months late in the cases brought by the SEC, but some forms were filed up to four years late. Late-reported transactions had aggregate market values of between $1 million and $182 million. The SEC proceedings also addressed several instances in which beneficial owners failed to file required amendments to Schedules 13D and 13G disclosing changes in beneficial ownership.

For corporate insiders settling these violations with the SEC, monetary penalties ranged from $25,000 to $120,000, with the average penalty being just over $72,000 among the 28 insiders. Larger penalties—ranging from $60,000 and up—were associated with a greater number of missing reports (for example, 25 untimely beneficial ownership reports being filed) and/or extreme untimeliness in filing (for example, filing a required report three years late).

Officers and directors charged with violations of Sections 16(a), 13(d), and 13(g) of the Exchange Act by the SEC often claimed that the violations were the result of the failure of their publicly-traded issuer employer to file beneficial ownership reports and required amendments on their behalf. In turn, their publicly-traded issuer employer often blamed such violations on lack of internal staffing or the late receipt of necessary information from the corporate insider. The major shareholders charged by the SEC indicated that the violations were the result of the failure of outside counsel to correctly advise them on their reporting obligations.

When such defenses were brought by corporate insiders, the SEC noted in the cease-and-desist orders that reliance on an employer, outside personnel, or counsel to make the required beneficial ownership filings or provide correct advice does not excuse the charged violations, as an insider retains legal responsibility for compliance with the filing requirements.

Such defenses proved unpersuasive to the SEC and ultimately unsuccessful to the charged insiders because there is no state of mind requirement for violations of Sections 16(a) and 13(d) and the rules thereunder. The failure to timely file a required report, even if inadvertent, constitutes a violation.

Settlements by Issuers

In a series of settlements, the SEC issued cease-and-desist orders against, and collected fines from, issuers for misstatements in, and failures to include, the required Item 405 disclosures. The misstatements and omissions were violations of Section 13(a) of the Exchange Act and Rule 13a-1 thereunder. In each matter, the SEC noted that the issuer "was required to review the forms filed and identify by name each such insider who failed to file on a timely basis and set forth the number of late reports and the number of transactions that were not reported on a timely basis." Further, the SEC listed the annual disclosures by each issuer and then stated the facts which showed the inaccuracy of those disclosures. For example, the settlements noted the following improper disclosures in response to Item 405:

- "Based solely upon a review of such reports and amendments thereto furnished to us and upon written representations of certain of such persons regarding their ownership of Common Stock, we believe that no person failed to file any such report on a timely basis during 2010, except that within the required two business day reporting requirement imposed by the SEC, the Company did not timely file one Form 4 report for [Section 16 Officer] with respect to the sale of 55 shares for which he has indirect beneficial ownership." The SEC noted that, during the fiscal years described in the disclosure, all of the company's officers and directors filed untimely Forms 4.
- "Based solely on a review of Forms 3, 4, and 5 and amendments thereto furnished to us, we know of no failure in Section 16(a) beneficial ownership reporting compliance except that through inadvertence certain directors or executives filed late." The SEC noted that, during each of the fiscal years described in the disclosure, there were multiple failures by insiders to file reports on a timely basis.
- "During the fiscal year ended December 31, 201[X], our Directors, executive officers and holders of more than ten percent of our common stock complied with all applicable Section 16(a) filing requirements." The SEC noted that, during each of the fiscal years described in the disclosure, there were multiple failures by insiders to file reports on a timely basis.
- "All Section 16(a) filing requirements applicable to its Directors, executive officers and greater than 10 percent beneficial owners were complied with for the most recent fiscal year." The SEC noted that, during each of the fiscal years described in the disclosure, the issuer's principal accounting officer failed to file required Section 16(a) reports. The issuer later disclosed that the principal accounting officer had not filed those reports, stating that "because the Company failed to timely

advise [the principal accounting officer] that he was subject to the reporting requirements of Section 16 in his position as chief accounting officer."

- "All officers, directors and 10% beneficial owners, known to the Company, had timely filed required forms reporting beneficial ownership of Company securities, based solely on review of Filed Forms 3 and 4 furnished to the Company." The SEC noted that, during each of the fiscal years described in the disclosure, there were multiple failures by insiders to file reports on a timely basis.

In bringing actions against issuers for causing violations of Section 16(a) by their insiders, the SEC noted that—while it encourages issuers to assist insiders in complying with Section 16(a) filing requirements—issuers that voluntarily accept certain responsibilities and then act negligently in the performance of those tasks may be liable for causing Section 16(a) violations by insiders. In each matter, the SEC noted that the issuer had voluntarily agreed with its insiders to perform certain tasks in connection with the filing of Section 16(a) reports on their behalf, including the preparation and filing of all such reports. After noting that the issuers had received the required information in a timely manner, the SEC stated that issuer personnel responsible for tasks relating to the preparation and filing of Section 16(a) reports repeatedly failed to perform on a timely basis the tasks the company had agreed to perform. The number of untimely filings ranged from 35 untimely filings over three years to 75 untimely filings in a single year. The amount of the fines in these matters ranged from $75,000 to $150,000.

Fraud Settlements

The SEC's charging of a publicly-traded issuer and corporate insiders for violations of Section 16(a) of the Exchange Act in separately announced settlements demonstrates the SEC's focus on these activities and the potential for fraud charges if these violations continue. The SEC charged a biotech issuer and its former CEO with defrauding investors by failing to report his sales of company stock. Given the CEO's failure to file initial and annual beneficial ownership reports on Forms 3 and 5, respectively, the degree of untimeliness of the filing of several Forms 4 (up to 26 months late), and the significant value of the late-reported sales, the SEC order found that the CEO's "sales would have been viewed by a reasonable investor as significantly altering the total mix of available information given, among other things, his position as CEO, the frequency with which he was selling [company] stock, and the size of his sales." Due to his conduct, the CEO was charged with violating Section 16(a) of the Exchange Act, as well as various federal securities law provisions relating to committing fraud upon investors as a result of the CEO's certification of annual reports and signing of a proxy statement, which all included material misstatements regarding his compliance with Section 16(a) of the Exchange Act.

Related to the CEO's violations of Section 16(a), the issuer was charged with failing to provide the disclosures required by Item 405 of Regulation S-K in annual reports, in violation of Section 13(a) of the Exchange Act, and with various federal securities law provisions relating to committing fraud upon investors as a result of such action.

Both the publicly-traded issuer and its former CEO settled with the SEC, and agreed to the imposition of significant monetary penalties, in the amounts of $175,000 for the CEO and $375,000 for the issuer.

Key Observations

The actions undertaken by the SEC as discussed above give rise to a number of important observations, as well as considerations for insiders, investors, and public companies.

- Issuers almost universally assist their officers and directors with the filing of Section 16 reports. Although the filing obligation ultimately rests with the individuals, the SEC actions make clear that issuers who undertake to assist their insiders with Section 16 obligations will also be held responsible for significant failures in Section 16 compliance. Accordingly, issuers must maintain a robust compliance system reasonably designed to avoid late or missed Section 16 filings.
- Likewise, the SEC actions make clear that insiders cannot rely solely on their issuers or counsel for compliance with Section 16; they must understand their reporting obligations. Periodic reminders and training are important to keep these compliance obligations front of mind. (We also recommend that issuers provide a short summary of the SEC's actions to their directors and officers as enforcement actions often make good "teaching moments.")
- It is very common for issuers to include in their Item 405 disclosure language that the disclosures are "based solely on a review of Forms 3, 4, and 5, and amendments thereto furnished to us." It is clear from several of the actions that the issuers actually did not review the forms, or that the individual reviewing the forms was unfamiliar with the legal requirements underlying them. As with other disclosures in an issuer's periodic reports, there should be a procedure that covers this review and an appropriately trained individual should undertake such review.
- One of the actions included a settlement with an insider and the related public issuer that included violations of Section 17(a) of the Securities Act of 1933, as amended. The SEC took the position that the insider and the issuer violated the anti-fraud provisions of the securities laws by failing to file Section 16(a) reports of securities transactions and holdings in a timely and accurate manner, rendering the issuer's annual reports and proxy statements false and misleading. This settlement demonstrates the SEC's belief that the failure to file timely reports, and an issuer's related materially inaccurate Item 405 disclosures, can serve as the basis of a fraud charge.

- The SEC noted the Enforcement Staff's use of "quantitative data sources and ranking algorithms" to identify late filers. The Staff has mentioned on numerous occasions its increasing use of electronic methods to identify potential issues. Expect to see more charges and settlements derived from these methods.

Guidance on Procedures for Confidential Treatment of Information in Exhibits

In an April 2019 announcement, the Division of Corporation Finance indicated that it will review filings for compliance with the new rules regarding confidential treatment of information redacted from exhibits filed under paragraphs (b)(2) and (b)(10) of Item 601 of Regulation S-K. These reviews will be conducted separately from regular filing reviews. The Staff plans to separate its requests for supplemental information about the redacted exhibits and will request that issuers provide their responses to those requests separately from the regular filing review comment and response process, in order to "minimize the risk of inadvertent public disclosure of competitive information." The Staff will initiate its review by sending a letter with a request that the issuer provide a paper copy of the unredacted exhibit, marked to highlight the redacted information. Once the Staff reviews the unredacted materials, the Staff may or may not ask for further substantiation. If the review of the unredacted exhibit does not lead to comments, the Staff will send a letter indicating that the review is complete. If the review of the unredacted exhibit leads to questions about whether redacted information is material or whether there is a basis for the claim of competitive harm (the competitive harm prong will no longer apply when rule amendments are effective in March 2020), the Staff will provide the issuer with comments separate and apart from comments on any associated filing. When the Staff's comments are resolved, the Staff will send the issuer a letter indicating that the review is complete. Consistent with past practice, the Staff will ask issuers to resolve any questions relating to redacted exhibits in registration statements before submitting a request for acceleration of the effective date.

The Staff intends to release the initial request for an unredacted exhibit and the closing letter publicly on the EDGAR system in connection with posting the other correspondence related to the filing review, if applicable. The Staff will not make public the Staff's comments regarding redacted exhibits, as well as the responses from issuers. Issuers may request confidential treatment of supplemental materials while they are in the Staff's possession pursuant to Rule 83. Upon completion of a compliance review, the Staff will destroy or return all supplemental materials, as long as the issuer has complied with the procedures outlined in Rules 418 or Rule 12b-4.

The new rules have not changed an issuer's ability to request confidential treatment pursuant to Rule 406 or Rule 24b-2, and the Staff will continue to process new applications, as well as pending applications that are not withdrawn, following established procedures.

If an issuer has a confidential treatment request pursuant to Rule 406 or Rule 24b-2 pending at the time the new rules became effective, the issuer may, but is not required to, withdraw its pending application. Issuers who elect to withdraw their confidential treatment requests and rely on the new rules must amend their filing to conform to the new rule requirements. If an issuer has received an order granting confidential treatment and the order is still in effect, the grant of confidential treatment will continue until the date stated in the order.

The Staff notes that if an issuer has received an order granting confidential treatment and that order is still in effect, the grant of confidential treatment continues until the date stated in the order, notwithstanding the adoption of the amendments to Item 601(b) of Regulation S-K. If an existing order granting confidential treatment is approaching its expiration date, then the issuer must submit an application prior to the order's expiration. In an April 2017 announcement, the Staff announced a new streamlined approach for seeking an extension. The Staff says that this streamlined approach, or the traditional application for extension of a confidential treatment order, must be used for seeking an extension, because an issuer is not permitted to refile the redacted exhibits under the recent amendments to paragraphs (b)(2) and (b)(10) to Item 601 of Regulation S-K.

The Staff created a short form application that is designed to facilitate the process for seeking an extension. The short form application requires an issuer to affirm that the most recently considered application for confidential treatment continues to be "true, complete and accurate regarding the information for which the applicant continues to seek confidential treatment." The Staff indicates that when an applicant can make the affirmation, the applicant can request that the Staff extend the time period for confidential treatment for an additional three, five or ten years by indicating the time period desired and providing a brief explanation to support the request.

On September 9, 2020, the Division of Corporation Finance updated its guidance to address options for companies when a confidential treatment order is about to expire. The Staff states that companies that previously have obtained a confidential treatment order have three choices of what to do when the order is about to expire.

First, the company can refile the unredacted exhibit. If the contract is still material, refile it in complete, unredacted form if none of the information needs to be protected from public disclosure;

Second, the company can extend the confidential period pursuant to Rules 406 or 24b-2. If the contract continues to be material, and the previously redacted information continues to be confidential, companies may request to extend the period of confidential treatment by filing an application under Rule 406 or Rule 24b-2 to continue to protect the confidential information from public release. If the order is about to expire and was initially issued less than three years ago, companies may use the short form application, which provides a streamlined process to file an application to extend the time for which confidential treatment has been granted. If the order is about to expire and initially was issued more than three years ago, companies may file new, complete applications for confidential treatment under Rule 406 or Rule 24b-2. The short form application is not available in these cases.

Third, if it has been more than three years since the initial confidential treatment order was issued, and if the contract continues to be material, companies have the option to transition to compliance with the requirements set out in Item 601(b)(10) of Regulation S-K and other parallel rules, referred to here as the redacted exhibit rules. The redacted exhibit rules allow for the filing of redacted exhibits without submitting an explanation or substantiation to the SEC, or providing an unredacted copy of the exhibit, except upon request of the staff. In order to transition to the redacted exhibits rules in these situations, a company would only be required to refile the material contract in redacted form and comply with the legend and other requirements of the applicable redacted exhibit rule, most commonly Item 601(b)(10)(iv) of Regulation S-K. The Staff anticipates that many, if not most, companies will chose to transition to this process, given that the substantiation of compliance and submission of unredacted materials to the Staff is only required upon Staff request. With regard to the timing of this transition, the Staff will not recommend enforcement action to the Commission if a company refiles a redacted exhibit in compliance with the redacted exhibit rules in the company's first Exchange Act report following the expiration of the confidential treatment order.

On March 9, 2021, the Division of Corporation Finance clarified its guidance for extending confidential treatment orders. These clarifications relate to a company's options for dealing with expiring confidential treatment orders and makes the options available to a company with an expiring confidential treatment order dependent on whether the order was initially issued before or after October 15, 2017. For purposes of determining when an order was "initially issued," companies must look to when the original confidential treatment order was initially issued, rather than the date of any applicable extensions to that original order. For example, if an order was initially issued before October 15, 2017, and then subsequently extended after October 15, 2017, the company is able to rely on the options available for expiring confidential treatment orders initially issued on or before October 15, 2017. Under this revised guidance, companies with an expiring confidential treatment order have the following options:

- If the exhibit continues to be material and the information does not need to be protected from public disclosure, then the company may refile the exhibit in complete, unredacted form.

- If the exhibit continues to be material and the previously redacted information continues to be confidential, then the company may request to extend confidential treatment under Rule 406 or Rule 24b-2 as follows:
  - If the order was initially issued after October 15, 2017, then the company may utilize the short form application, submitted by email to the SEC.
  - If the order was initially issued on or before October 15, 2017, then the short form application is not available, and the company may file a new, complete application for confidential treatment.

If the exhibit continues to be material and the order was initially issued on or before October 15, 2017, then the company may use the option of filing under the ask for forgiveness approach contemplated by Item 601(b) of Regulation S-K. If a company determines to redact information in an exhibit under that approach, the company may file the redacted exhibit without submitting any substantiation to the SEC, but must:

- Mark the exhibit index to indicate that portions of the exhibit have been omitted;
- Include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both (i) not material and (ii) is the type that the company treats as private or confidential; and
- Indicate with brackets where the information has been omitted from the filed version of the exhibit.

The Staff noted that companies can transition to the updated exhibit rules by refiling the redacted exhibit in compliance with the SEC rules in any Exchange Act report up until the first report following expiration of the subject confidential treatment order.

On August 4, 2020, the Division of Corporation Finance announced that it is providing a temporary secure file transfer process for the submission of supplemental materials pursuant to Securities Act Rule 418 and Exchange Act Rule 12b-4 and information subject to Rule 83 confidential treatment requests.

COVID-19 Pandemic Disclosure Guidance

The COVID-19 pandemic has had far-reaching implications for issuers. The impact of COVID-19 on operations and financial performance has raised difficult questions of when and how much information to provide to existing shareholders, prospective investors and the public. The communications by companies about COVID-19 have been subject to heightened scrutiny by both the SEC and potential litigants, making it critical for companies to consider their disclosure obligations arising from COVID-19.

COVID-19 Disclosure Considerations

A company must evaluate whether it has an affirmative disclosure obligation that would require the company to address material risks and uncertainties arising from COVID-19, including SEC periodic and current reports, potential securities offerings, ongoing share repurchases, or other public statements (such as earnings announcements or investor day presentations). If a company chooses to make a statement regarding COVID-19, such statement may not be materially misleading, or omit information that would make the statement materially misleading. Companies have a duty to correct prior disclosure that the company determines was untrue (or omitted a material fact necessary to make the disclosure not misleading) at the time the disclosure was made.

In addition to the information expressly required by SEC rules and forms, a public company is required to disclose "such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading." The SEC considers omitted information to be material if there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision or that disclosure of the omitted information would have been viewed by the reasonable investor as having significantly altered the total mix of information available. The materiality of risks and uncertainties associated with COVID-19 depends upon the nature, extent, and potential magnitude of the impact on the company's business and the scope of the company's operations.

SEC and Staff Statements

On January 30, 2020, then SEC Chairman Jay Clayton stated that he had asked the Staff to "monitor and, to the extent necessary or appropriate, provide guidance and other assistance to issuers and other market participants regarding disclosures related to the current and potential effects of the coronavirus." He further stated that the effects "may be difficult to assess or predict with meaningful precision both generally and as an industry- or issuer-specific basis," noting that "actual effects will depend on many factors beyond the control and knowledge of issuers." Chairman Clayton also stated, "how issuers plan for that uncertainty and how they choose to respond to events as they unfold can nevertheless be material to an investment decision."

In February 19, 2020, then SEC Chairman Jay Clayton, then Division of Corporation Finance Director William Hinman, then SEC Chief Accountant Sagar Teotia, and PCAOB Chairman William D. Duhnke III issued guidance about auditing considerations arising from COVID-19. The joint statement included the observation that U.S.-listed companies (including companies based in the U.S., companies based in China, and companies based outside of the U.S., but not based in China) may have significant operations in China and other jurisdictions that may be affected by COVID-19. The statement further noted that companies that do not themselves have operations in China or other potentially affected jurisdictions may depend on companies that do have operations in those jurisdictions, including, for example, as suppliers, distributors, and/or customers. The authors of the joint statement noted that, in recent dialogue with the senior leaders of the largest U.S. audit firms, they have discussed the potential exposure of companies to the effects of COVID-19 and the impact that exposure could have on financial disclosures and audit quality. In those discussions, they emphasized:

- The need to consider potential disclosure of subsequent events in the notes to the financial statements in accordance with guidance included in Accounting Standards Codification 855, Subsequent Events; and
- The SEC's general policy to grant appropriate relief from filing deadlines in situations where, in light of circumstances beyond the control of the company, filings cannot be completed on time with appropriate review and attention.

It was noted that the Staff welcomes questions regarding the reporting of matters related to the potential effects of the coronavirus, including potential subsequent event disclosure. The joint statement encouraged companies and advisors to contact the Staff regarding any need for relief or guidance. It was further noted that based on these communications and its continuing monitoring of the situation, the Staff will determine whether to provide additional guidance and relief as appropriate for affected parties, including relief that may be made available on a case-by-case or on broader basis, as circumstances merit.

On March 4, 2020, the SEC adopted an exemptive order extending deadlines for many SEC reports and encouraged "all companies and other related persons to consider their activities in light of their disclosure obligations under the federal securities laws." In the press release announcing the order, the SEC reminded companies that when they do choose to disclose material information regarding the impact of the coronavirus, they should "take the necessary steps to avoid selective disclosures and to disseminate such information broadly" and the issuer may need to consider whether it is necessary to "revisit, refresh, or update previous disclosure to the extent that the information becomes materially inaccurate." The SEC noted that issuers providing forward-looking information about material developments, including known trends or uncertainties regarding the coronavirus, can "take steps to avail themselves of the safe harbor in Section 21E of the Exchange Act for this information."

On April 3, 2020, Sagar Teotia, then the SEC's Chief Accountant, issued a statement noting that the SEC's Office of the Chief Accountant, along with the Commission and other Divisions and Offices of the SEC, is closely monitoring the impact of issues raised by COVID-19 on investors and global capital markets. The Chief Accountant noted that, during these challenging times, "investors and other stakeholders need high-quality financial information more than ever." He noted that "to further high-quality financial information, we are available to help companies, auditors, and others with complex accounting, financial reporting, independence, and auditing issues. We are taking a proactive approach and have been engaged with stakeholders across the financial reporting ecosystem – e.g., preparers, auditors, audit committee members, investors, standard setters, and other regulators – on issues related to current market developments. We remain available for consultation and encourage stakeholders to contact our office with questions they encounter as a result of COVID-19."

According to the statement, the Office of Chief Accountant actively engaged with the Financial Accounting Standards Board ("FASB") in support of FASB's efforts to address the impacts of COVID-19. Further, the statement noted that the Office of Chief Accountant has consistently not objected to well-reasoned judgments that entities have made when making significant judgments and estimates, and they will continue to apply this perspective. The statement indicated that some of the accounting areas that may involve significant judgments and estimates in light of the evolving status of COVID-19 include: (i) fair value and impairment considerations; (ii) leases; (iii) debt modifications or restructurings; (iv) hedging; (v) revenue recognition; (vi) income taxes; (vii) going concern; (viii) subsequent events; and (ix) adoption of new accounting standards (e.g., the new credit losses standard). The Office of Chief Accountant stressed the importance of required disclosures of judgments and estimates in these and other areas.

The Office of Chief Accountant worked with market participants regarding the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"). The CARES Act, which was signed into law on March 27, 2020, allows a limited number of entities the option to temporarily defer or suspend the application of two provisions of U.S. GAAP. The statement noted that, for those entities that are eligible for and elect to apply this deferred application under either Section 4013 or Section 4014 of the CARES Act, the Staff would not object to the conclusion that this application is in accordance with GAAP for the periods for which such elections are available.

The Office of Chief Accountant has also been actively engaged and working collaboratively and constructively with the PCAOB to address emerging issues relating to COVID-19. The Office of Chief Accountant also remained actively focused on independence matters, and the statement notes that "[m]anagement and audit committees should be aware of how an auditor independence violation may affect the company's required SEC filings."

The Office of Chief Accountant also engaged in the activities of a number of international organizations and securities regulators, both as part of the Office's normal operations and specifically relating to the impact of COVID-19, including discussions with the International Accounting Standards Board on the impact of COVID-19 and through the SEC's leadership role in the Monitoring Group, a global organization composed of regulators and others dedicated to serving the public interest in areas related to international audit standard setting and audit quality.

The Office of Chief Accountant engages with stakeholders both domestically and internationally, including recent engagement with representatives from the four largest global accounting firms to discuss each of the firms' efforts to advance audit quality in emerging markets, including China, the largest emerging market economy.

The statement concluded that the "financial reporting structure is strong, thanks to the collective work of all participants in fulfilling each of our unique roles with integrity and transparency." The Office of Chief Accountant "urges all participants in the financial reporting system to continue to work together to provide investors with the high-quality financial information they need to make decisions amidst uncertainty."

On April 8, 2020, then SEC Chairman Jay Clayton and then Director of the Division of Corporation Finance William Hinman released a statement calling on public companies to provide forward-looking information in upcoming earnings releases and investor calls in light of the wide-ranging impacts from the COVID-19 pandemic and the efforts taken to mitigate the spread of the disease.

In the statement, Clayton and Hinman urged public companies "to provide as much information as is practicable regarding their current financial and operating status, as well as their future operational and financial planning."

The statement noted that "the collective national effort to mitigate the COVID-19 pandemic has caused a deep contraction in vast areas of our economy, with many workers and businesses facing profound challenges." Further, the statement indicated that, while there is broad support for a mitigation response to COVID-19, there is "broad recognition that our strategy must evolve to effectively address the health risks of COVID-19 while fostering a meaningful, responsible increase in economic activity" and the "executing such a strategy will require constant coordination among workers, consumers, businesses, governmental authorities and investors, both broadly and at the individual and firm-specific level." Further, Clayton and Hinman indicated that "[t]here now appears to be an emerging consensus that, as we develop more tools to fight COVID-19—increased testing, enhanced monitoring, data analysis, and identification of effective therapeutics—we can, anchored by advice of healthcare specialists, incrementally foster economic activity."

Clayton and Hinman indicated that public company disclosures “should reflect this state of affairs and outlook” and should address “investor interest” in:

- Where the company stands today, operationally and financially;
- How the company’s COVID-19 response, including its efforts to protect the health and well-being of its workforce and its customers, is progressing; and
- How the company’s operations and financial condition may change as all our efforts to fight COVID-19 progress, with historical information relatively less significant for this purpose.

Clayton and Hinman acknowledged that “providing detailed information regarding future operating conditions and resource needs is challenging, including because our response strategies are in their incipient stages (and are likely to change), but it is important on many levels” but indicate that “updating and refining these estimates should become less difficult over time.”

They further stated their view that “[h]igh quality disclosure will not only provide benefits to investors and companies, it also will enhance valuable communication and coordination across our economy—including between the public and private sectors—as together we pursue the fight against COVID-19” and that “[t]his transparency can foster confidence in countless specific instances, for example, between a supplier and a manufacturer as well as between an investor and a company, which in combination will benefit all.”

Clayton and Hinman encouraged public companies that respond to this call for forward-looking disclosure “to avail themselves of the safe-harbors for such statements and also note that we would not expect good faith attempts to provide appropriately framed forward-looking information to be second guessed by the SEC.” In this regard, they stated further that “[g]iven the uncertainty in our current business environment, we would not expect to second guess good faith attempts to provide investors and other market participants appropriately framed forward-looking information.”

Clayton and Hinman indicated that “[t]his quarter, earnings statements and calls will not be routine. In many cases, historical information may be substantially less relevant. Investors and analysts are thirsting to know where companies stand today and, importantly, how they have adjusted, and expect to adjust in the future, their operational and financial affairs to most effectively work through the COVID-19 health crisis.” They noted that the Staff “has encouraged earnings and related disclosures that are as timely, accurate and robust as practicable under the circumstances.” They also urged public companies, in their earnings releases and analyst calls, as well as in subsequent communications to the marketplace, “to provide as much information as is practicable regarding their current operating status and their future operating plans under various COVID-19-related mitigation conditions." This could include disclosure concerning:

- Current liquidity positions and expected financial resource needs;
- The impact of COVID-19 on operations, including "as a result of company efforts to protect worker health and well-being and customer safety;" and
- The impact of financial assistance under the CARES Act or other similar COVID-19 related federal and state programs.

Clayton and Hinman discouraged public companies from resorting to "generic, or boilerplate, disclosures that do little to inform investors of company-specific status, operational strategies and risks." Instead, they encouraged companies and their advisers "to make all reasonable efforts to convey meaningful information—information that provides investors a level of insight that allows them to see the key operational and financial considerations and challenges the company faces through the eyes of management."

Clayton and Hinman expressed the view that "robust, forward-looking disclosures will benefit investors, companies and, more generally, our fight against COVID-19," indicating that "such disclosures will facilitate communication and coordination among the public and private sectors."

On June 23, 2020, Sagar Teotia, then the Chief Accountant of the SEC, issued a statement noting that, during the course of the COVID-19 pandemic, "the financial reporting system has continued to serve its critical function of providing much-needed information to investors and our capital markets." In the statement, the Chief Accountant highlighted recent engagement with stakeholders in the financial reporting system, as well as significant accounting, auditing, and financial reporting issues addressed by the SEC's Office of Chief Accountant.

Recognizing that companies must make significant judgments and estimates to address a variety of accounting and financial reporting matters, the Chief Accountant notes that the Office of Chief Accountant has "consistently not objected to well-reasoned judgments that entities have made, and we will continue to apply this perspective." The Chief Accountant noted that companies should ensure that significant judgments and estimates "are disclosed in a manner that is understandable and useful to investors, and that the resulting financial reporting reflects and is consistent with the company's specific facts and circumstances."

The Chief Accountant noted the importance of "robust internal accounting controls to high-quality, reliable financial reporting," which include disclosure controls and procedures and internal control over financial reporting. The Chief Accountant noted that the Office of Chief Accountant understands that preparers have adapted, or are in the process of adapting, their financial reporting processes as they respond to the current environment. The Chief Accountant indicated that these changes could include considerations as to "how controls operate or can be tested and if there is any change in the risk of the control operating effectively in a telework environment." The Chief Accountant noted that changes to a company's business, as well as additional uncertainties, may result in additional risks of material misstatement to the financial statements, therefore new or enhanced controls may need to be implemented in order to mitigate such risks. The Chief Accountant reminded preparers that if any change materially affects, or is reasonably likely to materially affect, a company's internal control over financial reporting, such change must be disclosed in quarterly filings in the fiscal quarter in which it occurred (or fiscal year in the case of a foreign private issuer).

The Chief Accountant noted that U.S. GAAP presumes that a reporting entity has the ability to continue as a going concern. The Chief Accountant reminded companies that in each reporting period, including interim periods, "management should consider whether relevant conditions and events, taken as a whole, raise substantial doubt about the entity's ability to meet its obligations as they become due within one year after the issuance of the financial statements." In those situations where substantial doubt about a company's ability to continue as a going concern exists, "management should consider whether its plans alleviate such substantial doubt, and make appropriate disclosures to inform investors." The Chief Accountant noted that "such disclosures should include information about the principal conditions giving rise to the substantial doubt, management's evaluation of the significance of those conditions relative to the entity's ability to meet its obligations, and management's plans that alleviated substantial doubt." If, after considering management's plans, substantial doubt about a company's ability to continue as a going concern is not alleviated, additional disclosure is required pursuant to GAAP. The Chief Accountant noted that GAAP requires such disclosure in the notes of the financial statements, which may be in addition to other disclosure required in SEC filings.

The Chief Accountant also indicated that auditors have responsibility to evaluate a company's ability to continue as a going concern, "based on their knowledge of relevant conditions that exist at or occurred prior to the date of the auditor's report." While acknowledging that a review of interim financial information "is not designed to identify conditions or events that indicate substantial doubt about an entity's ability to continue as a going concern," the Chief Accountant noted that an auditor "may become aware of such conditions or events in the course of performing review procedures." The Chief Accountant reminded auditors that, in these situations, the auditor should discuss the matter with management and consider the adequacy of the disclosure in light of the GAAP requirements. The Chief Accountant reminded auditors that, after performing such procedures, "to the extent the auditor determines the relevant disclosure is inadequate such that it represents a departure from GAAP, the auditor should extend the procedures, evaluate the results and communicate as appropriate with the issuer and its audit committee."

Based on the Office of Chief Accountant's consultation process and outreach with public companies, auditors, and others, the Chief Accountant believed that complex financial reporting issues that arose at the onset of the pandemic were addressed effectively and in a timely manner. The Chief Accountant provided a reminder that the Office of Chief Accountant has processes in place to provide staff views on the application of U.S. GAAP and International Financial Reporting Standards (IFRS) to complex, unique, or novel issues. The Chief Accountant reported that issues addressed by the Office of Chief Accountant over the first quarter reporting cycle included the financial reporting ramifications of the CARES Act, debt modifications, hedging, consolidation, business combinations, lease concessions, revenue recognition and income taxes. As companies and auditors enter the second quarter reporting cycle, the Office of Chief Accountant expected to continue to address financial reporting issues as they arise, and the Chief Accountant encouraged engagement with the Office of Chief Accountant on questions arising from COVID-19 or other emerging issues, as well as auditor independence issues.

The Chief Accountant noted that the Office of Chief Accountant continued to be actively engaged with standard setters, other regulators, and related groups in the U.S. and internationally. The Chief Accountant reported that the Office of Chief Accountant has been in constructive dialogue with the FASB and the PCAOB "regarding their respective efforts to address emerging issues and promote high-quality financial reporting."

The Chief Accountant noted that the SEC has been working with securities regulators around the world in response to the effects of COVID-19 through the work on IOSCO's Committee 1 and has otherwise been actively engaged with other regulators. IOSCO issued a statement on May 29, 2020 emphasizing "the importance of complying with accounting and auditing standards as well as providing investors with complete, transparent and entity-specific disclosures that enable investors to better understand the risks that public companies are facing in the current environment of heightened uncertainty."

The Chief Accountant reiterated that audit committees play a key role in the financial reporting system through their oversight of financial reporting, including internal control over financial reporting and the external, independent audit process. The Chief Accountant noted that, "[i]n these times of rapid change and increased uncertainty, the need for the oversight role that audit committees play is as critical as ever." The Chief Accountant expressed the view that "the most effective audit committees are engaged, executing their responsibilities with diligence, and this engagement significantly enhances the financial reporting output."

CF Disclosure Guidance: Topic No. 9—Coronavirus (COVID-19)

CF Disclosure Guidance: Topic 9 provides the Division's views regarding disclosure and other federal securities law obligations that public companies should consider with respect to COVID-19 and related business and market disruptions. The Division states that "[c]ompanies should consider the need for COVID-19-related disclosures within the context of the federal securities laws and our principles-based disclosure system." As with the Division's other CF Disclosure Guidance Topics, the Disclosure Guidance represents the Division's views and is not a rule, regulation or statement of the Commission, and has not been approved by the Commission.

The Disclosure Guidance presents examples of disclosure considerations and provides reminders with respect to insider trading and selective disclosure requirements. The Disclosure Guidance notes the potential impacts on earnings estimates and earnings reports preceding SEC periodic reports, acknowledging that COVID-19 will likely make it more difficult for public companies and their auditors to complete the work required to maintain timely filings and encouraging public companies to proactively address financial reporting matters earlier than usual. In this regard, the Disclosure Guidance provides additional guidance regarding the use of non-GAAP financial measures.

This Disclosure Guidance provides the Division's current views regarding the following fundamental concepts that must be considered in light of COVID-19 and related business and market disruptions:

- The Division encourages timely reporting while recognizing that it may be difficult to assess or predict with precision the broad effects of COVID-19 on industries or individual companies.
- [The Division] also recognize[s] that the actual impact will depend on many factors beyond a company's control and knowledge.
- [T]he effects COVID-19 has had on a company, what management expects its future impact will be, how management is responding to evolving events, and how it is planning for COVID-19-related uncertainties can be material to investment and voting decisions.
- Companies should consider the need for COVID-19-related disclosures within the context of the federal securities laws and our principles-based disclosure system. The cornerstone of this system is disclosure of material information that is widely disseminated. It is only with this type of disclosure that all investors can make informed decisions.
- The Commission has made clear that its disclosure requirements can apply to a broad range of evolving business risks even in the absence of a specific line item requirement that names the particular risk presented. In addition, a number of existing rules or regulations require disclosure about the known or reasonably likely effects of and the types of risks presented by COVID-19.

Based on these principles, the Division expressed its view that disclosure regarding the effects and risks related to COVID-19 may be necessary in the following areas of a public company's disclosures:

- Management's Discussion and Analysis of Financial Condition and Results of Operations;
- Business;
- Risk Factors;
- Legal Proceedings;
- Disclosure Controls and Procedures;
- Internal Control over Financial Reporting; and
- Financial Statements.

The Division explains that a company's assessment of the risks and effects of COVID-19, and the related risks to a company's business operations, will be a facts and circumstances analysis that will continue to evolve and that the resulting disclosures (including any response by the company and management) should be tailored to a company's situation. In connection with the assessment of appropriate disclosures related to the effects of COVID-19, the Division set forth the following non-exhaustive list of illustrative "questions to consider with respect to their present and future operations:"

- How has COVID-19 impacted your financial condition and results of operations? In light of changing trends and the overall economic outlook, how do you expect COVID-19 to impact your future operating results and near-and-long-term financial condition? Do you expect that COVID-19 will impact future operations differently than how it affected the current period?
- How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook? Has your cost of or access to capital and funding sources, such as revolving credit facilities or other sources changed, or is it reasonably likely to change? Have your sources or uses of cash otherwise been materially impacted? Is there a material uncertainty about your ongoing ability to meet the covenants of your credit agreements? If a material liquidity deficiency has been identified, what course of action has the company taken or proposed to take to remedy the deficiency? Consider the requirement to disclose known trends and uncertainties as it relates to your ability to service your debt or other financial obligations, assess the debt markets, including commercial paper or other short-term financing arrangements, maturity mismatches between borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral, and counterparty or customer risk. Do you expect to disclose or incur any material COVID-19-related contingencies?

- How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets? For example, will there be significant changes in judgments in determining the fair-value of assets measured in accordance with U.S GAAP or IFRS?
- Do you anticipate any material impairments (e.g., with respect to goodwill, intangible assets, long-lived assets, right of use assets, investment securities), increases in allowances for credit losses, restructuring charges, other expenses, or changes in accounting judgments that have had or are reasonably likely to have a material impact on your financial statements?
- Have COVID-19-related circumstances such as remote work arrangements adversely affected your ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures? If so, what changes in your controls have occurred during the current period that materially affect or are reasonably likely to materially affect your internal control over financial reporting? What challenges do you anticipate in your ability to maintain these systems and controls?
- Have you experienced challenges in implementing your business continuity plans or do you foresee requiring material expenditures to do so? Do you face any material resource constraints in implementing these plans?
- Do you expect COVID-19 to materially affect the demand for your products or services?
- Do you anticipate a material adverse impact of COVID-19 on your supply chain or the methods used to distribute your products or services? Do you expect the anticipated impact of COVID-19 to materially change the relationship between costs and revenues?
- Will your operations be materially impacted by any constraints or other impacts on your human capital resources and productivity?
- Are travel restrictions and border closures expected to have a material impact on your ability to operate and achieve your business goals?

The Division encourages companies considering these questions to provide investors and market participants with tailored disclosure of material information concerning the impact of COVID-19 and to “proactively revise and update disclosures as facts and circumstances change.” Consistent with its long-standing statements regarding public company disclosures, the Division further encourages companies to “provide disclosures that allow investors to evaluate the current and expected impact of COVID-19 through the eyes of management.”

As the disclosures addressing the matters described in the Disclosure Guidance will likely involve forward looking information that may be based on assumptions and expectations regarding future events, the

Division reminds companies to provide that disclosure in a manner that allows them to avail themselves of the safe harbors in Section 27A of the Securities Act and Section 21E of the Exchange Act for this information.

The Disclosure Guidance provides important reminders regarding the need for companies and related persons to consider the application of the federal securities laws to their market activities, including the sale or purchase of securities. The Division provides examples of how trading matters may need to be considered, as well as the potential for selective disclosure of material nonpublic information:

- [W]here COVID-19 has affected a company in a way that would be material to investors or where a company has become aware of a risk related to COVID-19 that would be material to investors, the company, its directors and officers, and other corporate insiders who are aware of these matters should refrain from trading in the company's securities until such information is disclosed to the public.
- When companies disclose material information related to the impacts of COVID-19, they are reminded to take the necessary steps to avoid selective disclosures by disseminating such information broadly to the public. Depending on a company's particular circumstances, it should consider whether it may need to revisit, refresh, or update previous disclosure to the extent that the information becomes materially inaccurate.

The Disclosure Guidance notes the potential impacts on earnings estimates and earnings reports preceding Exchange Act periodic reports, acknowledging that COVID-19 may present novel or complex issues – such as the impact of COVID-19 on its assets, including impairment of goodwill or other assets – that may make it more difficult for companies and their auditors to complete the work required to maintain timely filings. o address these concerns, the Disclosure Guidance encourages companies to proactively address financial reporting matters earlier than usual.

In connection with earnings releases, the Disclosure Guidance discusses the use of non-GAAP financial measures. The Disclosure Guidance notes that, if a company presents a non-GAAP financial measure that adjusts for or explains the impact of COVID-19 on the company's financial results, it would be appropriate to explain why management finds the measure useful and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations.

The Disclosure Guidance also addresses the requirement to reconcile a non-GAAP financial measure to the appropriate GAAP financial measure. In this regard, the Disclosure Guidance notes that there may be instances where a GAAP financial measure is not available at the time of the earnings release because the measure may be impacted by COVID-19-related adjustments that may require additional information and analysis to complete. In these situations, the Division indicates that it would not object 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 Disclosure Guidance provides guidance regarding the application of the Division's position regarding disclosure of earnings before interest, taxes, depreciation and amortization (referred to as "EBITDA"). In this situation, a company could reconcile that measure to either its GAAP earnings, a reasonable estimate of its GAAP earnings that includes a provisional amount, or its reasonable estimate of a range of GAAP earnings, where the provisional amount or range reflects a reasonable estimate of COVID-19-related charges not yet finalized, such as impairment charges.

The Disclosure Guidance states, however, that in filings where GAAP financial statements are required, companies should reconcile to GAAP results and not include provisional amounts or a range of estimated results. Further, if a company presents non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures in reliance on the above position, the Disclosure Guidance states that the company should limit the measures in its presentation to those non-GAAP financial measures it is using to report financial results to the Board of Directors.

CF Disclosure Guidance: Topic No. 9A, Coronavirus (COVID-19)—Disclosure Considerations Regarding Operations, Liquidity, and Capital Resources

On June 23, 2020, the Division of Corporation Finance published *CF Disclosure Guidance: Topic No. 9A*, which addresses operations, liquidity, and capital resources disclosures companies should consider with respect to business and market disruptions related to COVID-19. This Disclosure Guidance notes that the Division continues to monitor how companies are disclosing the effects and risks of COVID-19 on their businesses, financial condition, and results of operations, and supplements CF Disclosure Guidance Topic No. 9 with guidance regarding additional disclosure considerations. The Staff encourages companies "to provide disclosures that allow investors to evaluate the current and expected impact of COVID-19 through the eyes of management and to proactively revise and update disclosures as facts and circumstances change." That staff notes that "[t]hese disclosures should enable an investor to understand how management and the Board of Directors are analyzing the current and expected impact of COVID-19 on the company's operations and financial condition, including liquidity and capital resources."

The Staff notes that companies have undertaken, and are generally in the process of making, a diverse range of operational adjustments in response to the effects of COVID-19. Among the adjustments that the

Staff notes are a transition to telework; supply chain and distribution adjustments; and suspending or modifying certain operations to comply with health and safety guidelines to protect employees, contractors, and customers, including in connection with a transition back to the workplace. The Staff notes that these types of adjustments "may have an effect on a company that would be material to an investment or voting decision, and affected companies should carefully consider their obligations to disclose this information to investors."

The Staff also notes that companies "are undertaking a diverse and sometimes complex range of financing activities in response to the effects of COVID-19 on their businesses and markets," which include obtaining and utilizing credit facilities, accessing public and private markets, implementing supplier finance programs, and negotiating new or modified customer payment terms. The Staff notes that these funding sources may include novel terms and structures. The Staff indicates that "[i]t is important that companies provide robust and transparent disclosures about how they are dealing with short- and long-term liquidity and funding risks in the current economic environment, particularly to the extent efforts present new risks or uncertainties to their businesses. While we have observed companies making some of these disclosures in their earnings releases, we encourage companies to evaluate whether any of the information, in light of its potential materiality, should also be included in MD&A."

The Staff encourages companies to consider a number of questions as they analyze their specific facts and circumstances and consider their disclosure obligations, including:

- What are the material operational challenges that management and the company's board of directors are monitoring and evaluating? How and to what extent has the company altered its operations, such as implementing health and safety policies for employees, contractors, and customers, to deal with these challenges, including challenges related to employees returning to the workplace? How are the changes impacting or reasonably likely to impact the company's financial condition and short- and long-term liquidity?
- How is the company's overall liquidity position and outlook evolving? If COVID-19 is adversely impacting a company's revenues, the staff indicates that the company should consider whether such impacts are material to the company's sources and uses of funds, as well as the materiality of any assumptions made about the magnitude and duration of COVID-19's impact on your revenues. Are any decreases in cash flow from operations having a material impact on the company's liquidity position and outlook?
- Has the company accessed revolving lines of credit or raised capital in the public or private markets to address liquidity needs? Are the company's disclosures regarding these actions and

any unused liquidity sources providing investors with a complete discussion of your financial condition and liquidity?

- Have COVID-19-related impacts affected the company's ability to access traditional funding sources on the same or reasonably similar terms as were available in recent periods? Has the company provided additional collateral, guarantees, or equity to obtain funding? Have there been material changes in the company's cost of capital? How has a change, or a potential change, to the company's credit rating impacted its ability to access funding? Do the company's financing arrangements contain terms that limit its ability to obtain additional funding? If so, is the uncertainty of additional funding reasonably likely to result in a decline in the company's liquidity in a way that would result in the company not being able to maintain current operations?
- Is the company at material risk of not meeting covenants in credit and other agreements?
- If a company includes metrics, such as cash burn rate or daily cash use, in its disclosures, is the company providing a clear definition of the metric and explaining how management uses the metric in managing or monitoring liquidity? Are there estimates or assumptions underlying such metrics, the disclosure of which is necessary for the metric not to be misleading?
- Has the company reduced capital expenditures and, if so, how? Has the company reduced or suspended share repurchase programs or dividend payments? Has the company ceased any material business operations or disposed of a material asset or line of business? Has the company materially reduced or increased human capital resource expenditures? Are any of these measures temporary in nature, and if so, how long will they be maintained? What factors will be considered in deciding to extend or curtail these measures? What is the short- and long-term impact of these reductions on the company's ability to generate revenues and meet existing and future financial obligations?
- Is the company able to timely service debt and other obligations? Has the company taken advantage of available payment deferrals, forbearance periods, or other concessions? What are those concessions and how long will they last? Are any liquidity challenges possible once those accommodations end?
- Has the company altered terms with customers, such as extending payment terms or refund periods, and if so, how have those actions materially affected the company's financial condition or liquidity? Did the company provide concessions or modify terms of arrangements as a landlord or lender that will have a material impact? Has the company modified other contractual arrangements in response to COVID-19 in such a way that the revised terms may materially impact the company's financial condition, liquidity, and capital resources?

- Is the company relying on supplier finance programs, otherwise referred to as supply chain financing, structured trade payables, reverse factoring, or vendor financing, to manage cash flow? Have these arrangements had a material impact on the company's balance sheet, statement of cash flows, or short- and long-term liquidity and, if so, how? What are the material terms of the arrangements? Did the company or any of its subsidiaries provide guarantees related to these programs? Does the company face a material risk if a party to the arrangement terminates it? What amounts payable at the end of the period relate to these arrangements, and what portion of these amounts has an intermediary already settled for the company?
- Has the company assessed the impact that material events that occurred after the end of the reporting period, but before the financial statements were issued, have had or are reasonably likely to have on its liquidity and capital resources and considered whether disclosure of subsequent events in the financial statements and known trends or uncertainties in MD&A is required?

The Disclosure Guidance notes that the CARES Act includes financial assistance for companies in the form of loans and tax relief in the form of deferred or reduced payments and potential refunds. The staff indicates that "companies receiving federal assistance should consider the short- and long-term impact of that assistance on their financial condition, results of operations, liquidity, and capital resources, as well as the related disclosures and critical accounting estimates and assumptions." The staff suggests that companies should consider the following questions:

- How does a loan impact the company's financial condition, liquidity, and capital resources? What are the material terms and conditions of any assistance received, and does the company anticipate being able to comply with them? Do those terms and conditions limit the company's ability to seek other sources of financing or affect the company's cost of capital? Does the company reasonably expect restrictions, such as maintaining certain employment levels, to have a material impact on revenues or income from continuing operations or to cause a material change in the relationship between costs and revenues? Once any such restrictions lapse, does the company expect to change its operations in a material way?
- Is the company taking advantage of any recent tax relief, and if so, how does that relief impact short- and long-term liquidity? Does the company expect a material tax refund for prior periods?
- Does the assistance involve new material accounting estimates or judgments that should be disclosed or materially change a prior critical accounting estimate? What accounting estimates were made, such as the probability a loan will be forgiven, and what uncertainties are involved in applying the related accounting guidance?

The Disclosure Guidance indicates that "[m]anagement should consider whether conditions and events, taken as a whole, raise substantial doubt about the company's ability to meet its obligations as they become due within one year after the issuance of the financial statements. Where there is substantial doubt about a company's ability to continue as a going concern or the substantial doubt is alleviated by management's plans, management should provide the appropriate respective disclosures in the financial statements and consider the following questions regarding the company's MD&A disclosure:

- Are there conditions and events that give rise to the substantial doubt about the company's ability to continue as a going concern? For example, has the company defaulted on outstanding obligations? Has the company faced labor challenges or a work stoppage?
- What are the company's plans to address these challenges? Has the company implemented any portion of those plans?

CHAPTER 4

SHAREHOLDER ACTIVISM AND CORPORATE GOVERNANCE

SHAREHOLDER ACTIVISM AND CORPORATE GOVERNANCE

Introduction

Continued shareholder concerns over corporate governance and executive compensation issues will shape the outcome of votes in the 2023 proxy season. Issuers will need to continue to focus on voting policies of institutional shareholders and proxy advisory services when making corporate governance and executive compensation decisions.

Trends in Shareholder Proposals

Governance-related Shareholder proposals in 2022 focused on:

- Board and employee diversity;
- Climate change;
- Other environmental and social matters;
- Compensation-related proposals;
- Majority voting for directors (particularly at Russell 3000 companies);
- Shareholder ability to call special meetings and take action by written consent;
- Declassified board of directors;
- Proxy access shareholder proposals;
- Disclosure, limits, board oversight, and shareholder approval or ratification of political contributions and lobbying; and
- Independent board chair proposals.

Evolution of Proxy Access

Section 971 of the Dodd-Frank Act provided the SEC with authority to promulgate “proxy access” rules, allowing specified shareholders to include director nominees in a company’s proxy materials. The Dodd-Frank Act did not prescribe specific standards for these rules, and the SEC had in fact proposed proxy access rules prior to enactment of the Dodd-Frank Act. The SEC issued final rules facilitating shareholder director nominations on August 25, 2010, and such rules were scheduled to become effective on November 15, 2010. However, the effectiveness of those rules was stayed due to litigation challenging the rules.

Under Rule 14a-11 as adopted by the SEC, qualifying shareholders or groups holding at least three percent of the voting power of a company's securities, who had held their shares for at least three years, would have had the right to include director nominees in proxy materials upon meeting certain other requirements. An amendment to Rule 14a-8 provided that companies may not exclude from their proxy materials shareholder proposals for less restrictive proxy access procedures. However, on September 29, 2010, the Business Roundtable and Chamber of Commerce of the United States of America filed a petition with the United States Court of Appeals for the District of Columbia Circuit (the "Court") seeking judicial review of the changes to the SEC's proxy access rule, and on the same day filed with the SEC a request to stay the effective date of Rule 14a-11. On October 4, 2010, the SEC granted the request for a stay of the Rule 14a-11 and associated rules pending resolution of the petition for review by the Court.

On July 22, 2011, the Court vacated Rule 14a-11. The Court held that the SEC was "arbitrary and capricious" in promulgating Rule 14a-11, based principally on the SEC's failure to adequately address the economic effects of the rule. The Court expressed significant concerns about the conclusions that the SEC reached and the agency's consideration of comments during the course of the rulemaking. The Court did not address the First Amendment challenge to the rule that had been raised by the petitioners. On September 6, 2011, the SEC issued a statement indicating that it would not seek rehearing of the Court's decision, nor would it seek Supreme Court review of the decision; however, the SEC's staff would continue to study the viability of a proxy access rule. The statement also indicated that the amendment to Rule 14a-8 referenced above would go into effect when the Court's mandate was finalized, which occurred on September 14, 2011. As a result, the amendments to Rule 14a-8 (along with other rules adopted in connection with Rule 14a-11) became effective on September 20, 2011, following the SEC's publication of a notice announcing the effective date of the rule changes.

The amendments to Rule 14a-8 have permitted the type of "private ordering" for proxy access through the shareholder proposal process that many commenters had supported in the course of the proxy access rulemaking. Under Rule 14a-8(i)(8), as amended, a company may not exclude under this basis for exclusion a shareholder proposal that would amend or request that the company consider amending governing documents to facilitate director nominations by shareholders or disclosures related to nominations made by shareholders, as long as such proposal does not conflict with Rule 14a-11 and is not otherwise excludable under some other procedural or substantive basis in Rule 14a-8. The SEC also codified some of the Staff's historical interpretations of 14a-8(i)(8) which permitted exclusion of a shareholder proposal that would: (i) seek to disqualify a nominee standing for election; (ii) remove a director from office before the expiration of his or her term; (iii) question the competence, business judgment or character of a nominee or director; (iv) nominate a specific individual for election to the board of directors, other than through the

Rule 14a-11 process, an applicable state law provision, or an issuer's governing documents; or (v) otherwise affect the outcome of the upcoming election of directors.

While the SEC's amendments to Rule 14a-8(i)(8) eliminated one basis to exclude proxy access shareholder proposals, there may be other options for seeking to exclude proxy access shareholder proposals. An issuer could: (i) argue that the proposal is contrary to the proxy rules under Rule 14a-8(i)(3), i.e., the resolution contained in the proposal is inherently vague or indefinite; (ii) that by adopting its own proxy access bylaw amendment, the shareholder's proxy access proposal has been "substantially implemented" under Rule 14a-8(i)(10); (iii) the shareholder proposal conflicts with a similar company-sponsored proposal under Rule 14a-8(i)(9), however the Staff issued SLB No. 14H which substantially reduced the ability to rely on this basis for exclusion; or (iv) other potential bases for exclusion that may be applicable based on the wording of the proposal and supporting statement.

In November 2014, the Comptroller of the City of New York, on behalf of the New York City pension funds, launched a large-scale campaign for the 2015 proxy season targeting 75 issuers with a proxy access shareholder proposal. The campaign is called the "Boardroom Accountability Project." The Comptroller's office indicated this initiative is part of a wider effort to implement universal proxy access through private ordering.

The New York City Comptroller indicated that the 75 Boardroom Accountability Project proposals were submitted to issuers that were selected based on three priority issues: "climate change, board diversity, and excessive CEO pay." Based on that analysis, the proposals were submitted to: (1) 33 carbon-intensive coal, oil and gas, and utility companies; (2) 24 companies with few or no women directors, and little or no apparent racial or ethnic diversity; and (3) 25 companies that received significant opposition to their 2014 say-on-pay votes. The 75 identical precatory proposals submitted by the Comptroller requested that the board of directors adopt, and present for shareholder approval, a bylaw to give shareholders who meet a threshold of owning 3 percent of an issuer's shares continuously for three or more years the right to list their director candidates, representing up to 25 percent of the board, in the issuer's proxy materials. The proposal contemplated that the nominating shareholder would provide notice to the issuer, within the time specified in the bylaws, and would provide at that time the information required by the bylaws and the SEC's rules about both the director nominee and the nominator. The proposal also contemplated that the nominating shareholder would certify that (1) it will assume liability stemming from any legal or regulatory violation arising out of the nominator's communications with the issuer's shareholders; (2) it will comply with all applicable laws and regulations if it uses soliciting material other than the issuer's proxy materials; and (3) to the best of its knowledge, the required shares were acquired in the ordinary course of business and not to change or influence control of the issuer.

The proposal further provided that the nominating shareholder may submit a 500-word statement in support of the director nominee. The proposal would leave to the board the ability to adopt procedures to deal with whether submissions are timely and adequate, as well as how to prioritize multiple nominees. The proposal's supporting statement was very limited, noting a 2014 CFA Institute study which concluded that proxy access would "benefit both the markets and corporate boardrooms, with little cost or disruption" and has the potential to raise overall US market-capitalization by "up to $140.3 billion if adopted market-wide."

The New York City Comptroller resumed the Boardroom Accountability Project in the 2016 proxy season, targeting 74 large-cap companies based on board diversity, excessive CEO pay, or operation in the fossil fuels industry. Shareholders continue to submit shareholder proposals asking companies to adopt proxy access and seeking to change specific provisions of existing proxy access bylaws.

In November 2016, a proxy access bylaw was utilized for the first time when GAMCO Asset Management announced that it had used the proxy access provision in the bylaws of National Fuel Gas to nominate a director to be elected at National Fuel Gas's 2017 Annual Meeting. GAMCO Asset Management and its affiliates beneficially owned approximately 7.8% of the company's common stock. National Fuel Gas rejected the proxy access nomination, indicating that GAMCO Asset Management could not make the representation that the shares it owned were acquired in the ordinary course of business and not with an intent to change or influence control of the company, and the shareholder did not presently have such intent. GAMCO Asset Management subsequently announced that its director nominee had withdrawn his candidacy and that GAMCO would not pursue proxy access.

By the end of 2022, a substantial majority of S&P 500 companies had adopted proxy access provisions.

Adoption of Universal Proxy

On November 17, 2021, the SEC adopted amendments to the proxy rules to require the use of a universal proxy card in proxy contests for most SEC-registered companies. The new rules do not apply to registered investment companies and business development companies. The SEC indicates in the adopting release that these changes, which were originally proposed in 2016, are intended to "enhance the ability of shareholders to elect directors though the proxy process in a manner consistent with their ability to vote in person at a shareholder meeting." The rule changes became effective on January 31, 2022; however, the rules were subject to a transition period and therefore began to apply for any shareholder meetings held after August 31, 2022.

Mandatory Use of Universal Proxies in Non-exempt Solicitations

Prior to the amendments to Rule 14a-19(e), shareholders voting by proxy in a contested director election were generally unable to vote for a combination of director nominees from competing slates, while shareholders attending and voting at the meeting could vote for any combination of duly-nominated director nominees presented by all parties.

The SEC amended Rule 14a-19(e) to mandate the use of universal proxy cards, with the names of company, dissident, and other shareholder nominees, by registered companies (other than registered investment companies and business development companies) in non-exempt director election contests.

The SEC also amended the formatting and presentation requirements for universal proxy cards to require the conditions below, among others:

• The proxy card must set forth the names of all duly nominated director candidates;

- The proxy card must provide a means for shareholders to grant authority to vote for the nominees set forth in the proxy card;
- The proxy card must clearly distinguish among company nominees, dissident nominees, and proxy access nominees, with nominees being listed in alphabetical order within each group;
- The proxy card must present all nominees in the same font type, style, and size;
- The proxy card must prominently disclose the maximum number of nominees for which authority to vote can be granted; and
- The proxy card must prominently disclose the treatment and effect of a proxy executed in a manner that grants authority to vote for more nominees than the number of directors being elected, in a manner that grants authority to vote for fewer nominees than the number of directors being elected, or in a manner that does not grant authority to vote with respect to any nominees.

Notice of Nominees, Deadline to File Definitive Proxy Statement

The SEC amended Rule 14a-19(b), as proposed, to require that a dissident provide the company with the names of its nominees no later than 60 calendar days before the anniversary of the previous year's annual meeting date. The SEC also adopted, as proposed, a requirement for the dissident in a contested director election to file its definitive proxy statement by the later of 25 calendar days prior to the meeting date or five calendar days after the registrant files its definitive proxy statement.

The SEC also amended Rule 14a-19(d), requiring a company to notify the dissident of the names of its nominees no later than 50 calendar days prior to the anniversary of the previous year's annual meeting date.

The rules as amended will allow both dissidents and companies to change their nominees after providing the initial notice under Rule 14a-19, while requiring prompt notice of any changes in nominees. Further, the rules do not require dissidents or companies to provide notice under Rule 14a-19 if the information required by the notice is provided by the applicable deadlines in a preliminary or definitive proxy statement.

Minimum Solicitation Requirements for Dissidents

The SEC requires that the dissident in a contested election must (i) solicit holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors and (ii) make a statement in its proxy materials and notice to the registrant affirming its intention to satisfy the minimum solicitation requirement. To address some commenters' concerns regarding costs imposed on dissidents to deliver proxy materials to shareholders, the SEC notes in the Adopting Release that "the adopted rules, like the Proposed Rules, do not mandate a specific method of furnishing the proxy materials. A dissident may choose to use the less costly e-proxy delivery method (i.e., the "notice and access" method of mailing a notice of internet availability and posting the proxy materials on a website) should it wish."

Access to Information for Nominees

As amended, Item 7(h) of Schedule 14A requires each party in a contested election to "refer shareholders to the other party's proxy statement for information about the other party's nominees and explain that shareholders can access the other party's proxy statement without cost on the [SEC]'s website." Amended Rule 14a-5(c) allows parties to refer to information that would be furnished in the other party's filing in order to satisfy disclosure obligations.

The SEC also changed the definition of "participant" in Instruction 3 to Items 4 and 5 of Schedule 14A, clarifying that only a party's own nominees would be considered "participants" in that party's solicitation, even though all nominees would be included on the universal proxy card.

Voting Standards Disclosure and Voting Options

As adopted, Rule 14a-4(b) requires the inclusion of an "against" voting option, rather than a "withhold authority to vote" option, on the form of proxy for director elections where there is a legal effect to an "against" vote and prohibits the inclusion of an "against" voting option on a proxy card where there is no legal effect to an "against" vote. Similarly, Rule 14a-4(b) requires the inclusion of an "abstain" voting option, rather than a "withhold authority to vote" option, in a director election with a majority voting standard.

Bona Fide Nominees and Short Slate Rule

Previously, a bona fide nominee would be required to consent to being named in the proxy statement of the party listing that nominee on its card. In order to facilitate universal proxy requirements, the SEC expanded the scope of a bona fide nominee's consent in an election contest to "include consent to being named in *any* proxy statement for the applicable meeting."

The SEC also eliminated the short slate rule, which "allows dissidents soliciting in support of a partial slate of nominees that would make up a minority of the board of directors to seek authority to vote for some of a registrant's nominees," for companies that will be subject to the universal proxy requirements, noting that "it would be unnecessary with a universal proxy requirement and the revised bona fide nominee rule." The SEC clarified that the short slate rule would still be available with respect to registered investment companies and business development companies, as they are not subject to universal proxy requirements at this time.

Key Proxy Advisory Firm Voting Guidelines

The proxy advisory firms ISS and Glass Lewis released the 2023 updates to their U.S. proxy voting guidelines. Key changes to the ISS and Glass Lewis proxy voting guidelines are summarized below.

Overboarding

Glass Lewis generally will recommend against any of the following:

- A director who serves as an executive officer (other than executive chair) of any public issuer while serving on more than one external public issuer board;
- A director who serves as an executive chair of any public issuer while serving on more than two external public issuer boards; and
- Any other director who serves on more than five public issuer boards.

Diversity

Beginning with 2023 annual meetings, Glass Lewis will generally recommend against nominating committee chairs of boards of directors at Russell 3000 issuers where the board is not at least 30% gender diverse. For issuers that are outside the Russell 3000 index, Glass Lewis will continue to apply its policy requiring one gender diverse director. Glass Lewis will consider situations where the board has provided a sufficient rationale or clearly articulated a plan to address lack of gender diversity, such as a timeline to appoint additional gender diverse directors, generally by the next annual shareholder meeting. Glass Lewis will generally recommend against nominating committee chairs of boards at Russell 1000 issuers with fewer than one underrepresented community director, defined as an individual who self-identifies as Black, African American, North African, Middle Eastern, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaskan Native, or who self-identifies as gay, lesbian, bisexual or transgender. Glass Lewis may refrain from recommending against nominating committee chairs where the issuer has provided an adequate rationale or stated a plan to remedy the lack of board diversity.

Glass Lewis assesses the quality of board diversity disclosure based on the following categories:

- The board's current percentage of racial/ethnic diversity;
- Whether the board defines diversity to explicitly include gender and/or race/ethnicity;
- Whether the board has adopted the "Rooney Rule" requiring women and minorities to be included in the initial pool of director candidates; and
- Board skills disclosure.

Glass Lewis will generally recommend against the nominating committee chair and/or governance committee chair at any Russell 1000 issuer that: (i) has not provided any disclosure in each of the foregoing categories; and/or (ii) has not provided any disclosure of individual or aggregate racial/ethnic minority board demographic information.

ISS expanded the scope of its existing U.S. board gender diversity policy to generally vote against or withhold from the nominating committee chair or other relevant directors at *all* U.S. issuers with no women on the board. The one-year grace period that limited the scope of this policy to the Russell 3000 and S&P 1500 companies ended on February 1, 2023. Under this policy, ISS will make an exception when there was at least one woman on the board at the preceding annual meeting and the board makes a firm commitment to return to gender diversity within one year.

Board Oversight of Environmental and Social Issues

Glass Lewis will generally recommend against governance committee chairs of Russell 1000 issuers that fail to disclose the board's role in overseeing environmental and social issues, including matters such as diversity, climate change, human capital management, relations among stakeholders and health, safety and environment. Glass Lewis expects the disclosure to address the issuer's overall governance practices, as well as which directors or committees are responsible for oversight of environmental and social issues. Glass Lewis has expanded its tracking of board-level oversight of environmental and social issues to all Russell 3000 issuers.

Board Oversight of Cyber Risks

Glass Lewis established a new cyber risk oversight and disclosure policy, under which Glass Lewis will closely evaluate cyber-related disclosure where cyberattacks have caused significant harm to shareholders. Glass Lewis may recommend against appropriate directors in situations where the disclosure or oversight is not sufficient.

Climate Accountability

Glass Lewis has indicated that issuers whose GHG emissions represent a financially material risk must provide clear and comprehensive disclosure regarding these risks in line with the disclosures recommended by TCFD. Glass Lewis may recommend against appropriate directors in situations where the disclosure is not sufficient.

ISS has revised what it deems to be "appropriate GHG emissions reduction targets" and extended its policies with respect to board accountability for climate risk and performance globally. The revised policy on climate board accountability requires that companies in the Climate Action 100+ Focus Group (those issuers that ISS deems to be "significant greenhouse gas ('GHG') emitters") must take minimum steps to understand and mitigate risks related to climate change to the company and the larger economy. ISS uses two criteria to assess whether a significant GHG emitter has taken the required minimum steps:

- A significant GHG emitter must provide detailed disclosure of climate-related risks, such as disclosures aligned with the recommendations of the Task Force on Climate-related Financial Disclosures ("TCFD"), including disclosure of board governance measures, corporate strategy, risk management analyses, and metrics and targets.
- ISS defines "appropriate GHG emissions reduction targets" to include medium-term GHG reduction targets or Net Zero by 2050 GHG reduction targets, in each case, for at least 95% of an issuer's Scope 1 and 2 emissions.
- In cases where a "significant GHG emitter" fails to provide these disclosures and set appropriate emissions reduction targets, ISS will generally withhold from or recommend against responsible directors (such as the incumbent chair of the responsible committee) and/or other relevant voting items.

Racial Equity Audits

ISS will evaluate shareholder proposals requesting that an issuer conduct an independent racial equity audit by considering the following factors:

- The issuer's established framework for addressing racial inequity internally;
- Whether the issuer has sufficient disclosures regarding workforce diversity and inclusion goals and metrics;
- Whether the issuer has issued a public statement related to its racial justice efforts or committed to an internal review;
- Whether the issuer has engaged with impacted communities, stakeholders and civil rights experts;
- The issuer's recent track record on racial justice measures and outreach; and
- Whether the issuer has been the subject of recent controversy related to racial inequity.

Political Expenditures and Lobbying

ISS will generally recommend on a case-by-case basis on shareholder proposals requesting greater transparency on an issuer's alignment of its political contributions to its political commitments and/or its climate lobbying to its climate goals, considering the following factors:

- The issuer's policies, management, oversight, governance and existing level of disclosure (including payments to trade associations);
- Any lack of congruency between its political expenditures and its stated values; and
- Any recent significant controversies.

Officer Indemnification and Exculpation

Effective August 1, 2022, Delaware corporations may adopt charter provisions that will permit officers to be exculpated from direct claims by stockholders for breaches of the fiduciary duty of care in certain situations. ISS will evaluate proposals seeking to amend the charter to include exculpation provisions for officers on a case-by-case basis. ISS will assess whether proposed changes are reasonable, considering the stated rationale for the proposed change and the scope, as well as (if applicable) whether the proposal would expand coverage beyond just legal expenses for more serious violations of fiduciary obligations than mere carelessness. ISS will also consider whether the proposal being voted on would provide for mandatory indemnification where indemnification was previously at the discretion of the board of directors.

Glass Lewis will also evaluate officer exculpation proposals on a case-by-case basis. Glass Lewis may recommend against officer exculpation provisions eliminating monetary liability for breaches of the duty of care, absent a compelling rationale.

Unequal Voting Rights

Following the expiration of a one-year grace period, ISS will now withhold or recommend against directors at all companies that have unequal voting rights due to multi-class share structures, except for the following situations:

- Newly public companies with a sunset provision of no more than seven years from the date of going public;
- REIT limited partnerships and operating partnerships;
- Situations of de minimis inequity; and
- Situations where, in ISS's view, the company has sufficient protections in place for minority shareholders.

Adverse Governance Structures of Newly Public Issuers

ISS indicates that, for the purposes of its adverse governance structures policy, a "newly public company" is a company that holds or held its first annual public shareholder meeting after February 1, 2015. ISS indicates that a seven-year sunset provision will be considered as a mitigating factor for problematic governance structures, such as classified boards or supermajority voting.

Unilateral Charter or Bylaw Amendments

ISS amended its policy regarding unilateral charter or bylaw amendments to explicitly include the unilateral adoption by the board of fee-shifting provisions. If such an amendment is adopted, ISS will generally recommend against directors at subsequent shareholder meetings. ISS also applies this policy in the event of the unilateral adoption by the board of any other charter or bylaw provision deemed "egregious."

Short-Term Poison Pills

ISS will now consider the appropriateness of the board's action, the share ownership trigger threshold and the issuer's market capitalization (including the absolute level and any sudden changes) when evaluating short-term poison pills (those with a term of one year or less) that an issuer adopts without shareholder approval. If ISS determines that a poison pill is inappropriate under its case-by-case approach, it will generally recommend against or withhold from all board nominees.

Compensation

Glass Lewis revised the threshold for the minimum percentage of the long-term incentive grant that should be performance-based from 33% to 50%.

Board Diversity

Investor and Proxy Advisory Service Focus on Board Diversity

Beginning with 2023 annual meetings, Glass Lewis will generally recommend against nominating committee chairs of boards of directors at Russell 3000 issuers where the board is not at least 30% gender diverse. For issuers that are outside the Russell 3000 index, Glass Lewis will continue to apply its policy requiring one gender diverse director. Glass Lewis will consider situations where the board has provided a sufficient rationale or clearly articulated a plan to address lack of gender diversity, such as a timeline to appoint additional gender diverse directors, generally by the next annual shareholder meeting. Glass Lewis will generally recommend against nominating committee chairs of boards at Russell 1000 issuers with fewer than one underrepresented community director, defined as an individual who self-identifies as Black, African American, North African, Middle Eastern, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaskan Native, or who self-identifies as gay, lesbian, bisexual or transgender. Glass Lewis may refrain from recommending against nominating committee chairs where the issuer has provided an adequate rationale or stated a plan to remedy the lack of board diversity.

Glass Lewis assesses the quality of board diversity disclosure based on the following categories:

- The board's current percentage of racial/ethnic diversity;
- Whether the board defines diversity to explicitly include gender and/or race/ethnicity;
- Whether the board has adopted the "Rooney Rule" requiring women and minorities to be included in the initial pool of director candidates; and
- Board skills disclosure.

Glass Lewis will generally recommend against the nominating committee chair and/or governance committee chair at any Russell 1000 issuer that: (i) has not provided any disclosure in each of the foregoing categories; and/or (ii) has not provided any disclosure of individual or aggregate racial/ethnic minority board demographic information.

ISS has expanded the scope of its existing U.S. board gender diversity policy to generally vote against or withhold from the nominating committee chair or other relevant directors at *all* U.S. issuers with no women on the board. The one-year grace period that limited the scope of this policy to the Russell 3000 and S&P 1500 companies ended on February 1, 2023. Under this policy, ISS will make an exception when there was at least one woman on the board at the preceding annual meeting and the board makes a firm commitment to return to gender diversity within one year.

New York City Comptroller Scott M. Stringer announced the “Boardroom Accountability Project 3.0” in 2019. The Comptroller is the investment advisor to, and custodian and a trustee of, the New York City Retirement Systems, which have more than $200 billion in assets under management. The Comptroller asked the boards of directors of 56 S&P 500 companies to adopt a diversity search policy requiring that the initial lists of candidates from which new director nominees and chief executive officers are chosen include qualified female and racially/ethnically diverse candidates, and that director searches include candidates from non-traditional environments such as government, academic or non-profit organizations in order to broaden the pool of candidates considered. The Comptroller also indicated that the policy should provide that any third-party consultant asked to conduct a director or CEO search will be required to follow the policy.

State Street expects its portfolio companies to have at least one woman serving on their boards. Additionally, beginning in the 2023 proxy season, State Street expects boards to be comprised of at least 30 percent women directors for companies in major indices in the US. In each instance, State Street will vote against the chair of the board’s nominating committee or the board leader should a company fail to meet these expectations. State Street will take voting action against responsible directors if: (i) companies in the S&P 500 do not have a person of color on their board; (ii) companies in the S&P 500 do not disclose the racial and ethnic diversity of their boards; and (iii) companies in the S&P 500 do not disclose their EEO-1 reports.

Vanguard’s voting policies indicate that board diversity disclosure should at least include the genders, races, ethnicities, tenures, skills, and experience that are represented on the board. Disclosure of personal characteristics (such as race and ethnicity) should be on a self-identified basis and may occur at an aggregate level or at the director level. Disclosure of tenure, skills, and experience at the director level is expected. Vanguard will vote against the nominating and/or governance committee chair (or other director if needed) if a company’s board is making “insufficient progress” in its diversity composition and/or in addressing its board diversity-related disclosures. Vanguard will consider applicable market regulations & expectations, company-specific context, diversity of personal characteristics (gender, race, ethnicity, tenure, skills, experience), and believes that boards should reflect a composition that is appropriately representative given their markets and strategies. Vanguard's approach to shareholder proposals that call for skills matrix disclosures and board diversity policies is unchanged from last year.

In 2022, BlackRock added an aspirational goal of at least one director who identifies as a member of an underrepresented group to its existing targets for companies of 30 percent diversity of membership and at least two directors who identify as female. BlackRock defines "underrepresented group" as including (but not limited to): (i) individuals identifying as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, or Native Hawaiian or Pacific Islander; (ii) individuals who identify as LGBTQ+; (iii) individuals who identify as underrepresented based on national, Indigenous, religious or cultural identify; (iv) individuals with disabilities; and (v) veterans. A company's failure to meet these goals does not necessarily result in a vote against nominating committee members. BlackRock may vote against when "a company has not adequately accounted for diversity in its board compositions within a reasonable timeframe."

Legal Developments

In September 2018, California enacted a law that requires that public companies (defined as corporations listed on major U.S. stock exchanges) that have principal executive offices located in California must include a "representative number" of women on their boards of directors. Under the law, each public company was required to have a minimum of one woman on its board of directors by the close of 2019. That minimum increased to two by December 31, 2021, if the corporation has five directors, and to three women directors if the corporation has six or more directors. Section 301.3(c) of the California Corporations Code required the Secretary's office to publish on its website a report documenting the number of domestic and foreign corporations whose principal executive offices, according to the corporation's SEC filings, are located in California and who have at least one female director. Subsection (d) of Section 301.3 requires that another report be posted on March 1, 2020 and annually thereafter, which updates that information and also reports the number of publicly held corporations that moved their U.S. headquarters to or from California during the last year and the number of publicly held corporations that were subject to the requirements during the preceding year, but were no longer publicly traded. The law also authorizes the imposition of fines for violations of the new law and authorizes the Secretary to adopt implementing regulations.

In September 2020, California enacted a law that requires all publicly held companies with headquarters in California to have a minimum ratio of board members from underrepresented communities. Under this new law, boards must have a minimum of one director from an under-represented community on its board by no later than December 31, 2021. By no later than December 31, 2022, the board must have at least: (i) three directors from underrepresented communities if the board has nine or more directors; (ii) two directors from underrepresented communities if the board has more than four but fewer than nine directors; or (iii) one director from an under-represented community if the board has four or fewer directors. The bill defines a director from an under-represented community as "an individual who self-identifies as black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaska Native, or who self-identifies as gay, lesbian, bisexual or transgender."

These laws remain subject to litigation challenges that have prevented them from being implemented.

SEC Disclosure Considerations

The SEC's disclosure rules require disclosure of whether and, if so, how the nominating committee considers diversity in identifying director nominees. Further, if the nominating committee or the board has a policy with regard to the consideration of diversity in identifying director nominees, then disclosure is required of how the policy is implemented and monitored for effectiveness. In particular, Item 407(c)(2)(vi) of Regulation S-K requires disclosure of "whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented." In adopting this new requirement, the SEC has not defined the term "diversity," leaving it to each issuer to define diversity in the way that the issuer deems appropriate. The SEC noted that some issuers may define diversity to include "differences of viewpoint, professional experience, education, skill and other qualities or attributes that contribute to board heterogeneity," while other issuers may define diversity to include race, gender and national origin.

After the rules became effective, some issuers expressly disclaimed any policy on diversity, but the Staff consistently raised a comment requesting the "policy" disclosure whenever diversity is mentioned in a filing. In many cases, issuers have addressed diversity in the context of the director qualifications considered in the nomination process, and even if the word "diversity" is not used directly, but the disclosure implies the consideration of a broad range of skills and qualifications, the Staff will raise a comment asking for the complete diversity disclosure. As a result, the Staff's interpretation contemplates the policy disclosure whenever diversity (however defined) is considered, even if no such policy is actually articulated in writing. The additional disclosure required once it is determined that a diversity "policy" exists involves discussing how the policy has been implemented (i.e., through the nominating committee process) and how it is monitored (i.e., typically through the annual committee and/or board self-evaluation process).

In January 2016, then SEC Chair Mary Jo White asked the Staff in the Division of Corporation Finance to review board diversity disclosures and formulate recommendations for the Commission. At around the same time, a GAO report requested by Rep. Carolyn Maloney (D-NY) called for increased public disclosure requirements as one of several approaches toward increasing board gender diversity, and Rep. Maloney asked former Chair White to pursue a rulemaking to require expanded disclosure concerning a director nominee's gender, race and ethnicity. In response to the former Chair's request, the Staff reviewed the state of disclosure under Item 407(c)(2)(vi) and generally has observed that it is less clear from the disclosures reviewed how issuers have considered diversity. No rule changes have been proposed to date.

In 2019, the Staff issued new Regulation S-K Compliance and Disclosure Interpretations that relate to diversity disclosure. These interpretations apply to both Item 401 of Regulation S-K and Item 407 of Regulation S-K. The new Compliance and Disclosure Interpretations are Questions 116.11 and 133.13. The question in the interpretation asks what type of disclosure is required under Item 401 and Item 407 of Regulation S-K where directors or nominees have voluntarily provided "self-identified specific diversity characteristics, such as their race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background," and consented to disclosure of these diversity characteristics. Item 401(e) of Regulation S-K requires the company to "briefly discuss the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director for the registrant at the time that the disclosure is made, in light of the registrant's business and structure." Pursuant to the Staff's guidance, to the extent those self-identified diversity characteristics were considered by the board or nominating committee in assessing whether the person's "experience, qualifications, attributes or skills" were appropriate for the board, the Staff expects the discussion required by Item 401 of Regulation S-K to include, among other things, "identifying those characteristics and how they were considered." The Staff expects the description of diversity policies under Item 407 to "include a discussion of how the company considers the self-identified diversity attributes of nominees as well as any other qualifications its diversity policy takes into account, such as diverse work experiences, military service, or socio-economic or demographic characteristics."

The SEC has indicated that intends to propose rule amendments in 2023 addressing board diversity disclosure.

Nasdaq Requirements

On December 1, 2020, Nasdaq announced that it filed with the SEC a proposal to advance board diversity and enhance transparency of board diversity statistics through new listing requirements. The SEC approved the Nasdaq proposal in August 2021.

All operating companies listed on Nasdaq's U.S. exchange must use the Board Diversity Matrix that Nasdaq has established, or a format substantially similar, to annually disclose board-level diversity data. Companies must provide this disclosure in the company's proxy statement or its information statement (or if the company does not file a proxy or information statement, its Form 10-K or 20-F), or on the company's website. The matrix does not require diversity information that is specific to each director, rather statistical information is required for broad categories such as gender identity and demographic background (e.g., race and LGBTQ+). The information provided in the Board Diversity Matrix must be based on voluntary self-identification by each member of the company's board of directors. In its guidance to listed companies, Nasdaq provides examples of acceptable and unacceptable disclosures in response to this requirement.

Nasdaq-listed companies were first required to disclose the Board Diversity Matrix in 2022.

For the first year that a listed company is required to disclose board diversity statistics in the Board Diversity Matrix, the company is required to include board diversity statistics for the current year only. Each subsequent year, the listed company is required to publish the required board diversity statistics for the current year and the prior year. Nasdaq has said in its guidance that it is acceptable for companies to supplement the Board Diversity Matrix with additional information below the matrix or in a separate table.

Nasdaq points out that, to the extent a company elects to provide supplemental information in any year, it is not required to continue to provide the same disclosure in subsequent years.Nasdaq has suggested in its guidance that listed companies may use their D&O Questionnaires as a means for soliciting voluntary information about director diversity. Nasdaq has provided sample questions that listed companies may want to consider including in their D&O Questionnaires to facilitate their compliance with the disclosure requirement.

Nasdaq notes in its guidance that directors may choose to opt out rather than tell the company about their diversity characteristics, and in this case the listed company would need to include these directors in the "Did Not Disclose" category in the Board Diversity Matrix. Further, if a listed company is unable to meet the board diversity objective aspect of the rule as a result of one or more directors opting out of voluntary disclosure, then the listed company may provide the alternative public disclosure under Rule 5605(f)(2), explaining that the company has directors who do not wish to be identified or counted as diverse in order to satisfy the rule.

The diversity objectives aspect of the Nasdaq requirements specifies that Nasdaq listed companies that are not subject to exceptions or accommodations must either: (i) have at least two diverse directors, including one director who self-identifies as female and one director who self-identifies as either an “Underrepresented Minority” or LGBTQ+; or (ii) explain why they do not have two diverse directors.

For companies incorporated in the U.S., the term “Underrepresented Minority” means an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities. “Two or More Races or Ethnicities” means a person who identifies with more than one of the following categories: White (not of Hispanic or Latinx origin), Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander. The definition of “Underrepresented Minority” is consistent with the categories reported to the U.S. Equal Employment Opportunity Commission through the Employer Information Report EEO-1 form. Directors who self-identify as biracial or multi-ethnic are counted as diverse under Nasdaq’s board diversity requirement. A company cannot double count the same director in more than one diverse category. For example, if a company has one director who self identifies as female and from an Underrepresented Minority, and no other director self-identifies as female or in any of the other diverse categories, then that company would not satisfy both diversity objectives.

Foreign Issuers may satisfy the minimum diversity objectives by including two female directors, or by including a female director and an individual who self-identifies as LGBTQ+ or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country where the Foreign Issuer’s principal executive offices are located. Nasdaq defines a “Foreign Issuer” as: (i) a “Foreign Private Issuer” (as defined in Nasdaq Rule 5005(a)(19)); or (ii) a company that: (a) is considered a “foreign issuer” under Rule 3b-4(b) under the 1934 Act; and (b) has its principal executive offices located outside of the United States. This includes all Foreign Private Issuers and any foreign issuers that are not Foreign Private Issuers, so long as their principal executive offices are also located outside of the United States. Smaller Reporting Companies may satisfy the minimum diversity objective by including two female directors, or by including one female director and an individual who self-identifies as LGBTQ+ or an Underrepresented Minority. For this purpose, Smaller Reporting Company status is determined using the definition set forth in Rule 12b-2 under the 1934 Act.

Companies have a transition period to meet the diversity objectives or explain their reasons for not doing so. The timeframe to meet the minimum diversity objectives is based on a listed company’s listing tier:

- Companies listed on Nasdaq Global Select Market or Nasdaq Global Market are required to have, or explain why they do not have, one diverse director by August 7, 2023, and two diverse directors by August 6, 2025.

- Companies listed on the Nasdaq Capital Market are required to have, or explain why they do not have, one diverse director by August 7, 2023, and two diverse directors by August 6, 2026.
- Companies with boards that have five or fewer directors, regardless of listing tier, are required to have, or explain why they do not have, one diverse director by August 7, 2023.

If a company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting after the anniversary of the effective date in the calendar year for each respective year noted above, then the company will have until the date it makes such filing to meet, or explain why it does not meet, the applicable diversity objectives. For companies that are not in a position to meet the minimum diversity objectives within the required timeframes, they will not be subject to delisting if they provide an alternative public disclosure explaining why they did not meet the applicable minimum diversity objectives.

A company that met the diversity objectives of Rule 5605(f)(2) but no longer meets the diversity objectives due to a vacancy on its board of directors (for example if a diverse director becomes ill or resigns), has a grace period to regain compliance until the later of: (i) one year from the date of vacancy; or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) in the calendar year following the year of the date of vacancy, to satisfy Rule 5605(f)(2) or (3).

- Certain non-operating companies are exempt from Nasdaq's board diversity rule, just as they are exempt from other Nasdaq corporate governance requirements. These include:
- Acquisition companies listed under IM-5101-2 (as discussed in more detail below);
- Asset-backed issuers and other passive issuers. Note while closed end funds are exempt from the rule, business development companies are not (as set forth in Rule IM-5615-4);
- Cooperatives (as set forth in Rule 5615(a)(2));
- Limited partnerships (as set forth in Rule 5615(a)(4));
- Management investment companies (as set forth in Rule 5615(a)(5));
- Issuers of only non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)); and
- Issuers of securities listed under the Rule 5700 Series, including exchange traded products.

Any company that ceases to be exempt from the board diversity rule will have until the later of: (i) one year from the date that the company no longer qualifies as an exempt company; or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy statement, in its Form 10-K or 20-F) for the company's first annual meeting of shareholders subsequent to such event.

SPACs are exempt from Nasdaq's board diversity rule until they de-SPAC. They are not required to provide the Board Diversity Matrix or to have, or disclose that they do not have, any minimum number of diverse directors until their de-SPAC business combination transaction. Following the de-SPAC business combination transaction, such companies must meet, or explain why they do not meet, the applicable diversity objectives by the later of two years from the date of listing or the date the company files its proxy statement or its information statement (or, if the company does not file a proxy statement, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing, with differing milestones based on the company's market tier, as described above.

If a company: (i) does not meet the diversity objectives set forth under Rule 5605(f)(2); and (ii) does not provide an explanation as set forth in Rule 5605(f)(3) (and is not otherwise subject to a grace period), then Nasdaq's Listing Qualifications Department would promptly notify the company that it has until the later of its next annual shareholders meeting or 180 days from the event that caused the deficiency to cure the deficiency. The company can cure the deficiency either by meeting the applicable minimum diversity objectives of Rule 5605(f)(2) or providing an explanation as set forth in Rule 5605(f)(3). If a company does not regain compliance within the applicable cure period, the Listings Qualifications Department would issue a Staff Delisting Determination Letter. A company receiving a Staff Delisting Determination Letter can appeal the determination to the Nasdaq Hearings Panel through the process set forth in Rule 5815.

If a company does not disclose board diversity matrix as set forth in Rule 5606, Nasdaq will notify the company that it is not in compliance with a listing requirement, and the company will be allowed 45 calendar days to submit a plan sufficient to satisfy Nasdaq staff that the company has adopted processes and procedures designed to identify and disclose the information required under Rule 5606 in the future. If the company does not do so, it would receive a Staff Delisting Determination Letter, which the company could appeal to a Nasdaq Hearings Panel pursuant to Rule 5815

Director Compensation

On December 13, 2017, the Delaware Supreme Court issued an opinion in *In re Investors Bancorp Stockholder Litigation*, 177 A.3d 1208 (Del. 2017), stating that the decision to grant compensatory awards to directors was not entitled to the protection of the business judgment rule at the pleading stage if the plaintiff properly alleged that discretion was inequitably exercised, even if an award fell within a shareholder-approved limit.

In *Stein v. Blankfein*, C.A. No. 2017-0354-SG (Del. Ch. May 31, 2019), the Delaware Court of Chancery issued one of its first opinions addressing director compensation following the Delaware Supreme Court's ruling in *Investors Bancorp*. Applying Investors Bancorp, the court declined to dismiss a challenge to discretionary director awards, but dismissed related disclosure claims, including those seeking to invalidate past equity grants. These decisions have caused companies to look at how they can reduce the risk of director compensation litigation. Companies have taken steps such as the following:

- Establishing or retaining meaningful limits on director compensation in incentive compensation plans;
- Ensuring there is a rigorous process in place for establishing director compensation, and providing enhanced proxy statement disclosures about that process;
- Reviewing peer company practices when making compensation decisions; and
- Establishing a formula-based approach to compensation for directors.

Overboarding

Overboarding remains a significant area of focus for institutional investors and proxy advisors. In September 2019, ISS released the findings of its 2019 Global Benchmark Policy Survey. On the topic of overboarding, investors and non-investors diverged on the question of how to measure the concept of "overboarding." With regard to investor respondents, 42 percent selected four public company boards as the appropriate maximum limit for non-executive directors, and 45 percent of investor respondents indicated that two total board seats is an appropriate maximum limit for CEOs. With regard to non-investor respondents, 39% responded that a general board seat limit should not be applied to non-executive directors, and 36% indicated that a general board seat limit should not be applied to CEOs, noting that instead each board should consider what is appropriate and act accordingly.

During the 2019 proxy season, asset managers such as Vanguard, BlackRock, and LGIM revised their voting guidelines to apply stricter criteria for determining if a director is overboarded, and more directors serving on multiple public company boards faced significant opposition, contributing to the highest level of director opposition since 2011.

While there is no firmly established standards for evaluating whether a director is overboarded, investors appear to be coalescing around two total board seats for CEOs and four total board seats for other directors.

In 2022, the Council of Institutional Investors amended its corporate governance policies to redefine what CII considers to be "overboarding." The new policy recommends that directors serve on no more than two for-profit corporate boards if they are employed full-time and a maximum of four for-profit corporate boards if they are not employed full-time. Previously, CII's policy on board service recommended that a director who is not employed full time could serve on a maximum of five boards, and that a director who is employed full-time be limited to three boards. CII's amendment also requests that companies disclose all for-profit board memberships for each director, and that nominating and governance committees develop and publicly disclose their policies on board service.

Currently, ISS's policy is that a CEO should not sit on more than two outside boards plus his or her own company's board, while other directors (including non-CEO executives) can sit on up to five boards. Glass Lewis generally will recommend against any of the following: (i) a director who serves as an executive officer (other than executive chair) of any public issuer while serving on more than one external public issuer board; (ii) a director who serves as an executive chair of any public issuer while serving on more than two external public issuer boards; and (iii) any other director who serves on more than five public issuer boards

Business Roundtable Statement on Purpose of the Corporation

In August 2019, the Business Roundtable released a "Statement on the Purpose of a Corporation," which was signed by 181 CEOs who committed to lead their companies for the benefit of all stakeholders, rather than solely seek to maximize shareholder value. The Statement indicates that the signatories are committed to: (i) delivering value to customers; (ii) investing in employees; (iii) dealing fairly and ethically with suppliers; (iv) supporting communities; and (v) generating long-term value for shareholders.

Hedging and Pledging Policies

Background

Over the past several years, considerable attention has been focused on policies addressing the hedging and pledging of securities by an issuer's employees, executives and directors. In particular, significant market volatility has brought to light some key issues arising from the pledging of issuer securities by employees, executives and directors of issuers, including concerns as to whether an individual's interests

remain aligned with shareholders through his or her pledging of equity awards or other shares owned to secure loans. Similar concerns have been raised with regard to hedging and monetization arrangements, where employees, executives or directors may seek to continue to own issuer securities obtained through the company's benefit plans or otherwise, but without the full risks and rewards of ownership.

Hedging or monetization transactions can be accomplished through a number of possible mechanisms, including, but not limited to, through the use of financial instruments such as exchange funds, prepaid variable forwards, equity swaps, puts, calls, collars, forwards and other derivative instruments, or through the establishment of a short position in the issuer's securities. In addition, individuals may seek to secure loans by pledging the issuer's stock as collateral for the loan, including through the use of traditional margin accounts with a broker. Because securities held in a margin account as collateral for a margin loan may be sold by the broker without the customer's consent if the customer fails to meet a margin call, and securities pledged (or hypothecated) as collateral for a loan may be sold in foreclosure if the borrower defaults on the loan, significant concerns have been raised when the margin sale or foreclosure sale may occur at a time when the pledgor is aware of material nonpublic information or otherwise is not permitted to trade in the issuer's securities. The issuer may also face potentially adverse public perceptions when employees, executives and directors engage in these types of transactions.

Regulatory Developments

The Dodd-Frank Act directed the SEC to adopt rules requiring disclosure of whether any employee or director is permitted to purchase financial instruments that are designed to hedge or offset any decrease in the market value of equity securities granted as compensation or held directly or indirectly by the employee or director. While the SEC has not yet adopted rules implementing this directive, public companies have felt pressure from institutional investors and proxy advisory firms to disclose the issuer's policies about hedging and monetization transactions. Meanwhile, the SEC first required disclosure of shares pledged by the highest paid executive officers and the company's directors beginning in 2006, focusing additional attention on these arrangements in the context of an issuer's overall corporate governance and compensation policies and practices.

On December 18, 2018, the SEC adopted amendments to its rules to implement Section 955 of the Dodd-Frank Act, which added new Section 14(j) to the Exchange Act. As adopted, new paragraph (i) of Item 407 of Regulation S-K requires an issuer to describe any practices or policies it has adopted (whether written or not) regarding the ability of its employees (including officers) or directors of the issuer, or any of their designees, to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars and exchange funds), or otherwise engage in transactions that hedge or offset, or are designed to hedge or offset, any decrease in the market value of issuer equity securities granted as compensation of the employee or director, or held, directly or indirectly, by the employee or director. An issuer is required to provide a fair and accurate summary of the practices or policies that apply, including the categories of persons covered and any categories of hedging transactions that are specifically permitted and any categories that are specifically disallowed. Alternatively, the issuer is required to disclose the practices or policies in full. If an issuer does not have any such practices or policies, the issuer must disclose that fact or state that hedging transactions are generally permitted.

Issuers that are not foreign private issuers, listed closed-end investment companies, smaller reporting companies or emerging growth companies must begin complying with the new disclosure requirement specified in Item 407(i) of Regulation S-K in proxy statements or information statements with respect to the election of directors during fiscal years beginning on or after July 1, 2019. Issuers that qualify as smaller reporting companies or emerging growth companies must comply with the new disclosure requirement specified in Item 407(i) of Regulation S-K in proxy statements or information statements with respect to the election of directors during fiscal years beginning on or after July 1, 2020. The disclosure is not required for foreign private issuers and listed closed-end investment companies.

Exchange Act Section 14(j) directed the SEC to require each issuer to disclose in any proxy or consent solicitation material for an annual meeting of shareholders whether any employee or member of its board of directors, or any designee of such employee or director, is permitted to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars and exchange funds) that are designed to hedge or offset any decrease in the market value of equity securities: (i) granted to the employee or director by the issuer as part of the compensation of the employee or director; or (ii) held, directly or indirectly, by the employee or director.

The SEC proposed to adopt new paragraph (i) of Item 407 of Regulation S-K in February 2015. The SEC considered the report issued by the Senate Committee on Banking, Housing, and Urban Affairs with regard to Section 955 of the Dodd-Frank Act, and noted that the additional disclosure required by the proposed amendments would "provide transparency" to shareholders "to know if executives are allowed to purchase financial instruments to effectively avoid compensation restrictions that they hold stock long-term, so that they will receive their compensation even in the case that their firm does not perform." The SEC received twenty-two comments on the proposal. Comments received by the SEC were largely supportive of the proposed amendments and their objectives.

In the adopting release, the SEC noted that the final rule amendments do not direct issuers to have practices or policies regarding hedging, or dictate the content of any such practice or policy.

As adopted, Item 407(i) of Regulation S-K requires an issuer to describe any practices or policies it has adopted (whether written or not) regarding the ability of its employees (including officers) or directors of the issuer, or any of their designees, to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars and exchange funds), or otherwise engage in transactions that hedge or offset, or are designed to hedge or offset, any decrease in the market value of issuer equity securities granted as compensation of the employee or director, or held, directly or indirectly, by the employee or director.

An issuer is required to provide either:

- A fair and accurate summary of the practices or policies (whether written or not) that apply, including the categories of persons covered and any categories of hedging transactions that are specifically permitted and any categories that are specifically disallowed; or
- Disclosure of the practices or policies in full.

If an issuer does not have any practices or policies regarding hedging, then the issuer must: (i) disclose that the issuer does not have any practices or policies regarding hedging; or (ii) state that hedging transactions are generally permitted.

Item 407(i) does not require disclosure in the annual meeting proxy statement or information statement of any hedging transactions that have occurred. In the adopting release, the SEC indicates that such disclosure would be repetitive, considering an issuer's existing Section 16 reporting requirements.

The disclosure specified in Item 407(i) of Regulation S-K is required to be disclosed in a proxy statement or information statement when action is to be taken with respect to the election of directors. The disclosure is not required in Form 10-K Part III disclosure, even if that disclosure is incorporated by reference from the issuer's definitive proxy statement or information statement.

Item 407(i) of Regulation S-K requires disclosure of practices or policies regarding the ability of an issuer's employees (including officers) or directors of the issuer, or any of their designees. In this regard, the rule is broader in application than Item 402(b)(2)(xiii) of Regulation S-K, which is limited to disclosure of hedging policies applicable to the issuer's named executive officers.

The SEC did not define the term "designee" for the purpose of the rule amendments, explaining in the adopting release that whether someone is a designee of an employee or director is to be determined by the issuer based on the particular facts and circumstances of the relationship.

Exchange Act Section 14(j) refers to financial instruments “that are designed to hedge or offset any decrease in the market value.” Consistent with Exchange Section 14(j), the term “financial instruments” includes, but is not limited to, prepaid variable forward contracts, equity swaps, collars and exchange funds. The rule is not limited to transactions in financial instruments, however, and in fact extends to any transactions “that hedge or offset, or are designed to hedge or offset, any decrease in the market value of registrant equity securities.”

The SEC did not define the terms “hedge” or “hedging” in the final rule amendments. In the adopting release, the SEC referred to the language of Exchange Act Section 14(j), and noted that, for purposes of the disclosure requirements, “hedging” should be applied by issuers “as a broad principle,” and that the term applies to transactions with the same economic effects as the transactions specified in Exchange Act Section 14(j). As such, an issuer must “make its own judgments” when determining whether transactions are subject to the new disclosure requirements.

As proposed, the rule amendments would have used the term “equity securities.” The final rule amendments clarify the scope of Item 407(i) disclosure by expanding the term “equity securities” to “registrant equity securities.” Registrant equity securities include equity securities issued by the issuer and its parents, subsidiaries or subsidiaries of the registrant’s parents. In the adopting release, the SEC notes that the required disclosure is not limited to registrant equity securities that are registered under Section 12 of the Exchange Act. If an issuer has a practice or policy with respect to different classes of equity securities, the issuer’s disclosure should reflect those distinctions.

The disclosure required by new Item 407(i) must be included in a proxy statement or information statement when action is to be taken with respect to the election of directors. Noting that Item 402(b) of Regulation S-K requests disclosure of policies regarding hedging by named executive officers and that the two distinct disclosure requirements could lead to repetition in the proxy statement or information statement, the SEC adopted new Instruction 6 to Item 402(b) of Regulation S-K, which indicates that an issuer may satisfy the Item 402(b) disclosure requirement by cross-referencing the information disclosed pursuant to new Item 407(i), to the extent that the information disclosed pursuant to new Item 407(i) satisfies the requirement.

ISS Policy

ISS adopted policy changes for the 2013 proxy season that focused additional attention on pledging and hedging activities when ISS is conducting its analysis for determining vote recommendations on the election of directors. ISS takes a case-by-case approach in determining whether pledging of company stock rises to a serious concern for shareholders, and has included significant pledging of issuer stock as a failure of risk oversight for which directors should be held accountable (as opposed to as a consideration relevant to making a recommendation on a say-on-pay proposal). In determining vote recommendations for the election of directors at companies who currently have executives or directors with pledged common stock, ISS considers the following factors: (i) the presence in the issuer's proxy statement of an anti-pledging policy that prohibits future pledging activities; (ii) the magnitude of aggregate pledged shares in terms of the total common shares outstanding or the market value or trading volume of the common stock; (iii) disclosure of progress (or lack thereof) in reducing the magnitude of aggregate pledged shares over time; (iv) disclosure in the proxy statement that stock ownership or holding requirements do not include pledged company stock; and (v) any other relevant factors. With regard to hedging, the updated policy notes that hedging company stock "severs the ultimate alignment with shareholders' interests," therefore *any* amounts hedged will be considered a problematic practice potentially warranting a negative voting recommendation on the election of directors.

Adopting or Revisiting Policies

The increasing level of disclosure, the heightened investor scrutiny and the consideration accorded by proxy advisory firms has caused many issuers to adopt policies about hedging, monetization or pledging transactions, or revisit existing policies to consider whether the scope or coverage of such policies should be changed. The options that issuers have pursued include:

- Prohibiting hedging, monetization and/or pledging transactions for executive officers and directors, or perhaps even for all employees and directors;
- Subjecting hedging, monetization and/or pledging transactions to a pre-approval process;
- Restricting the types of hedging, monetization and/or pledging transactions that may be undertaken; or
- Permitting hedging, monetization or pledging transactions without any specific policy on their use.

The variation in approaches reflects how situations differ substantially from company to company, and from individual to individual. In some cases, hedging, monetization or pledging transactions may serve legitimate tax planning or other purposes, thereby making a complete prohibition on such transactions unworkable. For this reason, some issuers have chosen to address the situation though a pre-clearance process, which provides compliance personnel within the organization the ability to carefully analyze a transaction before an individual proceeds with the transaction. Other issuers may choose to restrict only certain types of transactions, particularly where it is perceived that the risks to the company and the participating individuals may be high.

Another key area of consideration is the extent of coverage for these policies. The Dodd-Frank Act disclosure requirement will seek disclosure with respect policies concerning *all* employees and directors, while in many cases issuers have adopted policies that are specifically limited to the issuer's executive officers and directors. Issuers are often concerned that adopting policies broadly applicable to all employees and directors may be difficult to communicate and enforce.

Some issuers have also sought to extend prohibitions to other types of short-term or speculative transactions, such as trading in exchange traded puts and calls on the issuer's securities, or short-term trading transactions (i.e., buying and selling the issuer's securities within six months).

Location of Policies

Very often, policies with regard to hedging, monetization or pledging are included in an issuer's insider trading policy. Some issuers have adopted standalone policies addressing some or all of these topics, while others have incorporated these concepts into the issuer's code of conduct, stock ownership guidelines and corporate governance guidelines.

Conclusion

Given the continued focus of attention on this topic, we will continue to see issuers adopting or revisiting their policies concerning hedging, monetization and/or pledging transactions.

FORM OF HEDGING AND PLEDGING POLICY

[Note: This policy may be incorporated into other policies of the company, such as the insider trading policy]

Introduction

Hedging or monetization transactions can be accomplished through a number of possible mechanisms, including, but not limited to, through the use of financial instruments such as exchange funds, prepaid variable forwards, equity swaps, puts, calls, collars, forwards and other derivative instruments, or through the establishment of a short position in the Company's securities. Such hedging and monetization transactions may permit an [employee,] officer or director to continue to own the securities of [Company Name] (the "Company") obtained through Company's benefit plans or otherwise, but without the full risks and rewards of ownership. When that occurs, the director, officer or employee may no longer have the same objectives as the Company's other stockholders. Moreover, certain short-term or speculative transactions in the Company's securities by [employees,] officers and directors create the potential for heightened legal risk and/or the appearance of improper or inappropriate conduct involving the Company's securities.

Objectives

The objectives of this Policy are to: (1) prohibit the Company's [employees,] officers and directors from directly or indirectly engaging in hedging or monetization trans-actions, through transactions in the Company's securities or through the use of financial instruments designed for such purpose; and (2) prohibit [employees,] officers and directors from engaging in short-term or speculative transactions in the Company's securities that could create heightened legal risk and/or the appearance of improper or inappropriate conduct by the Company's employees, officers or directors.

Applicability

This policy applies to all of the Company's [employees,] officers and directors. The Board of Directors may determine whether the policy should apply to other individuals, including consultants and contractors to the Company.

Policy

The Company's [employees,] officers and directors may not engage in any hedging or monetization transactions with respect to the Company's securities, including, but not limited to, through the use of financial instruments such as exchange funds, prepaid variable forwards, equity swaps, puts, calls, collars, forwards and other derivative instruments, or through the establishment of a short position in the Company's securities. Further, the Company's [employees,] officers and directors may not engage in the following in short-term or speculative transactions in the Company's securities that could create heightened legal risk and/or the appearance of improper or inappropriate conduct by the Company's employees, officers or directors:

- *Short-Term Trading*. Short-term trading of the Company's securities may be distracting to the person and may unduly focus the person on the Company's short-term stock market performance, instead of the Company's long-term business objectives. For these reasons, any [employee,] officer or director of the Company who purchases the Company's securities in the open market may not sell any Company securities of the same class during the six months following the purchase (or vice versa).

- *Short Sales.* Short sales of the Company's securities (*i.e.,* the sale of a security that the seller does not own) may evidence an expectation on the part of the seller that the securities will decline in value, and therefore have the potential to signal to the market that the seller lacks confidence in the Company's prospects. In addition, short sales may reduce a seller's incentive to seek to improve the Company's performance. For these reasons, short sales of the Company's securities by [employees,] officers or directors are prohibited. Short sales arising in certain types of hedging transactions are governed by this Policy's prohibition on hedging transactions, as described above.
- *Publicly-Traded Options.* Given the relatively short term of publicly-traded options, transactions in options may cause an [employee,] officer or director to focus on short-term performance at the expense of the Company's long-term objectives. Accordingly, this Policy prohibits transactions by [employees,] officers or directors in put options, call options or other derivative securities related to the Company's securities, on an exchange or in any other organized market. Transactions in options arising in certain types of hedging transactions are governed by this Policy's prohibition on hedging transactions, as described above.

Margin Accounts and Pledged Securities. Securities held in a margin account as collateral for a margin loan may be sold by the broker without the customer's consent if the customer fails to meet a margin call. Similarly, securities pledged (or hypothecated) as collateral for a loan may be sold in foreclosure if the borrower defaults on the loan. Because a margin sale or foreclosure sale may occur at a time when the pledgor is aware of material nonpublic information or otherwise is not permitted to trade in the Company's securities, [employees,] officers and directors are prohibited from holding the Company's securities in a margin account or otherwise pledging the Company's securities as collateral for a loan. Pledges of

Company Securities arising from certain types of hedging transactions are governed by this Policy's prohibition on hedging transactions, as described above. [An exception to this prohibition may be granted where a person covered by this Policy wishes to pledge the Company's securities as collateral for a loan (not including margin debt) and clearly demonstrates the financial capacity to repay the loan without resort to the pledged securities. Any person seeking an exception from this policy must submit a request for pre-approval to the [designated Compliance Officer] at least two weeks prior to the contemplated transaction and the person should be advised that any sale of stock by the pledgee will be deemed a sale by the pledgor for purposes of the short-swing profit recovery provisions of Section 16 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and the prohibition on insider trading in Rule 10b-5 under the Exchange Act.]

CHAPTER 5

FREQUENTLY ASKED QUESTIONS ABOUT SHAREHOLDER PROPOSALS AND PROXY ACCESS

FREQUENTLY ASKED QUESTIONS ABOUT SHAREHOLDER PROPOSALS AND PROXY ACCESS

Shareholder Proposals Generally

Shareholder proposals are matters that shareholders of an issuer seek to have acted on at an annual or other meeting of the issuer. In accordance with the requirements specified in state corporation laws and in an issuer's organizational documents, a shareholder could seek to have a matter voted on by raising the matter at a meeting of shareholders. Alternatively, a qualifying shareholder could seek to include the proposal in the issuer's proxy statement under Rule 14a-8 adopted under Section 14(a) of the Exchange Act, and thereby have the issuer solicit proxies with respect to the proposal that would be presented at the meeting. The following Questions and Answers address many of the common issues that arise with regard to shareholder proposals and proxy access.

Who submits shareholder proposals to companies?

Shareholder proposals come from a wide variety of shareholders, sometimes referred to as "proponents." Shareholder proponents may be individual investors who are seeking to raise a particular issue or implement a policy at an issuer, corporate "gadflies" who seek to bring about changes to corporate activity through the shareholder proposal process, activist investors who are seeking to bring about a change-in-control or a change in the strategy or policies of the company, and institutional investors who may be focused on particular corporate governance or social issues.

Who regulates the shareholder proposal process?

The SEC has adopted Rule 14a-8 as a means to control the process whereby proponents seek to have shareholder proposals included in the proxy statements of issuers, and the SEC Staff is involved in considering the arguments of companies that seek to exclude shareholder proposals based on the operation of Rule 14a-8 through a process whereby companies typically seek a "no-action letter" from the Staff with regard to whether the company may exclude the shareholder proposal. Under Rule 14a-8, an issuer must include a shareholder proposal in its proxy materials unless it violates one of the rule's eligibility and procedural requirements or falls within one of the rule's thirteen substantive bases for exclusion.

THE SCOPE OF RULE 14A-8

Does Rule 14a-8 require that all shareholder proposals be included in an issuer's proxy statement?

Under Rule 14a-8, an issuer must include a shareholder proposal in its proxy materials unless it violates one of the rule's eligibility and procedural requirements, or one of the thirteen substantive bases for exclusion specified in the rule.

What are the eligibility and procedural requirements for shareholder proposals under Rule 14a-8?

Rule 14a-8 imposes several eligibility and procedural requirements on shareholders who rely on the rule. A shareholder may only submit one proposal per meeting, must meet minimum ownership thresholds and must limit its proposal to 500 words. A shareholder must state that he or she is able to meet with the company, either in person or via teleconference, no less than 10 calendar days, or more than 30 calendar days, after submission of the shareholder proposal, and provide contact information as well as specific business days and times that the proponent is available to discuss the proposal with the company.

A shareholder must submit the proposal at least 120 days before the date of the issuer's proxy statement for the previous year's annual meeting (or a reasonable time before the issuer begins to print and mail its proxy materials if the issuer did not have an annual meeting during the previous year, or if the date of the annual meeting has been changed by more than 30 days from the date of the previous year's annual meeting). An issuer that intends to rely on the rule to exclude a proposal must submit its "no-action" request 80 days in advance of the date that it proposes to file its definitive proxy materials.

What are the substantive requirements under Rule 14a-8?

Under paragraph (i) of Rule 14a-8, an issuer may exclude a shareholder proposal from its proxy materials if the proposal falls into one of thirteen specific substantive bases for exclusion. These substantive bases represent areas that the SEC has determined over the years to not be appropriate matters for consideration by shareholders through the shareholder proposal process. To exclude a proposal, an issuer must first notify the SEC, which is typically done through a request for a "no-action" letter. In the no-action letter request, an issuer may argue that the subject shareholder proposal can be excluded under more than one basis for exclusion.

How does the no-action letter process work with respect to shareholder proposals?

The central component of the Rule 14a-8 process is the no-action letter. A no-action letter is a letter from the Staff that provides the Staff's informal view regarding whether it would recommend enforcement action to the SEC if the issuer takes the course of action described in the no-action request. No-action letters reflect the Staff's views concerning the application of securities laws to a particular set of facts. In the context of Rule 14a-8, no-action letters often serve as a key hurdle for shareholders that hope to include a proposal in an issuer's proxy materials.

There is no rule that requires the submission of no-action requests, nor is there a rule that requires that the Staff respond to such requests. Issuers submit requests to comply with Rule 14a-8(j), which requires that issuers "file their reasons" with the SEC. The Staff responds to such requests as a convenience to both issuers and shareholders, and in order to assist both issuers and shareholders in complying with the proxy rules. While the Staff's no-action letters typically address whether the issuer has a basis to exclude the proposal, there also may be times when the Staff will say that there appears to be some basis for the issuer's objection, but the problem can be cured if the proponent changes the proposal in some specific way, for example, the proponent makes a mandatory proposal into a nonbinding proposal, or deletes certain words or sentences in the proposal to avoid vagueness.

Some issuers have elected to submit a notice to the SEC of the company's intention to exclude the proposal, and then file suit in federal court seeking a declaratory judgment as to whether the proposal may be excluded under Rule 14a-8(i)(8).

The Eligibility and Procedural Requirements of Rule 14a-8

What are the requirements as to ownership for submitting shareholder proposals?

A shareholder proposal may be submitted under Rule 14a-8 by a proponent who meets one of three alternative thresholds, any one of which the proponent could satisfy to be eligible to submit a proposal: (i) continuous ownership of at least $2,000 of the company's securities for at least three years; (ii) continuous ownership of at least $15,000 of the company's securities for at least two years, or (3) continuous ownership of at least $25,000 of the company's securities for at least one year. The proponent must hold the securities through the date of the annual meeting. Shareholders are prohibited from aggregating their securities with other shareholders for the purpose of meeting the applicable minimum ownership thresholds to submit a Rule 14a-8 proposal. Shareholders are permitted to co-file or co-sponsor shareholder proposals as a group if each shareholder proponent in the group met one of the eligibility requirements.

How does a proponent demonstrate that the ownership requirements have been satisfied?

Under Rule 14a-8(b), at the time a shareholder submits a proposal, the shareholder must prove eligibility by being a record holder of the securities that the issuer could verify on its own, or by submitting either:

- A written statement from the record holder of the securities (usually a broker or bank that is a DTC participant) verifying that, at the time the shareholder submits the proposal, the shareholder meets the ownership requirements; or
- A copy of a Schedule 13D, Schedule 13G, Form 3, Form 4, Form 5, or amendments to those documents or updated forms, reflecting the shareholder's ownership of the shares as of or before the date on which the one-year eligibility period begins.

Rule 14a-8(b)(2)(i) provides that, in addition to the proof of ownership, "You [the shareholder proponent] must also include your own written statement that you intend to continue to hold the securities through the date of the meeting of shareholders."

What must a proponent submit if the proponent is not the record holder of the securities?

Usually, a proponent would submit a written statement from the "record" holder of the securities (usually a broker or bank that is a DTC participant) verifying that, at the time the shareholder submits the proposal, that the shareholder meets the eligibility requirements specified in Rule 14a-8(b). In Staff Legal Bulletin No. 14F ("SLB 14F"), the Staff clarified that only DTC participants should be viewed as "record" holders of securities that are deposited with DTC. In Staff Legal Bulletin No. 14G ("SLB 14G") the Staff states that "for purposes of Rule 14a-8(b)(2)(i), a proof of ownership letter from an affiliate of a DTC participant satisfies the requirement to provide a proof of ownership letter from a DTC participant."

In accordance with this guidance, a shareholder that owns shares through a broker or bank that is not a DTC participant or an affiliate of a DTC participant must obtain and submit two proof of ownership statements – one from the shareholder's broker or bank confirming the shareholder's ownership and one from the DTC participant or an affiliate of the DTC participant through which the securities are held confirming the ownership of the shareholder's broker or bank.

An issuer that seeks to exclude a shareholder proposal from its proxy materials on the basis of proof of ownership now must take at least the following steps: (i) determine whether the shareholder is a registered shareholder by checking its list of registered shareholders; (ii) review the proof of ownership to see if the bank or broker providing such proof is a DTC participant by comparing such bank or broker's name against the list of DTC participants; and (iii) notify the shareholder that the person that provided proof of ownership is not a DTC participant and request that the shareholder obtain a second letter demonstrating proof of ownership from the bank or broker that is a DTC participant through which the other bank or broker holds shares.

Is there particular language that a proponent should have its broker or bank use when providing the proof of ownership information?

In Staff Legal Bulletin No. 14L ("SLB 14L"), the Staff suggests that a shareholder proponent use the following format to have its broker or bank provide the required proof of ownership as of the date the shareholder plans to submit the proposal: "As of [date the proposal is submitted], [name of shareholder] held, and has held continuously for at least [one year] [two years] [three years], [number of securities] shares of [company name] [class of securities]" The Staff notes that brokers and banks are not required to follow this format.

How does a proponent determine the market value of the securities held for the purposes of eligibility to submit a proposal under Rule 14a-8?

The Staff noted in Staff Legal Bulletin No. 14 ("SLB 14") that, in order to determine whether the shareholder satisfies the market value threshold, the Staff looks at whether, on any date within the 60 calendar days before the date the shareholder submits the proposal, the shareholder's investment is valued at the threshold or greater, based on the average of the bid and ask prices. If bid and ask prices are not available, then the market value is determined by multiplying the number of securities the shareholder held for the one-year period by the highest selling price during the 60 calendar days before the shareholder submitted the proposal. The Staff notes that a security's highest selling price is not necessarily the same as its highest closing price.

How many proposals may a shareholder proponent submit?

Under Rule 14a-8(c), a proponent may submit no more than one proposal for a particular shareholders' meeting.

Can a proponent use a representative to submit a shareholder proposal?

Rule 14a-8 requires that a proponent who elects to use a representative for the purpose of submitting a shareholder proposal provide documentation that:

- Identifies the annual or special meeting for which the proposal is submitted,
- Identifies the shareholder submitting the proposal and the shareholder's designated representative,
- Includes the shareholder's statement authorizing the designated representative to submit the proposal and otherwise act on the shareholder's behalf,
- Identifies the specific topic of the proposal to be submitted,
- Includes the shareholder's statement supporting the proposal, and
- Is signed and dated by the shareholder.

How long can a shareholder proposal be?

Under Rule 14a-8(d), the proposal, including any accompanying supporting statement, may not exceed 500 words.

The Staff notes, in SLB 14, that any statements which are arguments "in support of the proposal" are considered to be part of the supporting statement, therefore, any title or heading in the proposal meeting that test may be counted toward the 500-word limitation. In general, the reference to a website address does not violate the 500 word limitation by virtue of indirectly including the content of the website in the proposal and supporting statement. In SLB 14, the Staff indicated that it counts a website address as one word for purposes of the 500-word limitation because the Staff does not believe that a website address raises the concern that Rule 14a-8(d) was intended to address.

What is the deadline for submitting a shareholder proposal?

Rule 14a-8(e)(2) requires that proposals for a regularly scheduled annual meeting be received at the issuer's principal executive offices by a date not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting. The deadline for shareholder proposals is included in the issuer's proxy statement, and is determined by (i) starting with the release date disclosed in the previous year's proxy statement; (ii) increasing the year by one; and (iii) counting back 120 calendar days.

Must a proponent or a proponent's designee attend the meeting to present the proposal?

Rule 14a-8(h)(1) requires that the proponent or the proponent's qualified representative attend the shareholders' meeting to present the proposal. Rule 14a-8(h)(3) provides that an issuer may exclude a proponent's proposals for two calendar years if the issuer included one of the proponent's proposals in its proxy materials for a shareholders' meeting, neither the proponent nor the proponent's qualified representative appeared and presented the proposal, and the proponent did not demonstrate "good cause" for failing to attend the meeting or present the proposal.

If a proponent voluntarily provides a written statement evidencing an intention to act contrary to Rule 14a-8(h)(1) and not attend the meeting, Rule 14a-8(i)(3) (discussed below) may serve as a basis for the issuer to exclude the proposal because the proponent's actions are contrary to the proxy rules.

What must a company do if it seeks to exclude a proposal based on the failure of the proponent to meet one these eligibility and procedural requirements?

If a shareholder fails to follow the eligibility or procedural requirements of Rule 14a-8, Rule 14a-8(f) provides that an issuer may exclude a proposal from its proxy materials due to eligibility or procedural defects if (i) within 14 calendar days of receiving the proposal, the company provides the shareholder with written notice of the defect or defects with the proposal, including the time frame for responding; and (ii) the shareholder fails to respond to this notice within 14 calendar days of receiving the notice of the defect or defects, or the shareholder timely responds but does not cure the eligibility or procedural defect(s). If the shareholder does not timely respond or remedy the defect(s) and the issuer intends to exclude the proposal, the issuer must still submit, to the Staff and the shareholder, a copy of the proposal and the reasons for excluding the proposal.

The issuer does not need to provide the shareholder with a notice of defect if the defect cannot be remedied; however, the issuer must still submit its reasons regarding exclusion of the proposal to the Staff and the shareholder. The shareholder may, but is not required to, submit a reply to the Staff with a copy sent to the company.

Under what circumstances must a company accept a revised shareholder proposal?

Under guidance provided in SLB 14F, if a shareholder proponent submits a revised proposal before the issuer's deadline for shareholder proposals, the issuer must accept the revised proposal. If a shareholder submits a revised proposal after the issuer's deadline, the company does not have to accept the revised proposal.

Does the Staff provide responses to no-action requests by e-mail?

The Staff indicated in SLB 14F that it now transmits Rule 14a-8 no-action responses by e-mail to issuers and proponents, provided that they include e-mail addresses for recipients in their correspondence.

Can a no-action letter be withdrawn?

If an issuer determines that it does not want to obtain a Staff response to a pending no-action request, because, for example, the company has negotiated with the proponent to withdraw the proposal or the issuer has elected to include the proposal in its proxy statement, then the issuer should submit a letter to the Staff requesting withdrawal of the no-action request.

The Substantive Bases For Exclusion of Shareholder Proposals Under Rule 14a-8

Rule 14a-8(i)(1) provides that a proposal is excludable when it is not a proper subject for action by shareholders under the laws of the jurisdiction of the issuer's organization. Under what circumstances is this basis for exclusion applicable?

Rule 14-8(i)(1) focuses on proposals that would not be a proper subject for shareholder action. With respect to subjects and procedures for shareholder votes, most state corporation laws provide that a corporation's charter or bylaws can specify the types of proposals that are permitted to be brought before the shareholders for a vote at an annual or special meeting. The SEC indicates that, depending on the subject matter, a proposal that would bind the issuer if approved by shareholders may not be considered proper under state law. Proposals cast as recommendations or requests that the board of directors take specified action, however, are generally considered proper under state law. As a result, the Staff will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise. The Staff will let a proponent amend a proposal to make it a "precatory" recommendation if the company objects to the mandatory nature of the proposal.

The Staff has consistently granted no-action relief to corporations under Rule 14a-8(i)(1) where a shareholder proposal mandates action that, under state law, falls within the powers of the board of directors. For example, the Staff has allowed issuers to exclude proposals that would require a board to declassify a staggered board, while the Staff has permitted proposals requesting company "take the steps necessary" to declassify staggered board.

Issuers must provide a supporting opinion of counsel when the reason for exclusion is based on matters of state or foreign law. Further, under a 2007 amendment to Delaware law, the SEC may request a legal interpretation from the Delaware Supreme Court. In June 2008, the SEC certified to the Supreme Court questions about the propriety under state law of a shareholder proposal submitted to CA by the AFSCME pension plan.

Rule 14a-8(i)(2) provides that a proposal is excludable when the proposal would, if implemented, cause the issuer to violate any state, federal or foreign law to which it is subject. Under what circumstances is this basis for exclusion applicable?

Rule 14a-8(i)(2) focuses on situations where the implementation of the shareholder proposal would result in a violation of any state, federal or foreign law. Such a violation could include a violation of applicable corporate law, or it could include the violation of other laws applicable to the company and its operations. For example, the Staff has allowed an issuer exclude a proposal that would require mandatory board retirement age, where doing so would violate a state age discrimination law. A note to Rule 14a-8(i)(2) provides that an issuer cannot exclude a proposal on the basis that it would violate foreign law if compliance with that law would result in violation of state or federal law. As with requests to exclude under Rule 14a-8(i)(1), the Staff will permit a proponent to amend a proposal to make it a "precatory" recommendation if the company objects to the mandatory nature of the proposal as a potential violation of state corporate law.

As with Rule 14a-8(i)(1), companies must provide a supporting opinion of counsel when the reason for exclusion is based on matters of state or foreign law. Further, under a 2007 amendment to Delaware law, the SEC may request a legal interpretation from the Delaware Supreme Court.

Rule 14a-8(i)(3) provides that a proposal is excludable when the proposal or supporting statement is contrary to any of the SEC's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials. Under what circumstances is this basis for exclusion applicable?

The Staff has indicated that reliance on Rule 14a-8(i)(3) to exclude or modify a statement may be appropriate where: (i) statements directly or indirectly impugn character, integrity, or personal reputation, or directly or indirectly make charges concerning improper, illegal, or immoral conduct or association, without factual foundation; (ii) the company demonstrates objectively that a factual statement is materially false or misleading; (iii) the resolution contained in the proposal is so inherently vague or indefinite that neither the shareholders voting on the proposal, nor the issuer implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires – this objection also may be appropriate where the proposal and the supporting statement, when read together, have the same result; and (iv) substantial portions of the supporting statement are irrelevant to a consideration of the subject matter of the proposal, such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which it is being asked to vote.

By contrast, in Staff Legal Bulletin No. 14B ("SLB 14B"), the Staff indicated that it would not be appropriate for issuer to exclude supporting statement language and/or an entire proposal in reliance on Rule 14a-8(i)(3) in the following circumstances: (1) the issuer objects to factual assertions because they are not supported; (2) the issuer objects to factual assertions that, while not materially false or misleading, may be disputed or countered; (3) the issuer objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and/or (4) the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such.

Under these standards, a request to exclude a proposal *in its entirety* under Rule 14a-8(i)(3) is unlikely to be granted.

Rule 14a-8(i)(4) provides that a proposal is excludable when the proposal relates to the redress of a personal claim or grievance against the issuer or any other person, or is designed to result in a benefit to the shareholder, or to further a personal interest, which is not shared by the other shareholders at large. Under what circumstances is this basis for exclusion applicable?

Rule 14a-8(i)(4) focuses on proposals involving matters that are deemed not to rise to the level that shareholders as a whole should vote on as a shareholder proposal. For example, if a proponent is involved in litigation with the issuer, and the proposal deals with a matter being litigated, that could serve as grounds to exclude the proposal on the theory that the proponent is pursuing its own agenda. The SEC has stated that Rule 14a-8(i)(4) is designed to "insure that the security holder proposal process [is] not abused by proponents attempting to achieve personal ends that are not necessarily in the common interest of the issuer's shareholders generally." *See* SEC Release No. 34-20091 (August 16, 1983).

In considering exclusion requests under Rule 14a-8(i)(4), the Staff often looks to the particular motives of proponent. However, a proponent's particular objectives need not be apparent from a proposal's plain language in order to be excludable under Rule 14a-8(i)(4). Rather, proposals phrased in broad terms that “might relate to matters which may be of general interest to all security holders” may be omitted from proxy materials “if it is clear from the facts…that the proponent is using the proposal as a tactic designed to…further a personal interest.” *See* SEC Release No. 34-19135 (October 14, 1982). These types of exclusion requests often involve proposals by disgruntled former employees of a company relating to personal issues that the former employees have with the issuer.

Rule 14a-8(i)(5) provides that a proposal is excludable when the proposal relates to operations that account for less than 5% of the issuer’s total assets at the end of its most recent fiscal year, and for less than 5% of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company’s business. Under what circumstances is this basis for exclusion applicable?

Rule 14a-8(i)(5) is referred to as the “relevance rule.” A significant focus of the Staff is on whether the proposal relates to operations that are “not otherwise significantly related to the company’s business.” As a practical matter, the Rule 14a-8(i)(5) exclusion may be limited in application, because proponents have been able to frame issues in a way that adequately establishes the significance of an issue, even if the economic impact may be minimal. The SEC stated in SEC Release No. 34-19135 (October 14, 1982):

> Historically, the Commission staff has taken the position that certain proposals, while relating to only a small portion of the issuer’s operations, raise policy issues of significance to the issuer’s business…For example, the proponent could provide information that indicates that while a particular corporate policy which involves an arguably economically insignificant portion of an issuer’s business, the policy may have a significant impact on other segments of the issuer’s business or subject the issuer to significant contingent liabilities.

In SLB 14L, the Staff rescinded the guidance provided in Staff Legal Bulletins 14I, 14J and 14K regarding shareholder proposals under Rule 14a-8, which included guidance regarding Rule 14a-8(i)(5). Staff Legal Bulletin 14L clarifies that proposals which raise broad social or ethical concerns that are related to a company’s business may not be excluded, even if the relevant part of the company’s business falls below the economic thresholds of Rule 14a-8(i)(5). As with the ordinary business exception, the Staff no longer expects issuers to provide information regarding the determination made by the issuer’s board of directors.

Rule 14a-8(i)(6) provides that a proposal is excludable when the company would lack the power or authority to implement the proposal. Under what circumstances is this basis for exclusion applicable?

Rule 14a-8(i)(6) focuses on proposals requesting that a board of directors do something that it lacks the power or authority to implement. For example, the Staff has allowed exclusion of a proposal that would require an issuer to breach existing contracts; however, the Staff has permitted revisions to such a proposal so that it applied only to future contracts. Further, the Staff has held that Rule 14a-8(i)(6) applies to a shareholder proposal that, if adopted by the issuer's shareholders, would cause the issuer to violate applicable state law. With respect to shareholder proposals that, if adopted by the issuer's shareholders, would cause the company to violate applicable state law. As with Rule 14a-8(i)(1) and Rule 14a-8(i)(2), issuers must provide a supporting opinion of counsel when the reason for exclusion is based on matters of state or foreign law. Further, under a 2007 amendment to Delaware law, the SEC may request a legal interpretation from the Delaware Supreme Court.

Rule 14a-8(i)(7) provides that a proposal is excludable when the proposal deals with a matter relating to the issuer's ordinary business operations. Under what circumstances is this basis for exclusion applicable?

The SEC has explained that the analysis under the "ordinary business" exclusion is based on two key considerations. First, certain tasks "are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." Examples that the SEC has cited include employee hiring, promotion and termination decisions, decisions on production quality or quantity, or the retention of suppliers. Even so, some proposals "focusing on sufficiently significant social policy issues" (such as employment discrimination policies) transcend day-to-day operational matters and raise issues "so significant" that shareholders should be afforded the opportunity to express their views. The second key consideration relates to "the degree to which the proposal seeks to 'micro-manage' the company by probing too deeply into matters of a complex nature upon which, shareowners, as a group, would not be in a position to make an informed judgment." Examples cited were proposals involving "intricate detail" or seeking to impose "specific timeframes or methods for implementing complex policies."

Most of the no-action letters under Rule 14a-8(i)(7) arise because the fact that a proposal relates to ordinary business matters does not conclusively establish that an issuer may exclude the proposal from its proxy materials. As the SEC stated in SEC Release No. 34-40018 (May 21, 1988), proposals that relate to ordinary business matters but that focus on "sufficiently significant social policy issues would not be considered to be excludable because the proposals would transcend the day-to-day business matters." Among the areas that have been considered to be significant social policy issues include: renewable energy generation; antibiotics in foods; health care reform; collateralization of derivatives; loan foreclosures; risk oversight; CEO succession planning; executive compensation; auditor rotation; environmental matters; South Africa; Myanmar; human rights; net neutrality; and predatory lending.

In SLB 14L, the Staff rescinded the guidance provided in Staff Legal Bulletins 14I, 14J and 14K, which included guidance regarding Rule 14a-8(i)(7). Under the now-rescinded Staff guidance, when reviewing no-action requests involving the “ordinary business” basis for exclusion, the Staff evaluated the significance of a policy issue to a particular issuer, and the Staff expected an issuer to provide an analysis by the board of directors to support the arguments for exclusion based on the ordinary business exception. The guidance in Staff Legal Bulletin 14L indicates that the Staff will no longer focus on how the policy issue relates to the issuer, but instead will focus solely on the “social policy significance” of the issue that is the subject of the shareholder proposal, evaluating whether the proposal raises issues with “broad societal impact.”

The Staff also allowed issuers seeking to rely on the “ordinary business” basis for exclusion to argue that proposals “micromanage” the company “by probing too deeply into matters of a complex nature.” Staff Legal Bulletin 14L rejects a broad interpretation of micromanagement to contemplate any limit on company or board discretion, and states that proposals seeking detail or those that promote timeframes and methods do not necessarily involve micromanagement. The Staff indicates that it will focus on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management. Staff Legal Bulletin 14L indicates that proposals requesting companies to “adopt timeframes or targets to address climate change” will not be excluded based on micromanagement if the proposals afford discretion to management as to how to achieve such goals.

Staff Legal Bulletin 14L also indicates that when determining whether a proposal involves a matter “too complex” for shareholders as a group, the Staff may consider “the sophistication of investors generally on the matter, the availability of data, and the robustness of public discussion and analysis on the topic.”

Rule 14a-8(i)(8) provides that a proposal is excludable when the proposal relates to an election for membership on the issuer’s board of directors or analogous governing body. Under what circumstances is this basis for exclusion applicable?

The SEC adopted amendments to Rule 14a-8 in 2010 in connection with its “proxy access” rulemaking. Rule 14a-11, the SEC’s proxy access rule, was vacated, but the amendments to Rule 14a-8(i)(8) recently became effective. Rule 14a-8(i)(8) has permitted the type of “private ordering” for proxy access through the shareholder proposal process that many commenters had supported in the course of the proxy access rulemaking. Under Rule 14a-8(i)(8), as amended, an issuer may not exclude under this basis a shareholder proposal that would amend or request that the issuer consider amending governing documents to facilitate director nominations by shareholders or disclosures related to nominations made by shareholders, as long as such proposal does not conflict with Rule 14a-11 and is not otherwise excludable under some other procedural or substantive basis in Rule 14a-8. The SEC also codified some of the Staff's historical interpretations of Rule 14a-8(i)(8) which permitted exclusion of a shareholder proposal that would: (i) seek to disqualify a nominee standing for election; (ii) remove a director from office before the expiration of his or her term; (iii) question the competence, business judgment, or character of a nominee or director; (iv) nominate a specific individual for election to the board of directors, other than through the Rule 14a-11 process, an applicable state law provision, or an issuer's governing documents; or (v) otherwise affect the outcome of an upcoming election of directors.

Rule 14a-8(i)(9) provides that a proposal is excludable when the proposal directly conflicts with one of the issuer's own proposals to be submitted to shareholders at the same meeting. Under what circumstances is this basis for exclusion applicable?

An issuer may properly exclude a proposal from its proxy materials under Rule 14a-8(i)(9) "if the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting." Prior to the 2015 proxy season, Rule 14a-8(i)(9) has been used to exclude shareholder proposals addressing topics such as compensation plan provisions, proxy access, shareholders' ability to call a special meeting, and shareholders' ability to take action by written consent. On January 16, 2015, then SEC Chair Mary Jo White directed the SEC's Division of Corporation Finance to review the proper scope and application of Rule 14a-8(i)(9), and the Staff thereafter announced that it would express no view on no-action requests relating to the exclusion of shareholder proposals in reliance on Rule 14a-8(i)(9). Without having the ability to seek the Staff's concurrence to exclude a shareholder proposal based on Rule 14a-8(i)(9), issuers pursued a number of alternative methods for addressing shareholder proposals that conflicted with management proposals. The most common alternative methods were (i) including both the shareholder proposal and the management proposal in the proxy statement, with an explanation to shareholders regarding any differences in scope of applicability and recommending that shareholders vote in favor of the management proposal; and (ii) including only the shareholder proposal, and recommending that shareholders vote against that proposal.

In SLB 14H, the Staff expressed the view that there is a "direct conflict" between a shareholder proposal and management proposal only where "a reasonable shareholder could not logically vote in favor of both proposals, i.e., a vote for one proposal is tantamount to a vote against the other proposal." The Staff noted that this analysis "more appropriately focuses on whether a reasonable shareholder could vote favorably on both proposals, or whether they are, in essence, mutually exclusive proposals." In communicating this interpretation, the Staff focused on the principle that Rule 14a-8(i)(9) is designed to ensure that the shareholder proposal process is not used as a means to circumvent the SEC's proxy rules governing solicitations.

In SLB 14H, the Staff provided the following examples to provide a better understanding of the Staff's focus on "whether a reasonable shareholder could logically vote for both proposals."

- Direct Conflict Exists. The Staff stated that (i) "where a company seeks shareholder approval of a merger, and a shareholder proposal asks shareholders to vote against the merger;" or (ii) "a shareholder proposal that asks for the separation of the company's chairman and CEO would directly conflict with a management proposal seeking approval of a bylaw provision requiring the CEO to be the chair at all times," the Staff "would agree that the proposals directly conflict."
- Direct Conflict Does Not Exist. In illustrating those circumstances in which a direct conflict would not exist for purposes of Rule 14a-8(i)(9), the Staff provided the following examples: (i) "if a company does not allow shareholder nominees to be included in the company's proxy statement, a shareholder proposal that would permit a shareholder or group of shareholders holding at least 3% of the company's outstanding stock for at least 3 years to nominate up to 20% of the directors would not be excludable if a management proposal would allow shareholders holding at least 5% of the company's stock for at least 5 years to nominate for inclusion in the company's proxy statement 10% of the directors;" and (ii) "a shareholder proposal asking the compensation committee to implement a policy that equity awards would have no less than four-year annual vesting would not directly conflict with a management proposal to approve an incentive plan that gives the compensation committee discretion to set the vesting provisions for equity awards." The Staff noted that these situations would not present a "direct conflict" because "a reasonable shareholder, although possibly preferring one proposal over the other, could logically vote for both."

With respect to the proxy access example described above, the Staff stated that there would be no direct conflict because "both proposals generally seek a similar objective, to give shareholders the ability to include their nominees for director alongside management's nominees in the proxy statement, and the proposals do not present shareholders with conflicting decisions such that a reasonable shareholder could not logically vote in favor of both proposals." The Staff analyzed the compensation example similarly, stating that "a reasonable shareholder could logically vote for a compensation plan that gives the compensation committee the discretion to determine the vesting of awards, as well as a proposal seeking implementation of a specific vesting policy that would apply to future awards granted under the plan."

The Staff noted that SLB 14H could impose "a higher burden for some companies seeking to exclude a proposal to meet than had been the case under our previous formulation." As a result, issuers may turn to Rule 14a-8(i)(10) in seeking to exclude a shareholder proposal that is very similar to a management proposal or action. Rule 14a-8(i)(10) provides an exclusion from an issuer's obligation to include shareholder proposals from eligible shareholders in the issuer's proxy statement if the issuer's existing policies and practices "substantially implement" the shareholder proposal.

Rule 14a-8(i)(10) provides that a proposal is excludable when the issuer has already substantially implemented the proposal. Under what circumstances is this basis for exclusion applicable?

Rule 14a-8(i)(10) permits an issuer to exclude a shareholder proposal from its proxy materials if the issuer has "substantially implemented" the proposal.

Interpreting the predecessor to Rule 14a-8(i)(10), the SEC stated in Release No. 34-12598 (July 7, 1976) that the rule was "designed to avoid the possibility of shareholders having to consider matters which have already been favorably acted upon by the management." To be excluded, the proposal does not need to be implemented in full or exactly as presented by the proponent. Instead, the standard for exclusion is substantial implementation. *See* SEC Release No. 34-40018 (May 21, 1998, *note 30 and accompanying text*); *see also* SEC Release No.34-20091 (August 16, 1983).

The Staff has stated that, in determining whether a shareholder proposal has been substantially implemented, it will consider whether an issuer's particular policies, practices, and procedures "compare favorably with the guidelines of the proposal," and not where those policies, practices, and procedures are embodied. The Staff has provided no-action relief under Rule 14a-8(i)(10) where an issuer has satisfied the essential objective of the proposal, even if the issuer (i) did not take the exact action requested by the proponent, (ii) did not implement the proposal in every detail or (iii) exercised discretion in determining how to implement the proposal. In these cases, the Staff concurred with the issuer's determination that the proposal was substantially implemented in accordance with Rule 14a-8(i)(10) when the issuer had taken actions that included modifications from what was directly contemplated by the proposal, including in circumstances when the issuer had policies and procedures in place relating to the subject matter of the proposal, or the company had otherwise implemented the essential objectives of the proposal.

Rule 14a-8(i)(11) provides that a proposal is excludable when the proposal substantially duplicates another proposal previously submitted to the issuer by another shareholder that will be included in the issuer's proxy materials for the same meeting. Under what circumstances is this basis for exclusion applicable?

Rule 14a-8(i)(11) creates a means to ensure that only one shareholder proposal relating to substantially the same matter is included in the company's proxy statement. The shareholder proposal that is the first submitted is the one that is included (absent some other basis for exclusion). In this regard, management cannot choose among multiple proposals. Rule 14-8(i)(11) involves three elements: (i) substantially duplicative proposals; (ii) the order in which such proposals were received; and (iii) the inclusion of the first-received proposal in the proxy materials. The purpose of Rule 14a-8(i)(11) is to avoid shareholder confusion and to prevent various proponents from including in proxy materials several versions of essentially the same proposal.

Rule 14a-8(i)(12) provides that a proposal is excludable when the proposal deals with substantially the same subject matter as another proposal or proposals that previously has or have been included in the issuer's proxy materials within a specified time frame and did not receive a specified percentage of the vote. Under what circumstances is this basis for exclusion applicable?

Rule 14a-8(i)(12) operates as follows:

- The issuer should look back three calendar years to see if it previously included a proposal or proposals dealing with substantially the same subject matter. If it has not, Rule 14a-8(i)(12) is not available as a basis to exclude a proposal from this year's proxy materials.
- If it has, the issuer should then count the number of times that a proposal or proposals dealing with substantially the same subject matter was or were included over the preceding five calendar years.
- The issuer should look at the percentage of the shareholder vote that a proposal dealing with substantially the same subject matter received the last time it was included.

Only votes for and against a proposal are included in the calculation of the shareholder vote of that proposal. Abstentions and broker non-votes are not included in this calculation.

Rule 14a-8(i)(13) provides that a proposal is excludable when the proposal relates to specific amounts of cash or stock dividends. Under what circumstances is this basis for exclusion applicable?

The basis for exclusion in Rule 14a-8(i)(13) is viewed as a function of the board of directors, not shareholders. For example, the Staff has allowed exclusion of a shareholder proposal seeking declaration of a dividend of 75% of earnings per share. Proposals seeking that company's distribute specific amounts of cash or stock dividends have been relatively uncommon in recent years.

PROXY ACCESS

What is "proxy access" or "shareholder access"?

Under the SEC's proxy solicitation rules, only the issuer's director nominees are included in the company's proxy statement and proxy card. If shareholders want to nominate their own candidates, then, in addition to complying with applicable state corporation law and the issuer's charter and bylaws, a nominating shareholder must prepare its own proxy statement and proxy card and conduct its own proxy solicitation for the director candidates. This is referred to as a "proxy contest." The terms "proxy access" or "shareholder access" refers to an alternative approach whereby director nominees from qualifying shareholders must be included in the company's proxy statement and on the issuer's proxy card.

Did the Dodd-Frank Wall Act require that the SEC adopt a proxy access rule?

Section 971 of the Dodd-Frank Act provided the SEC with the authority to promulgate "proxy access" rules, allowing specified shareholders to include director nominees in a company's proxy materials. The Dodd-Frank Act did not prescribe specific standards for these rules, and the SEC had in fact proposed proxy access rules prior to enactment of the Dodd-Frank Act.

Did the SEC adopt a proxy access rule and what is the status of that rule?

The SEC issued final rules facilitating shareholder director nominations on August 25, 2010, and such rules were scheduled to become effective on November 15, 2010. However, the effectiveness of those rules was stayed due to litigation challenging the rules.

Under Rule 14a-11 as adopted by the SEC, qualifying shareholders or groups holding at least 3% of the voting power of an issuer's securities, who had held their shares for at least three years, would have had the right to include director nominees in proxy materials upon meeting certain other requirements. An amendment to Rule 14a-8 provided that issuers may not exclude from their proxy materials shareholder proposals for less restrictive proxy access procedures.

On September 29, 2010, the Business Roundtable and Chamber of Commerce of the United States of America filed a petition with the United States Court of Appeals for the District of Columbia Circuit (the "Court") seeking judicial review of the changes to the SEC's proxy access rule, and on the same day filed with the SEC a request to stay the effective date of Rule 14a-11. On October 4, 2010, the SEC granted the request for a stay of the Rule 14a-11 and associated rules pending resolution of the petition for review by the Court. On July 22, 2011, the Court vacated Rule 14a-11. The Court held that the SEC was "arbitrary and capricious" in promulgating Rule 14a-11, based principally on the SEC's failure to adequately address the economic effects of the rule. The Court expressed significant concerns about the conclusions that the SEC reached and the agency's consideration of comments during the course of the rulemaking. The Court did not address the First Amendment challenge to the rule that had been raised by the petitioners.

On September 6, 2011, the SEC issued a statement indicating that it would not seek rehearing of the Court's decision, nor would it seek Supreme Court review of the decision; however, the Staff would continue to study the viability of a proxy access rule. The statement also indicated that the amendment to Rule 14a-8 referenced above would go into effect when the Court's mandate was finalized, which occurred on September 14, 2011. As a result, the amendments to Rule 14a-8 (along with other rules adopted in connection with Rule 14a-11) became effective on September 20, 2011, following the SEC's publication of a notice announcing the effective date of the rule changes.

What changes did the SEC make to the shareholder proposal rule and what is the status of those changes?

The amendments to Rule 14a-8 that the SEC adopted in 2010, which became effective on September 20, 2011, have served to facilitate, the type of "private ordering" for proxy access through the shareholder proposal process that many commenters had supported in the course of the proxy access rulemaking.

Under Rule 14a-8(i)(8), as amended, an issuer may not exclude a shareholder proposal that would amend or request that the issuer consider amending governing documents to facilitate director nominations by shareholders or disclosures related to nominations made by shareholders, as long as such proposal does not conflict with Rule 14a-11 and is not otherwise excludable under some other procedural or substantive basis in Rule 14a-8. The SEC also codified some of the Staff's historical interpretations of Rule 14a-8(i)(8) which permitted exclusion of a shareholder proposal that would: (i) seek to disqualify a nominee standing for election; (ii) remove a director from office before the expiration of his or her term; (iii) question the competence, business judgment or character of a nominee or director; (iv) nominate a specific individual for election to the board of directors, other than through the Rule 14a-11 process, an applicable state law provision, or an issuer's governing documents; or (v) otherwise affect the outcome of an upcoming election of directors.

Are there other bases under which companies could exclude a shareholder proposal seeking to establish proxy access at a company?

While the SEC's amendments to Rule 14a-8(i)(8) eliminated one basis to exclude proxy access shareholder proposals, there may be other options for seeking to exclude proxy access shareholder proposals. An issuer could argue (i) that the proposal is contrary to the proxy rules under Rule 14a-8(i)(3), i.e., the resolution contained in the proposal is inherently vague or indefinite; (ii) that by adopting its own proxy access bylaw amendment, the shareholder's proxy access proposal has been "substantially implemented" under Rule 14a-8(i)(10); (iii) the shareholder proposal directly conflicts with a similar company-sponsored proposal under Rule 14a-8(i)(9), however in SLB No. 14H the Staff substantially reduced the ability to rely on this basis for exclusion; or (iv) that another basis for exclusion specified in Rule 14a-8(i) applies, based on the specific language of the proposal and the supporting statement or the particular circumstances of the company or the proponent.

Are issuers adopting a proxy access bylaw as a result of the prospect of shareholder proposals seeking to establish proxy access?

Up until the 2015 proxy season, many issuers had been taking a "wait-and-see" approach with respect to amending their bylaws to permit proxy access in order to allow greater flexibility in responding to future shareholder proposals. In November 2014, the Comptroller of the City of New York, on behalf of the New York City pension funds, launched a large-scale campaign for the 2015 proxy season targeting 75 issuers with a proxy access shareholder proposal. The Comptroller's office has indicated this initiative is part of a wider effort to implement universal proxy access through private ordering.

The New York City Comptroller indicated that the 75 Boardroom Accountability Project proposals were submitted to issuers that were selected based on three priority issues: "climate change, board diversity, and excessive CEO pay." Based on that analysis, the proposals were submitted to: (1) 33 carbon-intensive coal, oil and gas, and utility companies; (2) 24 companies with few or no women directors, and little or no apparent racial or ethnic diversity; and (3) 25 companies that received significant opposition to their 2014 say-on-pay votes. The 75 identical precatory proposals submitted by the Comptroller requested that the board of directors adopt, and present for shareholder approval, a bylaw to give shareholders who meet a threshold of owning 3 percent of an issuer's shares continuously for three or more years the right to list their director candidates, representing up to 25 percent of the board, in the issuer's proxy materials. The proposal contemplated that the nominating shareholder would provide notice to the issuer, within the time specified in the bylaws, and would provide at that time the information required by the bylaws and the SEC's rules about both the director nominee and the nominator. The proposal also contemplated that the nominating shareholder would certify that (1) it will assume liability stemming from any legal or regulatory violation arising out of the nominator's communications with the issuer's shareholders; (2) it will comply with all applicable laws and regulations if it uses soliciting material other than the issuer's proxy materials; and (3) to the best of its knowledge, the required shares were acquired in the ordinary course of business and not to change or influence control of the issuer.

The proposal further provided that the nominating shareholder may submit a 500-word statement in support of the director nominee. The proposal would leave to the board the ability to adopt procedures to deal with whether submissions are timely and adequate, as well as how to prioritize multiple nominees. The proposal's supporting statement was very limited, noting a 2014 CFA Institute study which concludedthat proxy access would "benefit both the markets and corporate boardrooms, with little cost or disruption" and has the potential to raise overall US market-capitalization by "up to $140.3 billion if adopted market-wide." The supporting statement also noted that votes for similar proposals averaged 55 percent through September 2014 and similar bylaws have been adopted by some large companies.

During the 2015 proxy season, over 90 proxy access shareholder proposals appeared on ballots, and as of the end of 2015, approximately 100 issuers had adopted some form of proxy access, with much of this momentum prompted by the Boardroom Accountability Project. The New York City Comptroller resumed the Boardroom Accountability Project in the 2016 proxy season, targeting 74 large-cap companies based on board diversity, excessive CEO pay, or operation in the fossil fuels industry.

By the end of 2022, a substantial majority of the S&P 500 companies had adopted proxy access provisions.

Has a proxy access provision ever been utilized to nominate a director candidate?

In November 2016, a proxy access bylaw was utilized for the first time when GAMCO Asset Management announced that it had used the proxy access provision in the bylaws of National Fuel Gas to nominate a director to be elected at National Fuel Gas's 2017 Annual Meeting. GAMCO Asset Management and its affiliates beneficially owned approximately 7.8% of the company's common stock. National Fuel Gas rejected the proxy access nomination, indicating that GAMCO Asset Management could not make the representation that the shares it owned were acquired in the ordinary course of business and not with an intent to change or influence control of the company, and the shareholder did not presently have such intent. GAMCO Asset Management subsequently announced that its director nominee had withdrawn his candidacy and that GAMCO would not pursue proxy access.

In 2019, the Austin Trust, which owned approximately 3.8% of The Joint Corp. successfully utilized proxy access to include a director nominee in the proxy materials for The Joint Corp.'s 2019 annual meeting of stockholders. The director nominee was subsequently elected to the board of directors of The Joint Corp.

APPENDIX A

COMPLIANCE CHECKLIST
SCHEDULE 14A
FOR AN ANNUAL MEETING OF STOCKHOLDERS
February 2023

This checklist is a summary of the proxy rules that are generally applicable to proxy statements for annual stockholder' meetings. This checklist should not replace a careful review of the proxy rules and requirements, including, without limitation, Schedule 14A and Rule 14a-1 through Rule 14b-2 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). References to Items herein are references to Items of Schedule 14A unless otherwise noted, and references to rules herein are references to rules under the Exchange Act unless otherwise noted.

Item 1. Date, Time and Place Information

- The date, time, and place of the annual meeting.
- The complete mailing address of the company's principal offices, including the zip code.
- The approximate date on which the proxy statement and form of proxy are being sent to stockholders must appear on the first page of the proxy statement as delivered to stockholders.
- The deadline for submitting shareholder proposals for inclusion in the company's proxy statement for the following year (calculated according to Rule 14a-8(e)).
- The date after which a notice of shareholder proposal submitted outside the process of Rule 14a-8 is considered untimely.

Item 2. Revocability of Proxy

State whether or not the proxies are revocable. If the right to revoke is limited in any way or subject to compliance with any formal procedures, briefly describe such limitation or procedure.

Item 3. Dissenters' Rights of Appraisal

- Briefly outline the appraisal rights or similar rights of the dissenters with respect to any proposal to be acted on, and indicate the procedures that must be followed by a stockholder, including a deadline, if any, to exercise or perfect such rights.
- Indicate whether a stockholder's failure to vote against a proposal will constitute a waiver of appraisal or similar rights and whether a vote against a proposal will be deemed to satisfy any notice requirements.

Item 4. Persons Making the Solicitation

- State that the company (or its board of directors, on behalf of the company) is soliciting the proxy.
- If any director has informed the company that he or she intends to oppose a proposal, state the name of the director and the proposal at issue.
- State who will pay the costs of solicitation.
- If proxy solicitors are to be used, disclose the material terms of their contract, the anticipated costs, and who is paying the costs.
- If the solicitation is to be made in a manner other than through the mail, describe the methods to be used.
- If the proxy is being filed in connection with a proxy contest by a person in opposition to management's slate, see Item 4(b) for additional disclosure requirements.

Item 5. Interest of Certain Persons in Matters to be Acted Upon

- Briefly describe any substantial interest, direct or indirect, by security holdings or otherwise, of each of the following persons in any matter to be acted upon, other than elections to office:
  - each person who has been a director or executive officer of the company at any time since the beginning of the last fiscal year;
  - each nominee for election as a director of the company; and
  - each associate of any of the foregoing persons.

Item 6. Voting Securities and Principal Holders Thereof

- For each class of voting stock entitled to vote at the meeting, state the number of shares outstanding and the number of votes to which each class is entitled.
- State the record date for the annual meeting.
- If action is to be taken with respect to the election of directors and the stockholders have the right to cumulative voting, state the existence of the rights, briefly describe the rights, and state the conditions to the exercise of the rights.
- If the company has undergone a change of control since the beginning of its last fiscal year, see Item 6(e) for required disclosure.

Security Ownership of Certain Beneficial Owners and Management (Item 403 of Reg. S-K)

The following people must be listed in this table:

- Beneficial owners of more than 5% of any class of voting securities;
- Directors and director nominees; and
- Named executive officers (as defined under Item 402(a)(3)).

The table must include columns listing the following:

- Class of security;
- Name of beneficial owner (and home or business address for 5% shareholders);
- Amount and nature of beneficial ownership;
- Percentage of class owned; and

Any arrangement known to the company, including any pledge of the company's securities, which might result in a change of control must be described. See Item 403(c) of Regulation S-K.

Item 7. Directors and Executive Officers

If action is to be taken with respect to the election of directors, the following information must be included for each director, executive officer, person chosen to become an executive officer and director nominee, using tables where possible (Item 401 of Reg. S-K):

- Name and age;
- All positions and offices held with the company;
- Term of service with the company;
- A brief description of the person's business experience during the past five years, including the name and principal business of employers and whether or not these employers are parents, subsidiaries or affiliates of the company;
- Other public company directorships held or held during the last 5 years;
- A brief description of any arrangement or understanding with any other person by which the director was selected and the identity of such other person;
- Any involvement in certain legal proceedings during the last 10 years, including, without limitation, bankruptcy petitions, criminal convictions, orders limiting business practices or securities law violations among others (see Item 401(f) of Reg. S-K);
- Any material proceedings where any directors, nominees, executive officers or any of their associates is an adverse party to the company or any of its subsidiaries (see Instruction 4 to Item 103 of Reg. S-K);

- If the company has gone public in the last year, additional disclosure may be required for promoters or "control persons" (see Item 401(g) of Reg. S-K); and
- Briefly describe any family relationships between any director, executive officer, person chosen to become an executive officer or director nominee.

Related Person Transactions (see Item 404 of Reg. S-K)

Describe any transaction or series of related transactions, since the beginning of the company's last fiscal year, or any currently proposed transaction, in which the company was or is to be a participant and the amount involved exceeds $120,000 (for smaller reporting companies, the disclosure is required if the transaction amount exceeds the lesser of $120,000 or 1% of the company's total assets, and transactions must be reported for the prior two years), and in which any director, executive officer, person chosen to become an executive officer, director nominee or 5% stockholder (or family member of any of the foregoing) had or will have a direct or indirect material interest. Such description must include the following information regarding the transaction:

- The name of the related person and the basis on which the person is a related person.
- The related person's interest in the transaction, including the related person's position(s) or relationship(s) with, or ownership in, a firm, corporation, or other entity that is a party to, or has an interest in, the transaction.
- The approximate dollar value of the amount involved in the transaction.
- The approximate dollar value of the amount of the related person's interest in the transaction, which shall be computed without regard to the amount of profit or loss.
- In the case of indebtedness, the amount involved in the transaction shall include the largest aggregate amount of principal outstanding during the period for which disclosure is provided, the amount thereof outstanding as of the latest practicable date, the amount of principal paid during the periods for which disclosure is provided, the amount of interest paid during the period for which disclosure is provided, and the rate or amount of interest payable on the indebtedness.
- Any other material information regarding the transaction or the related person in the context of the transaction.

Review and Approval of Related Party Transactions (not required for smaller reporting companies)

- Describe the company's policies and procedures for the review, approval, or ratification of any transaction required to be reported as a related party transaction, such as, among other things:
  - The types of transactions that are covered by such policies and procedures;
  - The standards to be applied pursuant to such policies and procedures;
  - The persons or groups of persons on the board of directors or otherwise who are responsible for applying such policies and procedures; and
- Identify any related party transaction that was required to be reported since the beginning of the company's last fiscal year where such policies and procedures did not require review, approval or ratification or where such policies and procedures were not followed.

Compliance with Section 16(a) of the Exchange Act

- Identify any person required to file reports under Section 16 of the Exchange Act that failed to timely file a report under Section 16 during the last fiscal year under the heading "Delinquent Section 16 Reports", including:
  - The number of late reports;
  - The number of transactions that were not timely reported; and
  - Any known failure to file a required report.

Corporate Governance

- Director Independence (see Item 407(a) of Regulation S-K)
  - Identify each director and nominee for director that is independent under applicable listing standards (if the company is not listed on an exchange, the definition of independence for any national securities exchange may be used, but the definition used should be noted);
  - State the total number of board meetings that took place during the last fiscal year;
  - Name each director who attended less than 75% of the aggregate of (i) the total number of board meetings and (ii) the total number of meetings of committees on which he or she served; and
  - Describe the company's policy, if any, with respect to board member attendance at annual stockholders' meetings.
- State whether or not the company has the following committees;
  - Audit committee;

    - Compensation committee; and
    - Nominating committee.
- For each of these committees:
    - Describe briefly the functions performed by the committee;
    - Identify each committee member, and whether each member is independent under applicable listing standards and heightened standards for audit committee members, if applicable;
    - State whether the committee has a charter, and if so, whether it can be found on the company's website or is otherwise available;
    - State the number of committee meetings held during the last fiscal year; and
    - List the members of the audit committee that qualify as an "audit committee financial expert," (as defined in Item 407(d)(5) of Regulation S-K).

Nominating Committee (see Item 407(c) of Regulation S-K)

- If the company does not have a nominating committee, state the basis for the board's view that it does not need one, and identify each director who participates in the consideration of director nominees.
- If the company has a policy concerning shareholder nominees for director, discuss the material terms of such policy, and the procedures for shareholders who want to nominate a director; if the company has no such policy, state the basis for the board's view that it does not need one.
- Describe the nominating committee's procedures for identifying and evaluating director nominees, and any differences in procedures with respect to shareholder nominees, including any minimum qualifications for serving on the board and how the nominating committee considers diversity in evaluating nominees.
- With regard to each nominee for director (other than current directors or executive officers), disclose the source of the nomination: stockholder, director, CEO, other executive officer, third party search firm, or other source.
- Disclose any fees paid to a third-party search firm.
- If the nominating committee received a shareholder nomination from a stockholder or group of stockholders holding in the aggregate 5% of more of the company's outstanding stock, disclose that fact.

Audit Committee Requirements (see Item 407(d) of Regulation S-K)

Include an Audit Committee Report, stating:

- Whether the audit committee has reviewed and discussed the audited financials with management;
- Whether the audit committee has discussed with the auditors the matters required to be discussed by the applicable requirements of the Public Company Accounting Oversight Board and the SEC;
- Whether the audit committee has received the required independence-of-auditor letter from the accountants and has had discussions with the accountants regarding their independence;
- Whether the audit committee has recommended to the Board that the audited financials be included in the company's 10-K; and
- The name of each member of the audit committee must be set forth below the report.

Compensation Committee

- Describe the committee's processes and procedures for determining executive compensation, including:
  - The scope of authority of the compensation committee (or persons performing the equivalent functions);
  - The extent to which the compensation committee may delegate any authority, specifying what authority may be so delegated and to whom;
  - The role of executive officers in determining or recommending the amount or form of executive and director compensation; and
  - The role of compensation consultants in determining or recommending the amount or form of executive and director compensation.
- The fees paid to any compensation consultant used by the compensation committee, if the company paid such consultant fees in excess of $120,000 during the last fiscal year for services other than consulting on executive compensation.
- With regard to any compensation consultant identified in response to Item 407(e)(3)(iii) whose work has raised any conflict of interest, disclose the nature of the conflict and how the conflict is being addressed.

- Compensation Committee Interlocks and Insider Participation (see Item 407(e)(4) of Regulation S-K – must be separately captioned)
  - Identify each person who served on the compensation committee during the last fiscal year who was an employee of the company during the last fiscal year, was ever an officer of the company, or had a relationship during the last fiscal year requiring disclosure under Item 404(a) of Regulation S-K, describing such relationship.
  - If an executive officer of the company served as a director (or on the compensation committee) of another entity during the past year, and an executive officer of the other entity serves on the company's board or compensation committee, identify the directors and describe the relationships.
- Compensation Committee Report (see Item 407(e)(5) of Regulation S-K – must be separately captioned)
  - State that the compensation committee has reviewed the CD&A and recommended it for inclusion in the Form 10-K.
  - The name of each compensation committee member must be set forth below the report.

Shareholder Communications (see Item 407(b) and (f) of Regulation S-K)

- Describe the manner in which stockholders may send communications to members of the board.
- If company does not have a process for stockholders to communicate with the board, explain why.
- If all security holder communications are not sent directly to board members, describe the company's process for determining which communications will be relayed to board members.

Board Leadership and Role in Risk Oversight (*see Item 407(h) of Regulation S-K)*

- Disclose whether the same person serves as CEO and board chairman.
- Describe why the company has chosen to combine or separate the CEO and board chairman positions, as well as the reasons why the company believes that this board leadership structure is the most appropriate structure for the company at the time of the applicable filing.
- Where there is a combined CEO and board chairman but also a lead independent director, disclose whether and why the company has a lead independent director and the specific role that the lead independent director plays in the leadership of the company.
- Disclose the extent of the board's role in risk oversight.
  - Disclose the effect that the board's role in the oversight of risk has on the leadership structure.

Item 8. Compensation of Directors and Executive Officers

Furnish the following information if action is to be taken with respect to (a) the election of directors; or (b) any compensation plans in which executive officers or directors participate.

The compensation disclosure required by Item 8 is extensive and detailed. A high level summary of the requirements is below, however we strongly advise you to consult Item 402 of Regulation S-K for the specific disclosure requirements (smaller reporting companies and emerging growth companies have scaled reporting requirements which are set forth in Items 402 of Regulation S-K).

- Compensation Discussion and Analysis
  - Objectives of the company's compensation program;
  - What the compensation program is designed to reward;
  - Each element of compensation;
  - Why the company chooses to pay each element;
  - How the company determines the amount (and, where applicable, the formula) for each element;
  - How each element and the company's decisions regarding that element fits into the overall compensation objectives and affects decisions regarding other elements; and
  - Whether, and if so, how, the company has considered the results of the most recent shareholder advisory vote on executive compensation (as required by Section 14A of the Exchange Act or Exchange Act Rule 14a-20) in determining compensation policies and decisions and, if so, how that consideration has affected the company's compensation decisions and policies.
- Summary Compensation Table
- Grants of Plan-Based Awards Table
- Narrative Disclosure to the Summary Compensation Table and the Grants of Plan-Based Awards Table – Describe material factors necessary to understand tables, including:
  - Material terms of each named executive officer's employment arrangements, whether written or unwritten;
  - Material modifications to options or other equity-based awards, including repricings;
  - Material terms of any plan-based award disclosed in the tables, including formulas to be applied in determining amounts and vesting schedules; and
  - An explanation of the amount of salary and bonus in proportion to total compensation.

- Outstanding Equity Awards at Fiscal Year-End Table
- Option Exercises and Stock Vested Table
- Pension Benefits Table
- Nonqualified Deferred Compensation Table
- Potential Payments Upon Termination or Change in Control
  - Describe and explain the specific circumstances that would trigger payments or other benefits, including perquisites and health-care benefits;
  - Describe and quantify estimated payments and benefits;
  - Describe how payment and benefit levels are determined under various circumstances;
  - Describe material obligations or conditions to receipt of payments or benefits, e.g., non-compete, non-solicitation or non-disparagement agreements; and
  - Any other material factors.
- CEO pay ratio disclosure
- Pay versus performance disclosure
- Employee and director hedging policies disclosure
- Director Compensation Table
- Narrative to Director Compensation Table – Describe material factors necessary to understand the table, including:
  - A description of standard compensation arrangements (such as fees for retainer, committee service, service as chairman of the board or a committee, and meeting attendance); and
  - Whether any director has a different compensation arrangement, identifying that director and describing the terms of that arrangement.
- Narrative of the Company's Compensation Policies and Practices as they Relate to Risk Management
  - If risks arising from the company's compensation policies and practices for its employees are reasonably likely to have a material adverse effect on the company, disclose the company's policies and practices of compensating its employees, including non-executive officers, as they relate to risk management practices and risk-taking incentives.

Item 9. Independent Public Accountants.

- If the meeting involves (1) election of directors or (2) approval or ratification of the company's accountant, include the following:
  - The name of the accountant selected or being recommended for approval or ratification;

    - The name of the accountant for the last fiscal year if different from the accountant being recommended for approval or ratification, or if no accountant is being named for the current year;
    - Whether or not representatives of the accountant will be present at the annual meeting;
    - Whether or not the representatives of the accountant will have the opportunity to make a statement at the meeting if they desire to do so; and
    - Whether or not the representatives of the accountant will be available at the meeting to answer questions.
- If the accountant has changed during the last two years, additional disclosure may be required under Item 9(d).

Accountant Fee Disclosure (see Item 9(e))

- Under the caption “Audit Fees” list the aggregate fees billed by the accountant for the preparation of the annual financials for each of the last two fiscal years and the financials included in the company’s 10-Qs for those fiscal years.
- Under the caption “Audit-Related Fees” list the aggregate fees billed for each of the last two fiscal years for assurance and related services by the accountant that are reasonably related to the audit or review of the company’s financial statements and are not reported as “Audit Fees.”
- Under the caption “Tax Fees” list the aggregate fees billed for each of the last two fiscal years for professional services rendered by the accountant for tax compliance, tax advice, and tax planning and describe the nature of the services provided.
- Under the caption “All Other Fees” list the aggregate fees billed for each of the last two fiscal years by the accountant for all other services not otherwise described and identify the nature of the services provided.
- Describe the audit committee’s pre-approval policies and procedures.
- Describe the percentage of services other than Audit Fees that were approved by the audit committee pursuant to the “de minimis” exception in Regulation S-X Rule 2.01(c)(7)(1)(C).
- If more than 50% of the audit work was performed by persons other than the accountant’s full-time employees, list the percentage of work done by these people.

Item 10. Compensation Plans.

If any action is to be taken with regard to any compensation plan (cash or noncash) provide the information listed below. If a plan is being amended, provide the information for the amended plan and note any material differences from the existing plan.

- Briefly describe the material features of the plan being acted on, including (i) each class of persons that will be entitled to participate, (ii) the approximate number of people in each class and (iii) the basis for participation.
- Using the form of table specified in Item 10(a)(2)(i), disclose the benefits or amounts under the plan that will be received by or allocated to, subject to shareholder approval, each of the following:
    - Each named executive officer;
    - All current executive officers as a group;
    - All current directors who are not executive officers as a group; and
    - All employees, including all current officers who are not executive officers, as a group.
- If the plan grants options or warrants disclose:
    - The title and amount of securities underlying the options or warrants;
    - The price, expiration date and other material conditions for exercising the options or warrants;
    - The consideration received or to be received by the company on grant of the options or warrants;
    - The market value of the securities underlying the options or warrants as of the latest practicable date; and
    - In the case of options, the federal income tax consequences of the issuance and exercise of the options for the recipient and the company.
- The options received or to be received by the following people must be listed separately:
    - Each named executive officer;
    - All current executive officers as a group;
    - All current directors who are not executive officers as a group;
    - Each nominee for director;
    - Each associate of any such director, executive officer or nominee;

    - Each other person who will receive 5% of the options under the plan; and
    - All employees, including all current officers who are not executive officers, as a group.
- If the plan is a written, it must be filed as an appendix to the proxy statement in the SEC filing. See Instruction 3 to Item 10. The plan does not need to be included in the printed version of the proxy statement sent to stockholders.
- Equity Compensation Plan Table (Item 10(c) of Schedule 14A and Item 201(d) of Regulation S-K)

Item 21. Voting Procedures.

As to each matter which is to be submitted to a vote of security holders, furnish the following information:

- The vote required for approval or election, other than for the approval of auditors.
- The method by which votes will be counted, including the treatment and effect of abstentions and broker non-votes under applicable state law as well as the company's organizational documents.
- Items 11 through 20 of Schedule 14A set forth disclosure requirements applicable when action is being taken with respect to specific matters such as issuance of securities, modification or exchange of securities, mergers, consolidations or similar matters, restatement of accounts and amendment of charter or bylaws among other matters. Please refer to Items 11 through Item 20 to determine whether those requirements are applicable to your particular circumstances.

Item 23. Delivery of Documents to Security Holders Sharing an Address.

If one annual report, proxy statement or notice of availability of proxy materials is being delivered to multiple stockholders at the same address:

- State that only one annual report, proxy statement or notice of internet availability of proxy materials, as applicable, is being delivered to multiple security holders sharing an address unless the company has received contrary instructions from one of the security holders.
- Promptly deliver a separate copy of the applicable materials, if requested.
- Provide a phone number and mailing address for stockholders to contact if they wish to receive a separate copy of such materials in the future.
- Provide instructions on how stockholders can request delivery of a single copy if they are receiving multiple copies.
- Provide instructions on how a stockholder can request separate copies in the future.

Item 24. Shareholder Approval of Executive Compensation (Item 24 does not apply to emerging growth companies).

Companies that are required to provide any of the separate shareholder votes pursuant to Exchange Act Rule 14a-21 shall disclose:

- That they are providing such vote as required pursuant to Section 14A of the Exchange Act;
- A brief explanation of the general effect of each vote, such as whether each such vote is non-binding;
- Where applicable, the current frequency of advisory votes on executive compensation as required by Exchange Act Rule 14a-21(a) and when the next such shareholder advisory vote will occur.

APPENDIX B

Annotated Model Directors and Officers Questionnaire

CONFIDENTIAL

[Insert Company Name]

Directors and Officers Questionnaire

Date: ______________________________

Name: ______________________________

This Questionnaire is being furnished to you to obtain information to prepare and file **[the Proxy[1] Statement and an Annual Report on Form 10-K (collectively, the "Annual Report") of [Insert Company Name] (the "Company") with the Securities and Exchange Commission (the "SEC") covering the fiscal year ended [Insert Date of Last Fiscal Year End] ("Fiscal Year [Insert Last Fiscal Year]")] [a Registration Statement on Form S-1 (the "Registration Statement") for [Insert Company Name] (the "Company")]**. The Questionnaire will also assist the Company's board of directors in assessing each of its members' independence (as defined by the SEC and [Nasdaq] [the New York Stock Exchange (the "NYSE")]). As used in this Questionnaire, the term "Company" includes any *affiliate* of the Company, [including [Insert Applicable Entities]]. "You" also refers to any entity on whose behalf you are responding. Certain terms are *italicized*, and definitions of those terms are provided at the end of the Questionnaire.

Important Note: Please note several of the questions contained in this Questionnaire have changed from prior years as a result of recent SEC rule changes, including changes requiring additional disclosure related to your professional background and compensation.

Unless otherwise directed, please answer every question. If the Company has completed portions of the Questionnaire on your behalf, please confirm the accuracy of that information. If your answer to a question is "None" or "Not Applicable," please so state. If you do not provide an answer to a question, the Company will assume the answer is "None" or "No," as applicable. Unless otherwise stated, your answers should be given as of the date you sign the Questionnaire. Please note that certain questions are necessarily broad in scope, so if you have doubts regarding whether something should be included in your response please err on the side of over-inclusion. The Company may have additional follow-up questions for you in connection with preparing the Annual Report **[Registration Statement]**. It is important that you review the draft(s) of the Annual Report **[Registration Statement]** that are presented to you to confirm that the information about you is accurate.

[1] If preparing for Schedule 14C, replace "Proxy" with "Information."

Once you have completed the Questionnaire, please sign it to indicate: (i) your consent for the Company to use the information provided in its Annual Report **[Registration Statement]**; (ii) your acknowledgment that material misstatements or omissions in the Annual Report **[Registration Statement]** may give rise to civil and criminal liabilities to the Company, each officer and director of the Company signing the Annual Report **[Registration Statement]**, **[the officers providing certifications pursuant to Sections 302 and 906 of the Sarbanes-Oxley Act**], and other persons associated with the preparation and filing of the Annual Report [Registration Statement]; (iii) your agreement to notify the Company of any misstatement of a material fact in the Annual Report **[Registration Statement]**, and of the omission of any material fact necessary to make the statements contained in the Annual Report **[Registration Statement]** not misleading, promptly after you become aware of any such misstatement or omission; (iv) your agreement to promptly notify the Company of any changes in information provided in the Questionnaire occurring after the date you sign the Questionnaire; and (v) your confirmation that the information contained in the Questionnaire is true and correct, to the best of your knowledge and belief after a reasonable investigation, as of the date you sign the Questionnaire.

Please complete the Questionnaire and return it, **along with a copy of your current resume**, by **[insert date—should allow at least two weeks]**. Please return the completed Questionnaire by overnight delivery to the **[Insert Contact Information]**. If you have any questions with respect to these matters, please call **[Insert Contact Information]**.

THE EXISTENCE AND CONTENTS OF THE QUESTIONNAIRE, AS WELL AS YOUR ANSWERS AND ALL NOTES AND DRAFTS PREPARED BY YOU, ARE CONSIDERED EXTREMELY CONFIDENTIAL AND PROPRIETARY BY THE COMPANY AND SHOULD BE TREATED ACCORDINGLY.

BACKGROUND INFORMATION

QUESTION 1. Name, Birth Date, Address and Telephone Number[2]

(a) Your full name (as it should appear in the Company's Annual Report **[Registration Statement]**):

____

(b) Please provide all previous, assumed or fictitious names or aliases:

____

(c) Your birth date:____

Business Address:	***Home Address:***
Business Telephone: ( )	***Home Telephone: ( )***
E-Mail Address:	

QUESTION 2. Arrangement for Selection

Is there any *arrangement* between you and any other person(s) pursuant to which you were or are to be selected as a director, nominee for directorship, or officer?[3]

ANSWER: *YES* ☐ *NO* ☐

If your answer is "YES," please describe:

____

____

2 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(a), (b) (c) and instruction thereto.
3 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(a), (b) and instruction thereto.

QUESTION 3. Family Relationships

(a) Is there any "family relationship" between you and any director, *executive officer*, or person nominated or chosen to become a director or *executive officer* of the Company?[4] The term "family relationship" means any relationship by blood, marriage or adoption not more remote than first cousin.

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please describe:

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____

(b) Are any of your *family members* employed by the Company or any of its *affiliates*, or do any of your *family members* otherwise have business or other relationships with the Company or any of its *affiliates*? To your knowledge, does any group or entity with which any of your *family members* are affiliated have any business or other relationships with the Company or any of its *affiliates*?

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please describe:

____

____

[4] Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(d) and instruction thereto.

QUESTION 4. Business Experience

(a) Please describe your business experience during the past five (5) years in the table below (please attach additional pages as necessary), and note whether your employer was an *affiliate* of the Company.[5] (You may refer to your attached resume if it provides the requested information.)

Time Period (Month/Year) From:	To:	Principal Occupation	Position or Office	Name and Principal Business of Employer	Nature of Responsibilities	*Affiliate* of the Company?
						☐ YES ☐ NO
						☐ YES ☐ NO
						☐ YES ☐ NO
						☐ YES ☐ NO
						☐ YES ☐ NO

(b) Please list in the table below all positions and offices (including board of directors memberships) that you have held with the Company and/or any *subsidiary* during the past five (5) years (including your present position(s)), and the time periods in which you have held those positions or offices.[6] (You may refer to your attached resume to the extent that it provides the requested information.)

Positions/Offices Held	Time Period (Month and Year) From:	To:

5 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(e)(1) and instruction thereto.
6 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(e)(1) and instruction thereto.

QUESTION 5. Directorships

Have you served as a director of any entity besides the Company at any time in the past five years, or have you been selected to serve in the future as a director of any such entity?[7]

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please list in the following table the name of each such entity, the positions (including committee memberships) you have held or have been selected to hold, your dates of service, and indicate if the applicable entity is a public company or a registered investment company.

Entity	Positions and/or Board Committees	Dates of Service (Month and Year) From:	To:	Public Company/Registered Investment Company
				☐ YES ☐ NO
				☐ YES ☐ NO
				☐ YES ☐ NO
				☐ YES ☐ NO

QUESTION 6. Educational [and Other] Background[8]

(a) Please complete the following table regarding your educational background. (You may refer to your attached resume if it provides the requested information.)

Name and Address of College, University or Professional School Attended	Dates of Attendance (Month and Year) From:	To:	Area of Study (Major)	Degree Received

7 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(e)(2) and instruction thereto.
8 Consider attaching the prior year's disclosure for each recipient regarding background and including space for the recipient to update any changes.

(b) [If you are a director, aside from any information provided in Questions 4 through 6(a), above, please describe any specific experiences, qualifications or skills that qualify you to serve as a director.[9] Such information may include information about your risk assessment skills or any particular area of expertise. (You may refer to your attached resume if it provides the requested information.)][10]

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QUESTION 7. [Director Self-Identification *(Directors and Director Nominees Only)*

Do you self-identify yourself as from an "underrepresented community"? If your answer is "*YES*," please describe the details below. An individual from an "underrepresented community" is defined by California Assembly Bill (AB) 979 as an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self identifies as gay, lesbian, bisexual, or transgender.][11]

ANSWER: *YES* ☐ *NO* ☐

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9 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(e)(1) and instruction thereto.

10 Note, this information is required disclosure; however, consider whether or not this question should be included in the Questionnaire or left to the Company and/or the nominating committee to address through enhanced disclosure based on the background information otherwise obtained from directors in Questions 4, 5 and 6(a). If this question is not included in the Questionnaire, please ensure that the appropriate person at the Company is made aware of this disclosure requirement.

11 Public companies headquartered in California should consider including this question (AB 979 applies to any publicly held company, both foreign and domestically incorporated, whose principal executive offices are in California). Pursuant to the law, such companies must (a) have a minimum of one director from an under-represented community on its board no later than December 31, 2021 and (b) by no later than December 31, 2022, have at least: (i) three directors from under-represented communities if the board has nine or more directors; (ii) two directors from under-represented communities if the board has more than four but fewer than nine directors, or (iii) one director from an under-represented community if the board has four or fewer directors. See also the Staff's Regulation S-K Compliance and Disclosure Interpretation Questions 116.11 regarding Item 401 and 133.13 regarding Item 407 (February 6, 2019).

QUESTION 8. [Director Diversity Information (Directors and Director Nominees Only)

The following questions request information regarding individual self-identified diversity factors for the purpose of disclosing information regarding the diversity of the Company's directors in the Company's filings with the SEC, as well as on the Company's website and in the Company's other communications. The Company may also provide this information in response to inquiries from third parties such as shareholders, analysts and the media. Your responses to these questions are voluntary. If you provide information in response to these questions, you are also providing the Company with your consent to the disclosure of that information as specified above, or otherwise.

(a) What is your gender (check one)?

- ☐ Male
- ☐ Female
- ☐ Non-Binary
- ☐ Other:
- ☐ Prefer not to answer

(b) Are you lesbian, gay, bisexual, or transgender (LGBTQ+) (check one)?

- ☐ Yes
- ☐ No
- ☐ Prefer not to answer

(c) What is your ethnicity or race (check one or more, as applicable)?

- ☐ White
- ☐ Hispanic
- ☐ Latinx
- ☐ Black
- ☐ African American
- ☐ Native American
- ☐ Alaska Native
- ☐ Asian
- ☐ Native Hawaiian
- ☐ Pacific Islander
- ☐ Two or more races or ethnicities (identify each):
- ☐ Other:
- ☐ Prefer not to answer

(d) Do you self-identify by any other diversity characteristics, including being a part of an underrepresented community, or by your religion, nationality, disability, military service or other socio-economic or demographic characteristics (write "Prefer not to answer" in the space below if you do not wish to answer this question)?][12]

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12 All operating companies listed on Nasdaq's U.S. exchange will need to use the Board Diversity Matrix that Nasdaq has established, or a format substantially similar, to annually disclose board-level diversity data. Companies must provide this disclosure in the company's proxy statement or its information statement (or if the company does not file a proxy or information statement, its Form 10-K or 20-F), or on the company's website. The matrix does not require diversity information that is specific to each director, rather statistical information is required for broad categories such as gender identity and demographic background. The information provided in the Board Diversity Matrix must be based on voluntary self-identification by each member of the company's board of directors. See Nasdaq Rule 5606.

QUESTION 9. FINRA (Formerly NASD) Regulatory[13]

(a) Are you a *Member* of or otherwise associated or affiliated with a *Member* firm of the Financial Industry Regulatory Authority, Inc. (“FINRA”) (formerly National Association of Securities Dealers, Inc. (“NASD”))?[14] Such *Member* firms may include, for example, broker-dealers, *underwriters* and full-service and/or discount brokerage firms. A person associated with a *Member* firm may include, for example, a partner, officer, director or employee of any *Member* firm.

ANSWER: *YES* ☐ *NO* ☐

(b) Do you own stock or other securities of any FINRA *Member* firm (other than securities purchased on the open market)? For purposes of this question, please include securities *beneficially owned* by you. (You should assume, absent extraordinary circumstances, that securities held by your spouse, minor children or relatives who share your home are *beneficially owned* by you.)

ANSWER: *YES* ☐ *NO* ☐

(c) Have you made a loan to any FINRA *Member* firm?

ANSWER: *YES* ☐ *NO* ☐

If you answered “YES” to any of the questions above, please elaborate on your response:

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13 Include this question if the Questionnaire is to be used in connection with any public offering. See Rules 2710 and 2720 of the NASD Marketplace rules.

14 In July 2007, a new regulatory authority (FINRA) was created by consolidating the NASD and the member regulation, enforcement and arbitration functions of the New York Stock Exchange. The FINRA rules consist of both the NASD rules and certain NYSE rules that FINRA has incorporated. The incorporated NYSE rules apply only to those members of FINRA that are also members of NYSE on or after July 30, 2007, which FINRA refers to as “dual members.” Dual members also must comply with the NASD rules. Firms that were members only of the NASD as of July 30, 2007 remain subject only to the NASD rules, provided they do not become NYSE members in which case they would be subject to both the NASD rules and the incorporated NYSE rules. Similarly, a firm that becomes a new member of FINRA only (and not a member of NYSE) will be subject only to NASD rules. All FINRA members are subject to the FINRA By-Laws and Schedules to the By-Laws. In interpreting the rules, FINRA will continue to apply the same interpretive materials that NASD and NYSE applied prior to the formation of FINRA. For example, FINRA will consider existing NASD interpretive letters and Notices to Members in applying NASD rules and the NYSE Rule Interpretations Handbook and Information Memos in applying the incorporated NYSE rules.

QUESTION 10. Involvement in Legal and Regulatory Proceedings

Have any of the following events occurred during the past **[ten (10)]**[15] years? When computing the ten-year period, the date of an event should be the date on which the final order, judgment or decree was entered, or the date on which any rights of appeal from preliminary orders, judgments, or decrees lapsed. Regarding bankruptcy petitions, the date should be the date of filing for uncontested petitions or the date upon which approval of a contested petition became final. If your answer is "*YES*" to any of these questions, or if you are in doubt as to whether a question applies to a particular proceeding, please provide details on a separate sheet and attach it to the Questionnaire.[16]

(a) Was a petition under the federal bankruptcy laws or any state insolvency law filed by or against, or a receiver, fiscal agent or similar officer appointed by a court for the business or property of: (i) you, (ii) any partnership in which you were a general partner within two (2) years before the time of the filing, or (iii) any corporation or business association of which you were an *executive officer* at or within two (2) years before the time of the filing?[17]

ANSWER: *YES* ☐ *NO* ☐

(b) Were you convicted in a criminal proceeding, or are you the named subject in a criminal proceeding that is presently pending (other than traffic violations and other minor offenses), including, but not limited to, any felony or misdemeanor (i) in connection with the purchase or sale of any security; (ii) involving the making of any false filing with the SEC, or (iii) arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment advisor or paid solicitor of purchasers of securities?[18]

ANSWER: *YES* ☐ *NO* ☐

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15 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(f) and instructions thereto. See also Cal. Corp. Code § 1502.1(a)(6), (7) and § 2117.1(a)(6), (7). The ten year time period is required disclosure; however, to the extent that this Questionnaire is being used for a registration statement, consider removing the time limitation in an effort to elicit more expansive disclosure.

16 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(f) and instructions thereto.

17 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(f)(1) and instructions thereto.

18 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(f)(2) and instructions thereto. Additionally, see Rule 506(d)(1)(i) of Regulation D.

(c) Were you the subject of any court order, judgment or decree, not subsequently reversed, suspended or vacated, which permanently or temporarily enjoined you or otherwise limited you from any of the following activities:[19]

(i) Acting as a futures commission merchant, introducing broker, commodity trading adviser, commodity pool operator, floor broker, leverage transaction merchant, any other person regulated by the U.S. Commodity Futures Trading Commission, or an associated person of any of the foregoing; or as an investment adviser, *underwriter*, broker or dealer in securities, or as an affiliated person of any of the foregoing; or as a director or employee of any investment company, bank, savings and loan association or insurance company; or engaging in or continuing any conduct or practice in connection with such activity?[20]

(ii) Engaging in any type of business practice?[21]

(iii) Engaging in any activity in connection with the purchase or sale of any security or commodity or in connection with any violation of federal or state securities laws or federal commodities laws?[22]

ANSWER: *YES* ☐ *NO* ☐

(d) Were you the subject of any order, judgment or decree, not subsequently reversed, suspended or vacated, or any professional disciplinary proceeding, of any federal or state authority barring, suspending or otherwise limiting for more than sixty (60) days your right to engage in any of the activities described above or your right to be associated with persons engaged in any such activities?[23]

ANSWER: *YES* ☐ *NO* ☐

(e) Were you found by a court of competent jurisdiction in a civil action or by the SEC to have violated any federal or state securities law where the judgment or finding has not subsequently been reversed, suspended or vacated?[24]

ANSWER: *YES* ☐ *NO* ☐

19 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(f)(3) and instructions thereto.
20 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(f)(3)(i).
21 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(f)(3)(ii).
22 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(f)(3)(iii).
23 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(f)(4) and instructions thereto.
24 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(f)(5) and instructions thereto.

(f) Were you found by a court of competent jurisdiction or by the U.S. Commodity Futures Trading Commission to have violated any federal commodities law where the judgment or finding has not been subsequently reversed, suspended or vacated?[25]

ANSWER: *YES* ☐ *NO* ☐

(g) Other than in connection with the settlement of a civil proceeding among private litigants, were you the subject of, or a party to, any federal or state judicial or administrative order, judgment, decree, or finding, not subsequently reversed, suspended or vacated, relating to any of the following?

(i) An alleged violation of any federal or state securities or commodities law or regulation?[26]

(ii) An alleged violation of any law or regulation respecting financial institutions or insurance companies including, but not limited to, a temporary or permanent injunction, order of disgorgement or restitution, civil money penalty or temporary or permanent cease-and-desist order, or removal or prohibition order?[27]

(iii) An alleged violation of any law or regulation prohibiting mail or wire fraud or fraud in connection with any business entity?[28]

ANSWER: *YES* ☐ *NO* ☐

(h) Were you the subject of, or a party to, any sanction or order, not subsequently reversed, suspended or vacated, of any self-regulatory organization, any registered entity, or any equivalent exchange, association, entity or organization that has disciplinary authority over its members or persons associated with a member?[29]

ANSWER: *YES* ☐ *NO* ☐

25 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(f)(6) and instructions thereto.
26 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(f)(7)(i).
27 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(f)(7)(ii).
28 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(f)(7)(iii).
29 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(f)(8). Self-regulatory organization is defined by 15 U.S.C. 78c(a)(26); registered entity is defined by 7 U.S.C. 1(a)(29).

(i) Were you convicted of fraud?[30]

ANSWER: *YES* ☐ *NO* ☐

(j) Were you named as a defendant in any action, or have you been the subject of an action instituted by the SEC, in which it was alleged that you violated any securities law, engaged in any fraudulent conduct, or violated any fiduciary obligations such as that of an officer, director, trustee or partner of a corporation, trust or partnership?

ANSWER: *YES* ☐ *NO* ☐

(k) Have you ever been: (i) suspended or barred from being associated with an issuer or public accounting firm; or (ii) suspended or barred from appearing or practicing before the SEC?[31]

ANSWER: *YES* ☐ *NO* ☐

(l) Are you subject to any order, judgment or decree entered into within the past five years that restrains or enjoins you from engaging or continuing to engage in any conduct or practice: (i) in connection with the purchase or sale of any security, (ii) involving the making of any false filing with the SEC; or (iii) arising out of the conduct of the business of an underwriter, broker, dealer or municipal securities dealer, investment advisor or paid solicitor of purchasers of securities?[32]

ANSWER: *YES* ☐ *NO* ☐

(m) Are you subject to a final order from any of the following entities that bar you from (i) associating with such entity; (ii) engaging in the business of securities, insurance or banking; or (iii) engaging in savings association or credit union activities? Was a final order entered against you within the past ten years by any of these entities that prohibit fraudulent, manipulative or deceptive conduct? [33]

(i) State securities commissions;

(ii) State authorities that supervise or examines banks, savings associations or credit unions;

30 To the extent that the Company is required to file Form SI-PT in California, the Questionnaire should include this question regarding fraud convictions.
31 15 U.S.C. § 7215(c)(7)(B) (Sarbanes-Oxley Act § 105(c)(7)(B)).
32 See Rule 506(d)(1)(ii) of Regulation D.
33 See Rule 506(d)(1)(iii) of Regulation D.

(iii) State insurance commissions;

(iv) Federal banking agencies;

(v) The U.S. Commodity Futures Trading Commission; or

(vi) The National Credit Union Administration?

ANSWER: *YES* ☐ *NO* ☐

(n) Are you subject to an order of the SEC entered pursuant to Section 15(b) or 15B(c) of the Securities Exchange Act of 1934 (the "Exchange Act") or Section 203(e) or (f) of the Investment Advisers Act of 1940 that (i) suspends or revokes your registration as a broker, dealer, municipal securities dealer or investment adviser; (ii) places limitations on your activities, functions or operations; or (iii) bars you from being associated with any entity or from participating in the offering of any penny stock?[34]

ANSWER: *YES* ☐ *NO* ☐

(o) Are you subject to any order of the SEC entered within five years that orders you to cease and desist from committing or causing a violation or future violation of (i) any scienter-based anti-fraud provision of the federal securities laws, including without limitation Section 17(a)(1) of the Securities Act of 1933 (the "Securities Act"), Section 10(b) of the Exchange Act and Rule10b-5, Section 15(c)(1) of the Exchange Act and Section 206(1) of the Investment Advisers Act of 1940, or any other rule or regulation thereunder; or (ii) Section 5 of the Securities Act?[35]

ANSWER: *YES* ☐ *NO* ☐

(p) Have you ever been suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade?[36]

ANSWER: *YES* ☐ *NO* ☐

[34] See Rule 506(d)(1)(iv) of Regulation D.
[35] See Rule 506(d)(1)(v) of Regulation D.
[36] See Rule 506(d)(1)(vi) of Regulation D.

(q) Are you the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued in connection with any registration statement or Regulation A offering statement filed with the SEC[37]

ANSWER: *YES* ☐ *NO* ☐

(r) Have you filed (as a registrant or issuer), or were or were named as an underwriter in, any registration statement or Regulation A offering statement filed with the SEC that, within the past five years, was the subject of a refusal order, stop order, or order suspending the Regulation A exemption?[38]

ANSWER: *YES* ☐ *NO* ☐

(s) Have you been subject to a United States Postal Service false representation order during the past five years?[39]

ANSWER: *YES* ☐ *NO* ☐

(t) Are you subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the United States Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations?[40]

ANSWER: *YES* ☐ *NO* ☐

37 See Rule 506(d)(1)(vii) of Regulation D.
38 See Rule 506(d)(1)(vii) of Regulation D.
39 See Rule 506(d)(1)(viii) of Regulation D.
40 See Rule 506(d)(1)(viii) of Regulation D.

QUESTION 11. [Promoters and Control Persons][41]

(a) To your knowledge, has one or more of the events listed in (a) through (f) in Question 10 occurred to any *promoter* or *control person* of the Company during the same period referred to in Question 10?[42]

ANSWER: *YES* ☐ *NO* ☐

(b) [To your knowledge, has the Company had a *promoter* at any time during the past five (5) fiscal years?][43]

ANSWER: *YES* ☐ *NO* ☐

[41] Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). See Regulation S-K, Item 401(g) and instructions thereto. This question only needs to be included if the Company has not been subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act for the 12 months immediately prior to the filing of the document to which this item is applicable, and if the Company had a promoter at any time during the past five fiscal years per Item 401(g) of Regulation S-K.

[42] Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(k). Regulation S-K, Item 401(g).

[43] Regulation S-K, Item 404(c). This question only needs to be included if the Company is filing a registration statement on Form S-1 or on Form 10. If the Company did have a promoter, the drafter will need to ask the Company and the respondent follow-up questions regarding the name(s) of the promoter(s), the nature and amount of anything of value (including money, property, contracts, options or rights of any kind) received or to be received by each promoter, directly or indirectly, from the Company and the nature and amount of any assets, services or other consideration therefore received or to be received by the Company. As to any assets acquired or to be acquired from any promoter, the drafter will also need to determine the amount at which the assets were acquired or are to be acquired and the principle followed or to be followed in determining such amount, and identify the persons making the determination and their relationship, if any, with the Company or any promoter, and if the assets were acquired by the promoter within two years prior to their transfer to the Company, the drafter will also need to determine their cost to the promoters. See Regulation S-K, Item 404(c)(1)(i) and (ii). Also note that if the Company is a shell company (as defined in Rule 405 under the Securities Act), the same information will need to be disclosed as to any person who acquired control of the Company, or any person that is part of a group that acquired control of the Company.

Note: Questions 12 through 21 should be completed by (i) **all** executive officers of the Company, (ii) **anyone** who served as the Company's principal executive officer (or acted in a similar capacity) at any time during Fiscal Year **[Insert Last Fiscal Year]**, and (iii) **anyone** who served as the Company's principal financial officer (or acted in a similar capacity) at any time during Fiscal Year **[Insert Last Fiscal Year]**.[44]

QUESTION 12. Salary; Bonus; Earnings Under Non-Equity Incentive Plans *(Officers Only)*[45]

Please indicate in the table below the dollar value of the base salary (cash and non-cash) and any bonus (cash and non-cash) you earned from the Company or any of its *affiliates* during Fiscal Year **[Insert Last Fiscal Year],** whether or not you elected to forego any portion of such base salary or bonus amounts. If any amount of your salary or bonus earned is not presently calculable please so indicate in the table.[46]

If you elected to forego any portion of your salary or bonus and instead receive stock, equity-based or other forms of non-cash compensation from the Company, please describe such election below the table.[47] Do not include the amount of salary or bonus taken instead as non-cash compensation in the "Salary" and "Bonus" columns below, but instead note those amounts in your description of the election.[48]

Please also indicate in the table below the dollar value of all earnings for services performed during Fiscal Year **[Insert Last Fiscal Year]** pursuant to awards under *Non-Equity Incentive Plans* and all earnings on any outstanding awards under those plans.[49] (Please note that a "*Non-Equity Incentive Plan*" includes plans that are commonly thought of as "bonus" plans but that are designed to provide cash incentive for performance to occur over a specified period of time, e.g., a management incentive plan or bonus plan where cash payouts are dependent on the satisfaction of financial or other targets.)

If the relevant performance measure(s) under a *Non-Equity Incentive Plan* were satisfied during Fiscal Year **[Insert Last Fiscal Year]** (including for a single year in a plan with a multi-year performance measure), you

[44] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Item 402(a)(3). Please note that compensation disclosure under Item 402 of Regulation S-K is also required for up to two additional individuals for whom disclosure would have been required but for the fact that the individual was not serving as an executive officer of the registrant at the end of the last completed fiscal year – i.e., someone who was hired as or promoted to an executive officer position after the end of the last fiscal year or was terminated from an executive officer position prior to the end of the last fiscal year. Item 402(a)(3)(iv). The Company will likely be required to rely on its own records for any such additional person who was terminated. Any new hires should be picked up by the "all executive officers" note in the introduction to the Compensation section of the Questionnaire.

[45] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Item 402(a) and (b)(2)(ii), (iii)(A) and (B) and instructions thereto.

[46] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Instruction 1 to Item 402(c)(2)(iii) and (iv) of Regulation S-K.

[47] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Instruction 2 to Item 402(c)(2)(iii) and (iv).

[48] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Instruction 2 to Item 402(c)(2)(iii) and (iv) of Regulation S-K.

[49] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Item 402(c)(2)(vii).

should report the earnings in the table below (even if they are not payable until a later date) and note the payment terms below the table.[50] All earnings under *Non-Equity Incentive Plans* during Fiscal Year **[Insert Last Fiscal Year]** should be reported, whether the earnings were paid during the fiscal year, payable during the period but deferred at your election, or payable by their terms at a later date.[51]

Fiscal Year	Salary	Bonus	Non-Equity Incentive Plans
[Insert Last Fiscal Year]			

QUESTION 13. Stock and Option/SAR Awards *(Officers Only)*

(a) Please indicate in the table below all awards of stock (including restricted stock) that were granted to you during Fiscal Year **[Insert Last Fiscal Year],** including the date the particular grant was made, the number of shares subject to the award, the vesting period, forfeiture terms, and/or performance, market or other conditions (if applicable) of the award and any consideration you paid for the shares.[52] Please include and note any stock granted in lieu of cash compensation payments and indicate the amount of compensation foregone.[53] If any of the stock you were granted was not common stock, please so indicate.[54]

Stock Granted (#)	Grant Date	Vesting and/or Conditions (if applicable)	Consideration Paid

50 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Instruction 1 to Item 402(c)(2)(vii).
51 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Instruction 2 to Item 402(c)(2)(vii).
52 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Item 402(c)(2)(v) of Regulation S-K.
53 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Item 402(c)(1) and (2)(iii)-(iv) and instructions thereto.
54 Most grants will be of common stock, but it should be noted if that was not the case.

(b) Please indicate in the table below all awards of *stock options*, with or without tandem *SARs*, that were granted to you during Fiscal Year **[Insert Last Fiscal Year],** including the date the particular grant was made, the number of shares or SARs subject to the award, the per share exercise or base price, any forfeiture terms, and/or performance, market or other conditions (if applicable) of the award and the expiration date of the *stock options* or *SARs*.[55] You should include in the table any *stock options* or *SARs* that were granted to you but that you subsequently transferred.[56]

If the exercise or base price is adjustable, please so indicate and describe the adjustment feature. If the Company made more than one grant to you during Fiscal Year **[Insert Last Fiscal Year],** please use a separate line to note each grant. *Stock options* granted in connection with an option repricing transaction reported in Question 14 should also be reported below. Please include and note any *stock option* granted in lieu of cash compensation payments and indicate the amount of compensation foregone.[57]

Options Granted (#)	*SARs* Granted (#)	Exercise or Base Price (Dollar Value/Share)	Expiration Date

QUESTION 14. Repricings

Was the exercise price of any of your outstanding *stock option*, *SAR* or other equity-based awards adjusted or amended, whether through amendment, cancellation, replacement grants or other means, during Fiscal Year **[Insert Last Fiscal Year]**?[58] Were the terms of any of your outstanding *stock option*, *SAR* or other equity-based awards otherwise modified during Fiscal Year **[Insert Last Fiscal Year]**?[59]

ANSWER: *YES* ☐ *NO* ☐

55 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Item 402(c)(2)(vi) of Regulation S-K.
56 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Item 402(c)(2)(vi) of Regulation S-K.
57 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Item 402(c)(1) and (2)(iii)-(iv) and instructions thereto.
58 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Instruction 2 to Regulation S-K, Item 402(c)(2)(v)-(vi).
59 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Instruction 2 to Item 402(c)(2)(v) and (vi) of Regulation S-K. Only material modifications (and all repricings) must be disclosed, but the Questionnaire is designed to elicit information about any modifications so that the Company and the drafter can determine whether the modifications are material. See also Item 402(e)(1)(ii).

If your answer is "*YES*," please describe:

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QUESTION 15. Pension and Non-Qualified Deferred Compensation Earnings *(Officers Only)*

(a) Did you participate in any defined benefit or other pension plans (including supplemental plans) of the Company during Fiscal Year **[Insert Last Fiscal Year]**?[60] This would include any plan that provides for the payment of retirement benefits, or benefits that will be paid primarily following retirement, including but not limited to tax-qualified defined benefit plans (e.g., a plan that pays a life annuity at retirement based on annual compensation at retirement and years of service) and supplemental executive retirement plans (e.g., a non-qualified deferred compensation plan that is related to a traditional pension plan), but would exclude any tax-qualified defined contribution plans (*e.g., a 401(k) or profit sharing plan) and nonqualified defined contribution plans (e.g., a traditional deferred compensation plan).*[61]

ANSWER: *YES* ☐ *NO* ☐

(b) Did you defer any compensation during Fiscal Year **[Insert Last Fiscal Year]** on a basis that was not tax qualified (i.e., generally other than through a 401(k) or profit sharing plan)?[62] If "YES," please note the aggregate dollar amount of deferrals/contributions and the dollar amount of aggregate interest or other earning accrued during the fiscal year[63] below.

ANSWER: *YES* ☐ *NO* ☐

60 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Item 402(c)(2)(viii)(A) and Item 402(h). This question is designed to elicit basic information to enable the drafter to, with assistance from the Company, draft disclosure responsive to both Items 402(c) and 402(h). With respect to Item 402(h), the Company will need to provide the majority of the data.

61 See Instruction 1 to Regulation S-K, Item 402(c)(2)(viii) and Instruction 1 to Regulation S-K, Item 402(h)(2).

62 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Item 402(c)(2)(viii)(B) and Item 402(i).

63 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(i)(2)(iv).

(c) If you answered "YES" to question (b) above, did you receive above-market or preferential earnings (or dividends in the case of deferred stock) on the compensation you deferred?[64] For purposes of this question, interest on deferred compensation is above-market only if the rate of interest exceeds 120% of the applicable federal long-term rate, with compounding at the rate that corresponds most closely the rate under the applicable plan at the time the interest rate or formula was set.[65] If you are not sure whether you received above-market or preferential earnings, please indicate below.

ANSWER: *YES* ☐ *NO* ☐

(d) If you answered "YES" to question (b) above, did the Company contribute any funds on your behalf to the plan(s) during Fiscal Year **[Insert Last Fiscal Year]**?[66] If "YES," please note the aggregate dollar amount of contributions below.

ANSWER: *YES* ☐ *NO* ☐

(e) If you answered "YES" to question (b) above, did you make any withdrawals or receive any distributions from the plan(s) during Fiscal Year **[Insert Last Fiscal Year]**?[67] If "YES," please note the aggregate dollar amount of withdrawals and distributions below.

ANSWER: YES ☐ NO ☐

(f) If you answered "YES" to question (b) above, please indicate below the total balance in your account(s) under each particular plan as of the end of Fiscal Year **[Insert Last Fiscal Year]**.[68]

If you answered "YES" to any of the questions above, please elaborate on your responses by noting the specific plans, the amount deferred (i.e., contributed by you), the amount the Company contributed or other information requested above:

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64 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Item 402(c)(2)(viii)(B) and the instructions thereto. Only the above-market portion of the interest or dividends must be reported. The Company will likely need to calculate this amount. The Company will also need to identify whether there has been a discretionary reset of the applicable interest rate. The calculation will also be different if the rates vary depending upon conditions such as a minimum period of continued service. See Instruction 2 to Item 402(c)(2)(viii).

65 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Instruction 2 to Regulation S-K, Item 402(c)(2)(viii).

66 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(i)(2)(iii).

67 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(i)(2)(v).

68 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(i)(2)(vi).

QUESTION 16. Other Officer Compensation *(Officers Only)*

Please indicate in the table below all other compensation (regardless of amount) awarded to, earned by, or paid to you during Fiscal Year **[Insert Last Fiscal Year]** that is not already reported under Questions 12-15 above[69] (including compensation related to transactions between the Company or any of its *affiliates* and any third party where a purpose of the transaction was to furnish compensation to you or your *family members*). Such compensation would include, but is not limited to:

- Perquisites and other personal benefits, or property, **[unless the aggregate amount of such compensation (based on its incremental cost to the Company) was less than $10,000]**;[70]
- All "gross-ups" or other amounts reimbursed to you during the fiscal year for the payment of taxes;[71]
- Any security that you purchased from the Company or its subsidiaries (through deferral of salary or bonus, or otherwise) at a discount from the market price of the security on the date of purchase, unless the discount is generally available either to all security holders of the Company or to all of the Company's salaried employees;[72]
- Amounts you received or accrued in connection with a change of control of the Company;[73]
- Company contributions or other allocations to vested and unvested defined contribution plans (e.g. matching contributions to a 401(k) plan);[74]
- The dollar value of any insurance premiums paid by, or on behalf of, the Company during the fiscal year with respect to life insurance for your benefit;[75] and
- The dollar value of any dividends or other earnings paid on stock or option awards.[76]

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69 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(c)(2)(ix).

70 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(c)(2)(ix)(A) and Instruction 4 thereto. Note that the drafter may want to delete the exclusion of perquisites amounting to less than $10,000 to enable the Company to obtain information regarding all perquisites and then consider for itself the proper valuation for disclosure purposes.

71 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(c)(2)(ix)(B).

72 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(c)(2)(ix)(C).

73 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(c)(2)(ix)(D)(2). Note that under Item 402(c)(2)(ix)(D)(1) payments or accruals in connection with a Named Executive Officer's termination of employment, including through retirement, resignation, severance or constructive termination (including a change in responsibilities), must be reported, but someone in that position will not likely be filling out a D&O questionnaire. The Company will need to provide the required information.

74 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(c)(2)(ix)(E).

75 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(c)(2)(ix)(F).

76 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(c)(2)(ix)(G). Note that this only needs to be disclosed if the amounts were not factored into the grant date fair value required to be reported for the stock or option award itself. The drafter will need to confirm with the Company whether that was the case.

The SEC has stated that among the factors to be considered in determining whether an item is a perquisite or other personal benefit are the following:[77]

- An item is not a perquisite if it is integrally and directly related to the performance of your duties. This factor should be interpreted narrowly.
- Otherwise, an item is a perquisite or personal benefit if it confers a direct or indirect benefit that has a personal aspect, without regard to whether it may be provided for some business reason or for the convenience of the Company, unless it is generally available on a non-discriminatory basis to all employees. This factor should be interpreted broadly.

The following are some examples of items that would qualify as perquisites or other personal benefits: (i) club memberships not used exclusively for business entertainment purposes; (ii) personal financial or tax advice; (iii) personal travel using vehicles owned or leased by the Company; (iv) personal travel otherwise financed by the Company; (v) personal use of other property owned or leased by the Company; (vi) housing and other living expenses (including but not limited to relocation assistance and payments for you to stay at your personal residence); (vii) security provided at a personal residence or during personal travel; (viii) commuting expenses (whether or not for the Company's convenience or benefit); and (ix) discounts on the Company's products or services not generally available to employees on a nondiscriminatory basis.[78]

Description of Other Fiscal Year [Insert Last Fiscal Year] Compensation	Dollar Value

77 SEC Release 33-8732, 34-54302, p. 74 (August 29, 2006) (Final Rule Release re Executive Compensation and Related Person Disclosure).

78 Note that any item for which an executive officer has actually fully reimbursed the Company for its total cost should not be considered a perquisite or other personal benefit. See SEC Staff Guidance, Item 402 of Regulation S-K, Question 4.07.

QUESTION 17. Grants of Plan-Based Awards *(Officers Only)*

Did you receive any grants or awards under any *Incentive Plan* during Fiscal Year **[Insert Last Fiscal Year]**?[79] This would include grants or awards under both *Non-Equity Incentive Plans* and *Equity Incentive Plans*, and would also include grants or awards that you subsequently transferred.[80]

ANSWER: *YES* ☐ *NO* ☐

If you answered "YES," please briefly describe each grant or award (including the grant date and any threshold, target and maximum amounts applicable to the awards) in the table below.[81] If you paid any consideration for the particular award, please note the amount you paid.[82] You may cross reference to grants of stock, *stock options* and *SARs* that you previously noted in response to Question 13 instead of repeating the information.

Date of Grant/Award	Description of Grant/Award

[79] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(d).

[80] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(d)(1).

[81] This question is designed to elicit basic information to identify the particular grants and awards that the grantee received. The attorney preparing the SEC disclosure will need to do additional diligence with the Company to identify the remaining information that must be disclosed under Item 402(d), such as deviations between the grant date and the date on which the award was approved, deviations between the strike price of the award and the closing market price of the underlying security on the date of grant, etc.

[82] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Instruction 5 to Regulation S-K, Item 402(d).

QUESTION 18. Outstanding Equity Awards *(Officers Only)*

Please describe in the table below all outstanding equity awards (e.g., *stock options*, *SARs*, restricted stock, restricted stock units and similar instruments) that you held as of the end of Fiscal Year **[Insert Last Fiscal Year]** (regardless of when the award was granted to you).[83] Please indicate the number of securities, vesting schedule, expiration date and exercise price, as applicable, for each award.[84] If any of the awards have been transferred other than for value, please so indicate and describe the nature of the transfer.[85] You may cross reference to grants of stock, *stock options* and *SARs* that you previously noted in response to Question 13 instead of repeating the information.

Date of Grant/Award	Description of Grant/Award

If you have been granted any equity awards (e.g., *stock options*, *SARs*, restricted stock, restricted stock units and similar instruments) since the end of Fiscal Year **[Insert Last Fiscal Year]**, please note the grants below:

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83 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(f).

84 This data is required to be disclosed per Item 402(f) to the extent it is applicable to the particular award. This question is designed to elicit basic information to identify the particular grants and awards that the grantee held at the end of the subject fiscal year. The drafter preparing the disclosure will be required to take the data the respondent provides here and work with the Company to assemble the related data that must be disclosed under Item 402(f), e.g., the market value of stock and equity incentive plan awards of stock.

85 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Instruction 1 to Item 402(f)(2).

QUESTION 19. Option Exercises and Stock Vesting *(Officers Only)*

(a) Please describe in the table below each exercise of *stock options*, *SARs* and similar instruments that you had in during Fiscal Year **[Insert Last Fiscal Year]**.[86] If you transferred any such securities for value, please indicate which securities were transferred, when they were transferred and what you received as consideration for the transfer.[87]

Exercise Date	Security Exercised (Option, SAR, etc.)	Grant Date of Security Exercised	Number Exercised	Sale Price (if applicable)

(b) Please describe in the table below each grant of stock, including restricted stock, restricted stock units and similar instruments, that you held at any point during Fiscal Year **[Insert Last Fiscal Year]**.[88] To the extent that any or all of the grants that would be responsive to this question were already reported in response to Question 18 above (because you held them at the end of the fiscal year), you may so indicate instead of repeating the information. If you transferred any such securities for value, please indicate which securities were transferred, when they were transferred and what you received as consideration for the transfer.[89]

Security	Grant Date	Vesting Schedule

86 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(g).

87 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(g)(2)(iii).

88 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(g). The Company will be required to disclose information regarding amounts realized upon vesting of outstanding stock options, restricted stock, etc., during the last fiscal year, which can be derived based on the data provided regarding the vesting schedules, etc. for the particular awards.

89 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(g)(2)(v).

QUESTION 20. Termination and Change of Control Arrangements *(Officers Only)*

Do you have any contract, agreement, plan or other *arrangement* with the Company, whether written or unwritten, that provides for payment(s) to you at, following, or in connection with any termination, including without limitation resignation, severance, retirement or a constructive termination, or a change of control of the Company or a change in your responsibilities?[90] This question does not apply to contracts, agreements, plans or other *arrangements* to the extent they do not discriminate in scope, terms or operation in favor of executive officers of the Company and that are available generally to all salaried employees.[91]

ANSWER: *YES* ☐ *NO* ☐

If you answered "YES," please identify each such contract, agreement, plan or other *arrangement*:

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QUESTION 21. Employment Agreements *(Officers Only)*

Except for any change of control agreement identified in response to Question 20, do you have any other contract, agreement, plan or *arrangement* with the Company with respect to your employment (such as an employment agreement or offer letter)?

ANSWER: *YES* ☐ *NO* ☐

If you answered "YES," please identify each such contract, agreement, plan or *arrangement*:

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[90] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(j). This question is designed to elicit information regarding the existence of any such contract, agreement, plan or arrangement. If the respondent identifies any such agreement, the drafter will need to work with the respondent and the Company to identify the information regarding that agreement that Item 402(j) requires to be disclosed.

[91] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Instruction 5 to Item 402(j).

QUESTION 22. Director Compensation *(Directors only)*

(a) Please provide a description of any *arrangement* (including the Company's standard *arrangements* with directors), stating amounts, pursuant to which you are compensated for all services as a director, including any additional amounts payable for committee participation or special assignments.[92]

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(b) Please state the aggregate dollar amount of all fees you earned or were paid in cash for services as a director during Fiscal Year **[Insert Last Fiscal Year]**, including annual retainer fees, committee and or chairmanship fees, and meeting fees.[93]

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(c) Please identify in the table below any awards of stock (including restricted stock) and *stock options* (with or without tandem *SARs*) that you were granted during Fiscal Year **[Insert Last Fiscal Year],** the number of shares subject to the award, the vesting period, forfeiture terms, and/or performance, market or other conditions (if applicable) of the award and any consideration you paid for the shares.[94] Please note in the table any awards that you subsequently transferred.[95]

Security Granted	Grant Date	# Shares/Units	Vesting and/or Conditions (if applicable)	Consideration Paid (if applicable)

[92] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(k)(3). The Company is required to disclose both its standard compensation arrangements with directors and whether any director has a non-standard arrangement. A copy of last year's proxy statement could be used as a reference.

[93] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(k)(2)(ii).

[94] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(k)(2)(iii) and (iv).

[95] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(k)(2)(iv).

(d) Please describe in the table below all outstanding *stock option* (with or without tandem *SARs*) and stock (including restricted stock) awards that you held as of the end of Fiscal Year **[Insert Last Fiscal Year]** (regardless of when the award was granted to you).[96] You may cross reference to grants that you previously noted in response to Question 22(c) instead of repeating the information.

Security Granted	Grant Date	# Shares/Units	Vesting and/or Conditions (if applicable)	Consideration Paid (if applicable)

(e) Did you participate in any *Non-Equity Incentive Plan* during Fiscal Year **[Insert Last Fiscal Year]**?[97]

ANSWER: *YES* ☐ *NO* ☐

If you answered "YES," please identify the plan(s) and note the dollar value of all earnings for services performed during Fiscal Year **[Insert Last Fiscal Year]** and all earnings on outstanding awards under the plan(s), as applicable:

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(f) Did you participate in any defined benefit or other pension plans (including supplemental plans) of the Company during Fiscal Year **[Insert Last Fiscal Year]**?[98] This would include any plan that provides for the payment of retirement benefits, or benefits that will be paid primarily following retirement, including but not limited to tax-qualified defined benefit plans (e.g., a plan that pays a life annuity at retirement based on annual compensation at retirement and years of service) and supplemental executive retirement plans (e.g., a non-qualified deferred compensation plan that is related to a traditional pension plan), but would

[96] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Instruction to Regulation S-K, Item 402(k)(2)(iii) and (iv). Unlike with respect to officers of the Company, only the aggregate number of stock awards and aggregate number of option awards outstanding at fiscal year end needs to be disclosed for directors.

[97] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(k)(2)(v).

[98] Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Item 402(k)(2)(vi)(A) and (B). This question is designed to elicit basic information to enable the drafter to, with assistance from the Company, draft responsive disclosure. With respect to Item 402(k)(2)(vi)(A), the Company will need to provide the data.

exclude any tax-qualified defined contribution plans (e.g., a 401(k) or profit sharing plan) and nonqualified defined contribution plans (e.g., a traditional deferred compensation plan).[99]

ANSWER: *YES* ☐ *NO* ☐

(g) Did you defer any compensation during Fiscal Year **[Insert Last Fiscal Year]** on a basis that was not tax qualified (i.e., generally other than through a 401(k) or profit sharing plan)?[100]

ANSWER: *YES* ☐ *NO* ☐

(h) If you answered "YES" to question (g) above, did you receive above-market or preferential earnings (or dividends in the case of deferred stock) on the compensation you deferred?[101] For purposes of this question, interest on deferred compensation is above-market only if the rate of interest exceeds 120% of the applicable federal long-term rate, with compounding at the rate that corresponds most closely the rate under the applicable plan at the time the interest rate or formula was set.[102] If you are not sure whether you received above-market or preferential earnings, please indicate below.

ANSWER: *YES* ☐ *NO* ☐

(i) Please indicate in the table below all other compensation (regardless of amount) awarded to, earned by, or paid to you during Fiscal Year **[Insert Last Fiscal Year]** that is not already reported in this Question 22[103] (including compensation related to transactions between the Company or any of its *affiliates* and any third party where a purpose of the transaction was to furnish compensation to you or your *family members*). Such compensation would include, but is not limited to:

- Perquisites and other personal benefits, or property, unless the aggregate amount of such compensation (based on its incremental cost to the Company) was less than $10,000;[104]
- All "gross-ups" or other amounts reimbursed to you during the fiscal year for the payment of taxes;[105]

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99 See Instruction 1 to Regulation S-K, Item 402(c)(2)(viii). Certain instructions to Item 402(c) apply equally to Item 402(k) as well per Instruction to Item 402(k).

100 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Item 402(k)(2)(vi)(B).

101 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Item 402(c)(2)(viii)(B) and the instructions thereto. Certain instructions to Item 402(c) apply equally to Item 402(k) as well per the instruction to Item 402(k). Only the above-market portion of the interest or dividends must be reported. The Company will likely need to calculate this amount. The Company will also need to identify whether there has been a discretionary reset of the applicable interest rate. The calculation will also be different if the rates vary depending upon conditions such as a minimum period of continued service. See Instruction 2 to Item 402(c)(2)(viii).

102 See Instruction 2 to Regulation S-K, Item 402(c)(2)(viii).

103 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(k)(2)(vii).

104 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(k)(2)(vii)(A) and Instructions 2 and 3 thereto.

105 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(k)(2)(vii)(B).

- Any security that you purchased from the Company or its subsidiaries (through deferral of salary or bonus, or otherwise) at a discount from the market price of the security on the date of purchase, unless the discount is generally available either to all security holders of the Company or to all of the Company's salaried employees;[106]
- Amounts you received or accrued in connection with a change of control of the Company;[107]
- Company contributions or other allocations to vested and unvested defined contribution plans (e.g. matching contributions to a 401(k) plan);[108]
- Consulting fees earned from, or paid or payable by the Company and/or its *subsidiaries* (including joint ventures);[109]
- The annual costs of payments and promises of payments pursuant to director legacy programs and similar charitable award programs;[110]
- The dollar value of any insurance premiums paid by, or on behalf of, the Company during the fiscal year with respect to life insurance for your benefit;[111] and
- The dollar value of any dividends or other earnings paid on stock or option awards.[112]

The SEC has stated that among the factors to be considered in determining whether an item is a perquisite or other personal benefit are the following:[113]

- An item is not a perquisite if it is integrally and directly related to the performance of your duties. This factor should be interpreted narrowly.
- Otherwise, an item is a perquisite or personal benefit if it confers a direct or indirect benefit that has a personal aspect, without regard to whether it may be provided for some business reason or for the convenience of the Company, unless it is generally available on a non-discriminatory basis to all employees. This factor should be interpreted broadly.

106 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(k)(2)(vii)(C).
107 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(k)(2)(vii)(D)(2). Note that under Item 402(k)(2)(vii)(D)(1) payments or accruals in connection with a director's resignation, retirement or other termination must be reported, but someone in that position will not likely be filling out a D&O questionnaire. The Company will need to provide the required information.
108 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(k)(2)(vii)(E).
109 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(k)(2)(vii)(F).
110 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(k)(2)(vii)(G) and Instruction 1 to Item 402(k)(2)(vii).
111 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(k)(2)(vii)(H).
112 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(k)(2)(vii)(I). Note that this only needs to be disclosed if the amounts were not factored into the grant date fair value required to be reported for the stock or option award itself. The drafter will need to confirm with the Company whether that was the case.
113 SEC Release 33-8732, 34-54302, p. 74 (August 29, 2006) (Final Rule Release re Executive Compensation and Related Person Disclosure).

The following are some examples of items that would qualify as perquisites or other personal benefits: (i) club memberships not used exclusively for business entertainment purposes; (ii) personal financial or tax advice; (iii) personal travel using vehicles owned or leased by the Company; (iv) personal travel otherwise financed by the Company; (v) personal use of other property owned or leased by the Company; (vi) housing and other living expenses (including but not limited to relocation assistance and payments for you to stay at your personal residence); (vii) security provided at a personal residence or during personal travel; (viii) commuting expenses (whether or not for the Company's convenience or benefit); and (ix) discounts on the Company's products or services not generally available to employees on a nondiscriminatory basis.

Description of Other Fiscal Year [Insert Last Fiscal Year] Compensation	**Dollar Value**

(j) [Are you party to any agreements, arrangements or understandings with any person or entity (other than the Company) relating to compensation or any other payment in connection with your candidacy or service as a director of the Company? Compensation may include cash compensation, non-cash compensation or any other payment obligations such as health insurance premiums or indemnification arrangements.][114]

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please provide a description of the material terms of the agreement, arrangement or understanding and the total dollar amounts payable thereunder and name the other person(s) that are parties to this agreement, arrangement or understanding:

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114 Nasdaq Listing Rule 5250(b)(3). This question only needs to be included if the Company is listed on Nasdaq.

QUESTION 23. Director Legacy Program *(Directors Only)*

Does the Company have a "director legacy" or "charitable awards" program in which you participate?[115] For the purposes of this question and Question 22, programs in which the Company has agreed to make donations to one or more charitable institutions in your name, payable by the Company currently or on a designated event, such as your retirement, (as well as similar programs) are considered "director legacy" or "charitable awards" programs.

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please provide a description of the material terms of, and the total dollar amounts payable under, each such program:

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QUESTION 24. Boards of Directors and Committees *(Directors Only)*[116]

(a) Please state whether you attended the prior year's annual meeting of stockholders. [117]

ANSWER: *YES* ☐ *NO* ☐

(b) Please state below the total number of meetings of the board of directors (including regularly scheduled and special meetings) held during Fiscal Year **[Insert Last Fiscal Year]**:[118]

Number of meetings: ________________

(c) During Fiscal Year **[Insert Last Fiscal Year]**, did you attend all meetings of the board of directors of the Company? If your answer is "*NO*," please indicate the number of meetings you missed.[119]

ANSWER: *YES* ☐ *NO* ☐

Number of meetings missed: ________________

115 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). Regulation S-K, Item 402(k)(2)(vii)(G) and Instruction 1 to Item 402(k)(2)(vii).

116 Schedule 14A, Item 7(d). Regulation S-K, Item 407(b). This question may be deleted if the Questionnaire is being used in connection with a public offering. This item also requires disclosure of the Company's policy regarding board members' attendance at annual meetings.

117 Schedule 14A, Item 7(d). Regulation S-K, Item 407(b)(1)..

118 Schedule 14A, Item 7(d). Regulation S-K, Item 407(b)(1).

119 Schedule 14A, Item 7(d). Regulation S-K, Item 407(b)(1).

(d) Please complete the table below regarding the committees of the Company's board of directors. Please specify if you served as a member of any committee of the board of directors for less than the full fiscal year and complete the table for the portion of the fiscal year during which you served:[120]

	Board Has Committee	**I am a Member**	**Number of Meetings Held During Fiscal Year [Insert Last Fiscal Year]**	**Number of Meetings I Attended During Fiscal Year [Insert Last Fiscal Year]**
(i) Audit	Yes ☐ No ☐	Yes ☐ No ☐		
(ii) Compensation	Yes ☐ No ☐	Yes ☐ No ☐		
(iii) Nominating **[/Corporate Governance[121]]**	Yes ☐ No ☐	Yes ☐ No ☐		
(iv) Other:	____________ (list name of committee)	Yes ☐ No ☐		
	____________ (list name of committee)	Yes ☐ No ☐		

120 Schedule 14A, Item 7(d). Regulation S-K, Item 407(b)(1).
121 Include if the Company is listed on the NYSE. See NYSE Listed Company Manual § 303A.04.

QUESTION 25. Stock Ownership

(a) Please state in the table below the type and number of the Company's equity securities *beneficially owned* by you and/or which you have the right to acquire (through the exercise of options, warrants or otherwise) on or before **[Insert Date Sixty (60) Days After the Most Recent Practicable Date Prior to the Anticipated Filing]**. Include in this table all of the Company's equity securities that are: (i) registered in your name, including shares registered in your name as trustee, executor, custodian, pledgee, agent or nominee, either alone or with others; (ii) owned *beneficially* by you or any *associate* of yours; or (iii) registered in the name of a nominee or in street name, including any shares held for the account of any of the above.[122] If you do not have sole voting and investment power over any of the securities, please so indicate in the table below.

Name of Record Owner	Type of Security	Number of Shares	Type of Ownership (trust, partnership, direct, personal, etc.)

[122] Form 10-K, Item 12; Schedule 14A, Item 6; Form S-1, Item 11(m). See Regulation S-K, Item 403 and instructions thereto. See also Exchange Act Rule 13d-3(d)(1).

(b) Please state the following information in the table below regarding all *stock options* you hold: (i) the grant date, (ii) the number of shares subject to the originally granted options, (iii) the number of shares remaining subject to the options, and (iv) the schedule or terms of any vesting or exercise provisions.[123]

Grant Date	Number of Shares Originally Subject to Option	Number of Shares Remaining Subject to Option	Vesting Schedule

(c) Do you hold any warrants, convertible debt or other securities (other than options) or rights to acquire securities of the Company?[124] If your answer is "*YES*," please describe the securities or rights below.

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

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(d) Do you share voting and/or investment control over any shares of the Company's securities?[125] If your answer is "*YES*," please provide below a brief description of any *arrangement* concerning the shared control and the number of shares subject to the *arrangement*. "Shared voting power" and "shared investment power" are generally applied to securities held as tenants in common and in cases where you are a co-trustee or where someone's signature and approval other than your own are necessary to vote or sell the securities.

ANSWER: *YES* ☐ *NO* ☐

[123] Form 10-K, Item 12; Schedule 14A, Item 6; Form S-1, Item 11(m). See Regulation S-K, Item 403 and instructions thereto. See also Exchange Act Rule 13d-3(d)(1).
[124] Form 10-K, Item 12; Schedule 14A, Item 6; Form S-1, Item 11(m). See Regulation S-K, Item 403 and instructions thereto. See also Exchange Act Rule 13d-3(d)(1).
[125] Form 10-K, Item 12; Schedule 14A, Item 6; Form S-1, Item 11(m). See Regulation S-K, Item 403 and instructions thereto. See also Exchange Act Rule 13d-3(d)(1).

Description, if applicable:

(e) Are any of the Company's securities that you *beneficially own* pledged as security (e.g., pledged to a bank or broker in connection with a loan or margin account) or subject to a negative pledge (e.g., a promise by a borrower to a lender not to convey securities to a third party or otherwise encumber them)?[126] If your answer is "*YES*," please provide below a brief description of the nature of any such pledge, the type and amount of securities subject to the pledge, and the amount outstanding under the pledge. Please also provide a brief description of the material terms of the pledge *arrangement.*

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

QUESTION 26. Disclaimer of Beneficial Ownership

Do you wish to disclaim *beneficial ownership* of any of the shares reported in response to Question 25?[127]

Note: Whether you make such a disclaimer is, of course, entirely a matter of your own decision. You may wish to consult with counsel in this connection as a disclaimer may be important not only in connection with the securities laws, but also because, without it, your reporting the ownership of such shares might be construed as an admission of ownership by you for other purposes, such as short-swing trading liabilities.

ANSWER: *YES* ☐ *NO* ☐

[126] Form 10-K, Item 12; Schedule 14A, Item 6; Form S-1, Item 11(m). See Regulation S-K, Item 403(b) and instructions thereto. See also Exchange Act Rule 13d-3(d)(1). See also SEC Staff Guidance, Item 403 of Regulation S-K, Question 2.04.

[127] Form 10-K, Item 12; Schedule 14A, Item 6; Form S-1, Item 11(m). See Regulation S-K, Item 403 and instructions thereto. See also Exchange Act Rule 13d-4.

If the answer is "*YES*," please complete the table below with the requested information regarding the person(s) who should be shown as the *beneficial owner(s)* of the shares in question.

Class of Stock	Number of Shares Beneficially Owned	Name of Actual Beneficial Owner	Relationship of Such Person to You

QUESTION 27. Interest in Subsidiaries

Do you beneficially own any equity securities of any *subsidiary* of the Company? If your answer is "*YES*," please list your interest(s) in the table below.[128]

ANSWER: *YES* ☐ *NO* ☐

Name of Subsidiary	Securities Owned	Date Acquired

QUESTION 28.5% Stockholders

Do you know of any person (including yourself and your *associates*) who is the *beneficial owner* of more than 5% of any class of the Company's equity securities? If your answer is "*YES*," please provide the requested information in the table below to the extent you know such information.[129]

ANSWER: *YES* ☐ *NO* ☐

[128] Form 10-K, Item 12; Schedule 14A, Item 6; Form S-1, Item 11(m). See Regulation S-K, Item 403(b) and instructions thereto. See also Exchange Act Rule 13d-3(d)(1).

[129] Form 10-K, Item 12; Schedule 14A, Item 6; Form S-1, Item 11(m). See Regulation S-K, Item 403 and instructions thereto. See also Exchange Act Rule 13d-3(d)(1).

Shareholder's Name and Address	Title of Securities	Amount Held	Percentage Owned	Nature of Ownership ("Direct" or "Indirect")*

Note: Please explain the nature of any indirect ownership (e.g., "indirectly, as trustee for children," "indirectly, by spouse," "indirectly, by trust," etc.).

QUESTION 29. Voting Arrangements

Do you know of any voting trust or similar agreement or *arrangement* pursuant to which more than 5% of the Company's outstanding common stock is held or is to be held? If your answer is "*YES*," please describe below.[130]

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

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TRANSACTIONS AND RELATIONSHIPS

This section includes questions for Auditing Standard No. 18, which addresses related party transactions, significant unusual transactions and a company's financial relationships and transactions with its executive officers. **Accordingly, please note that these questions are broader in scope than those pertaining to related party disclosure under SEC rules. Therefore, questions 31-34 may require responses that differ from the other questions in this section.**

130 Form 10-K, Item 12; Schedule 14A, Item 6; Form S-1, Item 11(m). See Regulation S-K, Item 403(b) and Instruction 7 thereto. See also Exchange Act Rule 13d-3(d)(1).

QUESTION 30. Transactions with Company

(a) Has there been any *transaction* [since the beginning of **[Insert Last Fiscal Year]] [in the last three full fiscal years (i.e., since [Insert beginning date of fiscal year two years prior to last full fiscal year]]**[131], or is there any currently proposed *transaction*, to which the Company or any of its *affiliates* was or is to be a participant, which exceeds $120,000 in amount and in which you or any *related person* had or will have a direct or indirect interest?[132] The amount of the interest is to be computed without regard to the amount of any profit or loss involved in the transaction.[133]

In the case of a *transaction* involving a lease or otherwise providing for periodic payments or installments, include the aggregate amount of all periodic payments or installments due on or after the beginning of the last fiscal year, including any required or optional payments due during or at the conclusion of the lease or other transactions providing for periodic payments or installments.[134] In the case of a transaction involving indebtedness, include the largest amount of all indebtedness outstanding at any time since the beginning of the last fiscal year and all amounts of interest payable on it during the last fiscal year.[135] The following items may be excluded from the calculation of the amount of indebtedness: amounts due from the related person for purchases of goods and services subject to usual trade terms, for ordinary business travel and expense payments and for other transactions in the ordinary course of business.[136]

Examples of possible interests which must be disclosed are: You or any of your *associates* (i) has been, is now, or proposes to be a shareholder holding in excess of ten percent (10%) of the Company's stock, an officer, director or employee of a major creditor, customer or supplier of the Company or any *subsidiaries* or has an interest in any such creditor, customer or supplier; (ii) is a seller, buyer, lessee or lessor of property to, or from, the Company or any *subsidiary*; (iii) is the lender or guarantor of a loan made to, or is a borrower from, the Company or any *subsidiary*; (iv) is the debtor under an obligation which the Company or any *subsidiary* guarantees; and (v) is a buyer of securities or evidences of indebtedness from the Company or any *subsidiary*. If applicable, such transaction(s), the name of any such *associate(s)* and the

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131 For questionnaires distributed in connection with the preparation of a registration statement (other than an S-4), this disclosure must also cover the two fiscal years preceding the Company's last fiscal year. See Instruction 1 to Item 404 of Regulation S-K.

132 Form 10-K, Item 13; Schedule 14A, Item 5(b)(1)(xi), Item 7(b) and Item 22(b); Form S-1, Item 11(n). See Regulation S-K, Item 404(a) and instructions thereto Item 404(a) only requires disclosure of material interests, but this question is designed to elicit information to allow the drafter and the Company to determine what is material. Note also that certain interests are not required to be disclosed pursuant to the instructions to Item 404(a).

133 Form 10-K, Item 13; Schedule 14A, Item 5(b)(1)(xi), Item 7(b); Form S-1, Item 11(n). Regulation S-K, Item 404(a)(4), but the question is designed to elicit information to allow the drafter and the Company to determine if any of the exceptions apply.

134 Form 10-K, Item 13; Schedule 14A, Item 5(b)(1)(xi), Item 7(b); Form S-1, Item 11(n). Instruction 3(a) to Regulation S-K, Item 404(a).

135 Form 10-K, Item 13; Schedule 14A, Item 5(b)(1)(xi), Item 7(b); Form S-1, Item 11(n). Instruction 3(b) to Regulation S-K, Item 404(a).

136 Form 10-K, Item 13; Schedule 14A, Item 5(b)(1)(xi), Item 7(b); Form S-1, Item 11(n). Instruction 4(a) to Regulation S-K, Item 404(a). Note also that in the case of indebtedness, if the lender is a bank, savings and loan or broker-dealer you may also omit certain disclosures in some circumstances as described in Instruction 4(c) to Item 404(a).

nature of your relationship(s) with such *associate(s)* should be included. If any of your *immediate family members* are employed by the Company or any of its *subsidiaries* and such person's annual compensation exceeds $120,000, such relationship should be disclosed.

ANSWER: *YES* ☐ *NO* ☐

If your answer to question (a) is "*YES*," please (i) name the *related person* and briefly describe the basis on which the person is a *related person*, (ii) briefly describe the *related person's* interest in the *transaction*, including their position(s) or relationship(s) with, or ownership in, a firm, corporation or other entity that is a party to, or has an interest in, the *transaction*, (iii) note the approximate dollar value of the amount involved in the transaction (in the case of indebtedness, please indicate the largest aggregate amount of principal outstanding, the amount outstanding as of the latest practicable date, the amount of principal and interest paid during the relevant period, and the rate or amount of interest payable on the indebtedness. Please also indicate any other information regarding the *transaction* or the *related person* in the context of the *transaction* that is material in light of the circumstances of the particular transaction.[137]

Description, if applicable:

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(b) Other than those you have described elsewhere in this Questionnaire, has there been any *transaction* since [the beginning of Fiscal Year **[Insert Last Fiscal Year]] [Insert beginning date of fiscal year two years prior to last full fiscal year]**, or is there any currently proposed *transaction*, to which the Company or any of its *affiliates* was or is to be a participant, and in which you or any of your *family members* had or will have a direct or indirect interest?[138] If your answer is "*YES*," please describe below.

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

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[137] Form 10-K, Item 13; Schedule 14A, Item 5(b)(1)(xi), Item 7(b); Form S-1, Item 11(n). Regulation S-K, Item 404(a)(6).

[138] This question is designed to elicit information that does not otherwise fall within the general scope of Item 404(a) but that may otherwise be material, or may, upon further investigation, fall within the general scope of Item 404(a). It is also designed to elicit information that, while not disclosable under Item 404(a), may need to be categorized by type and disclosed under Item 407(a)(3).

QUESTION 31. Entities You Control[139]

Do you *control*, either directly or indirectly, any entities?

ANSWER: *YES* ☐ *NO* ☐

If your answer is "yes", please list all entities that you *control*, either directly or indirectly. If you have indirect or direct control over an entity, which in turn *controls* another entity, both entities are considered *controlled* by you and should be listed below.

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QUESTION 32. Entities Over Which You Can Exert Significant Influence[140]

Can you exert significant influence, either directly or indirectly, over any entities, to the extent that the entity may be prevented from fully pursuing its own separate interests with regard to any transactions with the Company and its affiliates? A relationship that meets this level of influence should be identified even if there are no current or anticipated transactions between the entity and the Company and its affiliates.

ANSWER: *YES* ☐ *NO* ☐

If your answer is "yes", please list all entities over which you can exert significant influence, either directly or indirectly. If you can exert significant influence, either directly or indirectly, over an entity which in turn can exert significant influence over another entity, both entities should be listed below.

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[139] For the purpose of soliciting information which may need to be disclosed pursuant to FASB ASC 850, *Related Party Disclosures*. The adoption of Auditing Standard No. 18 by the Public Company Accounting Oversight Board has focused auditor attention on the controls and procedures utilized to collect the information necessary to satisfy the accounting standard.

[140] FASB ASC 850, *Related Party Disclosures*.

QUESTION 33. Other Employment and Directorships[141]

Are there any entities, other than those already listed in your responses to other questions in this Questionnaire, with which you serve as a member of the board of directors or have any other employment relationship, even if the directorship and/or employment relationship does not result in your ability to exert *control* or significant influence over the entity as described above?

ANSWER: *YES* ☐ *NO* ☐

If your answer is "yes", please list all such entities and indicate your position with the entity.

____

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QUESTION 34. Family Relationships[142]

Please list the individuals, and any of their affiliations in which they control or significantly influence an entity to the extent that the entity might be prevented from fully pursuing its own separate interests with regard to any transactions with the Company and its affiliates, who, in your judgement, might control or influence you, or who might be controlled or influenced by you, because of your family relationship. In most cases, this definition would include your spouse, children and other family members living in the same household as you. It may also include a parent, stepparent, sibling, in-law, family members to whom you provide or receive significant monetary support, or any other relatives in a position to have control or influence on you, or to be controlled or influenced by you.

Family Relationships

Names	**Affiliations**

[141] FASB ASC 850, *Related Party Disclosures.*
[142] FASB ASC 850, *Related Party Disclosures.*

QUESTION 35. Contracts with the Company

Are you, or is any *associate* of yours, a party to any contract (including any management contract or compensatory plan, contract or *arrangement*) with the Company or in which the Company or any *subsidiary* has a beneficial interest, or to which the Company has succeeded by assumption or assignment, which is to be performed in whole or in part at or after the end of the Company's last fiscal year, or which was entered into within the Company's last two (2) fiscal years? If your answer is "*YES*," please describe below.[143]

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

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QUESTION 36. Personal Loans from the Company

Have you received at any time during the previous 24 months, or do you currently have outstanding any loan or extension of credit in the form of a personal loan from the Company or any of its *affiliates*?[144]

ANSWER: *YES* ☐ *NO* ☐

Has the Company or any of its *affiliates* arranged such a loan or an extension of credit in the form of a personal loan from any third party during the same time period?[145]

ANSWER: *YES* ☐ *NO* ☐

Is any such loan or extension of credit proposed to be extended to you during Fiscal Year **[Insert Current Fiscal Year]**?[146]

ANSWER: *YES* ☐ *NO* ☐

143 Form 10-K, Item 15; Form S-1, Item 16(a). See Regulation S-K, Item 601(b)(10).
144 See Sarbanes-Oxley Act § 402. See also Cal. Corp. Code § 1502.1(a)(5) and § 2117.1(a)(5).
145 See Sarbanes-Oxley Act § 402. See also Cal. Corp. Code § 1502.1(a)(5) and § 2117.1(a)(5).
146 See Sarbanes-Oxley Act § 402. See also Cal. Corp. Code § 1502.1(a)(5) and § 2117.1(a)(5).

If you answered "*YES*" to any of these questions, please describe below the material terms of the loan or extension of credit, including the original principal amount, the current balance and the material terms of the loan (including term, interest rate, etc.). Please also describe any modifications, amendments, renewals or forgiveness of such loans or extensions of credit made during the previous 24 months or intended to be made during Fiscal Year **[Insert Current Fiscal Year]** to any pre-existing loans or extensions of credit.

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QUESTION 37. Relationships with Competitors

Do you, or have you at any time on or after the beginning of the Company's most recent completed fiscal year, served as either a director or an officer of any business other than the Company, including non-public businesses, that had (a) total liabilities and stockholders equity (i.e., net worth as shown on the business's balance sheet) in excess of $45 million as of the end of that business's most recent completed fiscal year and (b) revenues in excess of $4.5 million attributable to business operations that could be viewed as competing with the Company because of the nature of the other business's business operations and the geographical markets in which the other business operates? If your answer is "*YES*," please describe the details below.[147]

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

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[147] Section 8 of the Clayton Act, regarding the prohibition against "interlocking directorates" where an individual or entity serves on the board or as an officer of two competing corporations.

QUESTION 38. Compensation Committee Interlocks and Insider Participation

(a) During the last three (3) fiscal years, have you participated in deliberations of the Company's board of directors (or compensation committee) concerning executive officer compensation? If your answer is "*YES*," please describe the details below.[148]

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

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(b) During the last three (3) fiscal years, have you (i) served as a member of the compensation committee (or other board committee performing equivalent functions or in the absence of any such committee, the entire board of directors) of another entity, which had an *executive officer* who served as a director or member of the compensation committee (or other board committee performing equivalent functions or in the absence of any such committee, the entire board of directors) of the Company or (ii) served as a director of another entity which had an executive officer who served as a member of the compensation committee (or other board committee performing equivalent functions or in the absence of any such committee, the entire board of directors) of the Company? If your answer is "*YES*," please describe the relationship below.[149]

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

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148 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Item 407(e) and instruction thereto.
149 Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Item 407(e) and instruction thereto.

QUESTION 39. Adverse Interests

Do you or any *associate* or *family member* of yours have an interest adverse to that of the Company or any of its *affiliates* in any pending or contemplated legal proceeding (including administrative proceedings and investigations by governmental authorities) to which the Company or any of its *affiliates* is or will be a party or of which any of its or their property is or will be the subject? If your answer is "*YES*," please describe.[150]

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

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QUESTION 40. Legal Proceedings; Investigations

Do you know of any legal, regulatory or administrative proceeding brought or contemplated by any governmental authority (including but not limited to antitrust, price-fixing, tax, environmental, copyright or patent litigation) to which the Company or any *subsidiary* is or may be a party or of which the property of the Company or any *subsidiary* is subject? If your answer is "*YES*," please give the details below.[151]

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

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[150] Form 10-K, Item 3; Form 10-Q, Item 1; Schedule 14A, Item 7(a) and Instruction 7(d)(3) to Item 14; Form S-1, Item 11(c). See Regulation S-K, Item 103, Instruction 4.

[151] Form 10-K, Item 3; Form 10-Q, Item 1; Schedule 14A, Item 7(a) and Instruction 7(d)(3) to Item 14; Form S-1, Item 11(c). See Regulation S-K, Item 103, Instruction 4.

QUESTION 41. Compensation Consultants

(a) [Other than **[Insert Compensation Consultant Name]**, which the **[Insert Committee Name]** has engaged, are] [Are] you aware of any compensation consultant that has been engaged by the Board or any committee of the Board? If your answer is "*YES*," please give details below. For all compensation consultants engaged (including **[Insert Compensation Consultant Name]**), please describe to the extent of your knowledge, each such consultant's name, the committee (if not engaged by the Board) that has engaged such consultant, the amount paid or agreed to be paid to such consultant, and the material elements of the instructions or directions given to the consultants with respect to the performance of their duties under the engagement.[152]

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

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(b) [Other than **[Insert Compensation Consultant Name]**, which management of the Company has engaged, are**]** [Are] you aware of any compensation consultant that has been engaged by management of the Company? If your answer is "*YES*," please give details below. For all compensation consultants engaged (including **[Insert Compensation Consultant Name]**), please describe to the extent of your knowledge, each such consultant's name, the committee (if not engaged by the board of directors) that has engaged such consultant, the amount paid or agreed to be paid to such consultant, and the material elements of the instructions or directions given to the consultants with respect to the performance of their duties under the engagement.[153]

ANSWER: YES ☐ NO ☐

[152] Note, if the identity of the compensation consultant is not known, delete the bracketed language. Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Item 407(e)(3)(iii).

[153] Note, if the identity of the compensation consultant is not known, delete the bracketed language. Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Item 407(e)(3)(iii).

Description, if applicable:

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(c) Do you have any business or personal relationship with: (i) any individual consultants employed by [**[Insert Compensation Consultant Name]]**[the compensation consultant described above]; (ii) [**[Insert Compensation Consultant Name]]**[the compensation consultant described above]; (iii) any other individual compensation consultant employed by a compensation consulting firm engaged by the board of directors, the compensation committee, or any other committee of the board of directors; or (iv) any other compensation consulting firm engaged by the board of directors, the compensation committee, or any other committee of the board of directors? If your answer is "*YES*," please give details below, describing the nature of the relationship and identifying the individual compensation consultant and/or compensation consulting firm with whom you have the relationship:[154]

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

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(d) Do you have any knowledge of, or reason to believe, that there is an actual or potential conflict of interest between (i) yourself or the Company, its directors or its executive officers and (ii) **[Insert Compensation Consultant Name]**[the compensation consultant described above] (including its individual consultants) or any other compensation consultant (including its individual consultants) that has been engaged by the board of directors, the compensation committee or any other committee of the board of directors? If your answer is "*YES*," please give details below, describing the nature of the relationship, identifying the individual compensation consultant and/or compensation consulting firm, and the nature of the actual or potential conflict of interest:[155]

ANSWER: *YES* ☐ *NO* ☐

[154] Note, if the identity of the compensation consultant is not known, delete the bracketed language. Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Item 407(e)(3)(iii).

[155] Note, if the identity of the compensation consultant is not known, delete the bracketed language. Form 10-K, Item 11; Schedule 14A, Item 8; Form S-1, Item 11(l). See Regulation S-K, Item 407(e)(3)(iii).

Description, if applicable:

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(e) Please provide the information requested in Questions 41(c) and (d) with respect to any other advisors or counsel (including individual advisors or counsel associated with an advisory firm or law firm) that the [**Insert Committee Name**] has selected or from whom the [**Insert Committee Name**] has obtained advice (either directly or indirectly).

Description, if applicable:

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QUESTION 42. Foreign Corrupt Practices Act

(a) In connection with your response to this question, the following instructions apply:

(i) Your answers should relate to the activities or conduct of the Company and any *affiliate* of the Company, as well as to the conduct of any person who has acted or is acting on behalf of or for the benefit of any of them. Persons who have acted or are acting on behalf of or for the benefit of any entity include, but are not necessarily limited to, directors, officers, employees, agents, consultants and sales representatives.

(ii) Your answers should relate not only to activities or conduct within the United States, but outside the United States as well.

(iii) The terms “payments” and “contributions” include not only giving cash or hard goods but also giving anything else of value (e.g., services or the use of property).

(iv) The term "indirectly" means an act done through an intermediary. Payments to sales agents or representatives that are passed on in whole or in part to purchasers, or compensation or reimbursement to persons in consideration for their acts, are examples of acts done through intermediaries.

(v) Your answers should include not only matters of which you have direct personal knowledge, but also matters which you have reason to believe may have existed or occurred (for example, you may not "know" of your own personal knowledge that contributions were made by the Company to a political party in a foreign land, but, based upon information which has otherwise come to your attention, you may nonetheless have "reason to believe" that such a contribution was made. In that case, your response would be "*YES*.")

(b) Do you have any knowledge or reason to believe that any of the activities or types of conduct enumerated below have been or may have been engaged in, either directly or indirectly, at any time:

(i) Any bribes or kickbacks to government officials or their relatives, or any other payments to such persons, whether or not legal, to obtain or retain business or to receive favorable treatment with regard to business.

ANSWER: *YES* ☐ *NO* ☐

(ii) Any bribes or kickbacks to persons other than government officials, or to relatives of such persons, or any other payments to such persons or their relatives, whether or not legal, to obtain or retain business or to receive favorable treatment with regard to business.

ANSWER: *YES* ☐ *NO* ☐

(iii) Any contributions, whether or not legal, made to any political party, political candidate or officeholder.

ANSWER: *YES* ☐ *NO* ☐

(iv) Any bank accounts, funds or pools of funds created or maintained without being reflected on the corporate books of account, or as to which the receipts and disbursements therefrom have not been reflected on the books of account.

ANSWER: *YES* ☐ *NO* ☐

(v) Any receipts or disbursements, the actual nature of which has been "disguised" or intentionally mis-recorded on the corporate books of account.

ANSWER: *YES* ☐ *NO* ☐

(vi) Any fees paid to consultants or commercial agents that exceeded the reasonable value of the services purported to have been rendered.

ANSWER: *YES* ☐ *NO* ☐

(vii) Any payments or reimbursements made to the Company's personnel to enable them to expend time or to make contributions or payments of the kinds or for the purposes referred to in <u>subparts (i)—(vi)</u> above.

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*" to any of the foregoing questions, please describe the details of the subject transaction below:

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QUESTION 43. Description of ***Associates***

Please note in the following table the full name, form (e.g., partnership, corporation, etc.), nature of business done by, and principal place of business of each *associate* of yours referred to in the answers to this Questionnaire and your relationship with such *associate(s)*, if applicable.[156]

Name	Form of Organization (if applicable)	Nature of Business	Principal Place of Business	Relationship

QUESTION 44. Change in Control

(a) Do you know of any *change in control* of the Company that has occurred during any of the Company's last three (3) fiscal years or during the Company's current fiscal year? If your answer is "*YES*," please provide a brief description of the *change in control*.[157]

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

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[156] Form 10-K, Item 13; Schedule 14A, Items 7(b); Form S-1, Item 11(n). See generally Regulation S-K, Item 404.
[157] Form 10-K, Item 11; Schedule 14A, Item 6(d); Form S-1, Items 11(m). See Regulation S-K, Item 403(c). Note – 403c doesn't require data about last 3 years.

(b) Do you know of any *arrangement*, including any pledge by any person of securities of the Company, the operation of which may at a subsequent date result in a *change in control* of the Company?[158] If your answer is "*YES*," please provide a brief description of the *arrangement(s)*.

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

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QUESTION 45. Regulatory Investigations

(a) Have you been involved in, or has any inquiry, investigation, lawsuit or disciplinary action been initiated against you by any regulatory or professional organization, including, but not limited to, the SEC, any state securities commission, FINRA (formerly NASD) or any foreign regulatory authority?

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please provide a detailed description of the applicable inquiry, investigation, lawsuit or disciplinary action, including a chronology and current status.

Description, if applicable:

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(b) Do you know of any inquiry, investigation, lawsuit or disciplinary action initiated against the Company, any of its officers, directors, principals, *associates*, *affiliates*, predecessors, or five percent (5%) stockholders by any regulatory organization including, but not limited to, the SEC, any state securities commission, FINRA (formerly NASD) or any foreign regulatory authority?

ANSWER: *YES* ☐ *NO* ☐

[158] Form 10-K, Item 11; Schedule 14A, Item 6(d); Form S-1, Items 11(m). See Regulation S-K, Item 403(c).

If your answer is "*YES*," please provide a detailed description, to the best of your knowledge, of any applicable inquiry, investigation, lawsuit or disciplinary action, including a chronology and current status.

Description, if applicable:

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QUESTION 46. Indemnification

Other than pursuant to a statutory provision or provision of the Company's charter or bylaws, do you know of any *arrangement* in which a director or officer of the Company is insured or indemnified in any manner against liability that he may incur in his capacity as such, including, without limitation, any indemnification agreement with the Company? If your answer is "*YES*," please provide a brief description of the *arrangement(s)* in the space below.

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

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QUESTION 47. Accounting Matters

(a) Do you believe that the systems of internal accounting controls of the Company in place during the Company's last fiscal year provided reasonable assurances that:

(i) Transactions were executed in accordance with management's general or specific authorization?

ANSWER: *YES* ☐ *NO* ☐

(ii) Transactions were recorded as necessary (a) to permit preparation of financial statements in conformity with generally accepted accounting principles (or other applicable criteria) and (b) to maintain accountability for assets?

ANSWER: *YES* ☐ *NO* ☐

(iii) Access to assets was permitted only in accordance with management's general or specific authorization?

ANSWER: *YES* ☐ *NO* ☐

(iv) The recorded accountability for assets was compared with the existing assets at reasonable intervals and appropriate action was taken with respect to any differences?

ANSWER: *YES* ☐ *NO* ☐

If you answered "*NO*" to any of subparts (i)–(iv), please explain your response on a separate sheet of paper and attach it to the Questionnaire.

(b) Do you know of any changes in the systems of internal accounting controls of the Company or any *subsidiary* that would result in a negative answer to any of the questions set forth in paragraph (a) above when applied to the Company's last three (3) fiscal years or to the Company's current fiscal year?

ANSWER: *YES* ☐ *NO* ☐

(c) Are you aware of any disagreements between the Company and its accountants?[159]

ANSWER: *YES* ☐ *NO* ☐

(d) Are you aware of any management letters prepared by the accountants for the Company identifying any reportable conditions?

ANSWER: *YES* ☐ *NO* ☐

[159] Schedule 14A, Items 9(d), 13(a)(4) and 14, and Instruction 7(d)(9) to Item 14; Form 10-K, Item 9. See Regulation S-K, Item 304.

QUESTION 48. Director Independence and Qualifications[160] *(Directors and Director Nominees Only)*

(a) Have you or any *family member* been employed within the past three (3) years by the Company or any parent or *subsidiary* of the Company?[161]

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please describe:

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(b) **[Have you or has any *family member* accepted, either directly or indirectly, compensation in any form from the Company or any parent or *subsidiary* of the Company in excess of $120,000 during any period of twelve (12) consecutive months within the past three (3) years? <u>Do not</u> include compensation for board or committee service, compensation paid to a *family member* who is a non-executive employee of the Company or any parent or *subsidiary* of the Company, benefits under a tax-qualified retirement plan, and non-discretionary compensation. Note that excluded compensation to family members should still be disclosed in Question 30. [162]] [Have you or any family member received during any twelve-month period within the last three (3) years, more than $120,000 in direct compensation from the Company or any parent or *subsidiary* of the Company (other than director and committee fees and pension or other forms of deferred compensation for prior service, provided that such compensation is not contingent in any way on continued service)? You need not consider compensation received by a director for former service as an interim executive officer. Also, do not consider compensation received by immediate family members for service as a non-executive employee of the Company or any parent or *subsidiary* of the Company. You need not consider individuals who are no longer *family members* as a result of legal separation or divorce, or those who have died or become incapacitated. [163]]**

ANSWER: *YES* ☐ *NO* ☐

160 This question covers only Nasdaq and NYSE director independence requirements. If the Company is listed on another exchange, please supplement with other relevant requirements accordingly. Please note that pursuant to Schedule 14A, Item 7(d) and Item 407(d)(2) of Regulation S-K, if the Company's board of directors has appointed a "non-independent" director as a member of the Company's audit committee, the Company is required to disclose the nature of the relationship that makes such director not independent and the reason for the board of directors' determination to appoint such person to the Company's audit committee.

161 Rule 5605(a)(2) of the Nasdaq Marketplace Rules; NYSE Listed Company Manual § 303A.02(b)(i) and commentary thereto; and Exchange Act Rule 10A-3(b)(1)(ii). See also Schedule 14A, Item 7(c); Regulation S-K, Item 407(a); and Nasdaq Marketplace Rule 5605(c)(2)(A) (applicable to audit committee members). Note that service as an interim executive officer of the listed company does not disqualify a director from being considered independent. See IM 5605 Definition of Independence – Rule 5605(a)(2) of the Nasdaq Marketplace Rules and NYSE Listed Company Manual § 303A.02(b)(i) and commentary thereto.

162 Rule 5605(a)(2)(B) of the Nasdaq Marketplace Rules. See also Schedule 14A, Item 7(c). See also Regulation S-K, Item 407(a).

163 NYSE Listed Company Manual § 303A.02(b)(ii) and commentary thereto.

If your answer is "*YES*" to either question, please describe:

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(c) Is any *family member* currently, or has any *family member* been within the past three (3) years, employed by the Company or by any parent or *subsidiary* of the Company as an *executive officer*?[164] **[You need not consider individuals who are no longer *family members* as a result of legal separation or divorce, or those who have died or become incapacitated.[165]]**

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please name such *family member* and indicate the *executive officer* position.

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(d) **[Are you, or is a *family member*, a partner, controlling shareholder or *executive officer* of any entity or organization (including law firms[166] and charitable entities) to which the Company or any parent or *subsidiary* of the Company made, or from which the Company or any parent or *subsidiary* of the Company received, payments in the current or in any of the past three (3) fiscal years for property or services (other than payments which arose solely from investments in the securities of the Company or any parent or *subsidiary* of the Company and payments under non-discretionary charitable contribution matching programs) that exceed five percent (5%) of the recipient's consolidated gross revenue for that year, or $200,000, whichever is greater?[167]] [(1) Are you currently an employee of another entity (including any charitable organization) that has made payments to, or has received payments from, the Company or any parent or *subsidiary* of the Company for property or services in an amount which, in any of the last three (3) fiscal years, exceeds the greater of $1,000,000 or 2% of such other entity's consolidated gross revenues; (2) Is any *family member* currently an *executive officer* of another entity (including any charitable organization) that has made payments to, or has received payments from, the Company or any**

164 Rule 5605(a)(2) (C) of the Nasdaq Marketplace Rules and NYSE Listed Company Manual § 303A.02(b)(i) and commentary thereto. See Schedule 14A, Item 7(c). See also Regulation S-K, Item 407(a).
165 NYSE Listed Company Manual, General Commentary to Section 303A.02(b).
166 See IM-5605 of the Nasdaq Marketplace Rules.
167 Rule 5605(a)(2)(D) of the Nasdaq Marketplace Rules. See also Schedule 14A, Item 7(c). See also Regulation S-K, Item 407(a).

subsidiary **for property or services in an amount which, in any of the last three (3) fiscal years, exceeds the greater of $1,000,000 or 2% of such other entity's consolidated gross revenues?[168] You need not consider individuals who are no longer** ***family members*** **as a result of legal separation or divorce, or those who have died or become incapacitated.]**

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*" to either question, please describe:

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(e) **[Are you or is a** ***family member*** **presently employed as an** ***executive officer*** **of another entity where any of the** ***executive officers*** **of the Company or any parent or** ***subsidiary*** **of the Company have served on the compensation committee (or other body performing similar functions) of such other entity in the current year or any of the past three (3) years?[169]] [Are you or is any** ***family member*** **currently, or within the last three (3) years have you or has any** ***family member*** **been, an** ***executive officer*** **of another entity where any of the present** ***executive officers*** **of the Company or any parent or** ***subsidiary*** **of the Company at the same time serve or served on the other entity's compensation committee (or board of directors or other committee performing similar functions)?[170] You need not consider individuals who are no longer** ***family members*** **as a result of legal separation or divorce, or those who have died or become incapacitated.]**

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please describe:

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(f) **[Are you or is any** ***family member*** **a current partner of the outside auditor of the Company or any parent or** ***subsidiary*** **of the Company, or have you or has any** ***family member*** **been a partner or employee of the outside auditor in the past three (3) years and worked on the audit of the Company or any parent**

[168] NYSE Listed Company Manual § 303A.02(b)(v) and commentary thereto. See also Schedule 14A, Item 7(c). See also Regulation S-K, Item 407(a).
[169] Rule 5605(a)(2)(E) of the Nasdaq Marketplace Rules. See also Regulation S-K, Item 407(e).
[170] NYSE Listed Company Manual § 303A.02(b)(iv) and commentary thereto. See also Regulation S-K, Item 407(e).

or *subsidiary* of the Company during that time?[171] [(1) Are you or a *family member* a current partner of a firm that is the internal or external auditor of the Company or any parent or *subsidiary* of the Company; (2) Are you a current employee of such a firm; (3) do you have a *family member* who is a current employee of such a firm and personally works on the audit of the Company or any parent or *subsidiary* of the Company; or (4) were you or a *family member* within the last three (3) years (but no longer) a partner or employee of such a firm and personally worked on the audit of the Company or any parent or *subsidiary* of the Company during that time?[172]]

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please describe:

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(g) Except as already noted elsewhere in the Questionnaire, to assist the Company in determining your independence pursuant to the Exchange Act, have you accepted at any time, or is there any proposed *arrangement* for you to accept, either directly or indirectly, any consulting, advisory or other compensatory fee from the Company or any of its *subsidiaries*?[173] For purposes of this question, "indirect" includes acceptance of such a fee by your spouse, minor children or stepchildren, and any of your children and stepchildren that share a home with you.[174] It also includes acceptance of such a fee by any entity that provides accounting, consulting, legal, investment banking or financial advisory services to the Company or any of its *subsidiaries* and in which you are a partner, member or officer, or in which you occupy a similar position; provided, however, that it does not include entities in which you are a limited partner or non-managing member, or those for which you occupy similar positions where you have no active role in providing services to the entity.

ANSWER: *YES* ☐ *NO* ☐

171 Nasdaq Marketplace Rule 5605(a)(2)(F).
172 Section 303A.02(b)(iii) of the NYSE Listed Company Manual.
173 Exchange Act Rule 10A-3(b)(1)(ii)(A) and Exchange Act Rule 10C-1(b)(1)(ii)(A). Nasdaq Marketplace Rule 5605(c)(2)(A)(ii) makes compliance with this SEC rule, along with all of the independence requirements of Exchange Act Rule 10A-3(b)(1), an explicit requirement for all audit committee members. While the NYSE and Nasdaq do not have a similar bright-line test for compensation committee independence, NYSE Listed Company Manual § 303A.02(a)(ii)(A) and revised Nasdaq Marketplace Rule 5605(d) make this a consideration the board of directors should take into account when determining independence for purposes of compensation committee members.
174 See SEC Release No. 34-47654, Section I.A.2.

If your answer is "*YES*," please provide a description, including amounts paid or payable on your behalf:

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(h) *[***Compensation Committee***] Members only*—The Company's board must consider your sources of compensation in determining your independence and eligibility to serve as a member of the [**Insert Name of Compensation Committee**]. This includes consideration of whether you receive compensation from any other person or entity that would impair your ability to be independent of management in connection with the duties of a compensation committee member or make independent judgments about the Company's executive compensation. For this purpose, please identify any sources of your compensation (other than any compensation identified in response to any other question in this Questionnaire) that could impair your ability to make independent judgments about the Company's executive compensation.[175]

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(i) Please indicate whether any of the following relationships exist:[176]

(i) Do you own or control, directly or indirectly, more than 10% of any class of the Company's voting securities?

ANSWER: *YES* ☐ *NO* ☐

(ii) Are you an *executive officer*, employee, general partner or managing member of the Company or any of its *affiliates*?

ANSWER: *YES* ☐ *NO* ☐

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175 Rule 5605(d)(2); NYSE Listed Company Manual § 303A.02

176 Rule 5605(c)(2)(A)(ii) of the Nasdaq Marketplace Rules; NYSE Listed Company Manual § 303A.06; Exchange Act Rules 10A-3(b)(1)(ii)(B) and 10A-3(e)(1)(iii). Please note that Nasdaq "recommends" that a listed company disclose in its proxy statement if any director is deemed independent but falls outside the safe harbor provisions of Exchange Act Rule 10A-3(e)(1)(ii). See IM-5605-4 of the Nasdaq Marketplace Rules. NYSE Listed Company Manual § 303A.06(b) requires that all audit committee members meet both the requirements of Exchange Act Rule 10A-3(b)(1) and the requirements of NYSE Listed Company Manual § 303A.02.

(iii) Are you otherwise an *affiliate* of the Company or any of its *affiliates* (other than in your capacity as a member of the Company's board of directors)? (Please consider any current or past relationship, circumstance, agreement or *arrangement* pursuant to which you or an entity in which you are an officer, general partner or managing member could be deemed to be an *affiliate* of the Company or any of its *affiliates*.)

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*" to any of these questions, please state the reason(s):

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____

____

(j) **[Have you participated in the preparation of the financial statements of the Company or any of its current *subsidiaries* at any time during the past three (3) years?[177]]**

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please describe:

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177 Rule 5605(c)(2)(A)(iii) of the Nasdaq Marketplace Rules.

(k) Please identify and describe any material relationship you or any of your *family members* currently have (or have had within the past three years) with any charitable organization or other non-public entity. Such relationships may include, but are not limited to, relationships as a partner, controlling shareholder, director or *executive officer* of the applicable organization or entity. Please include in your response the name of the applicable organization or entity, your relationship thereto and the applicable dates of such relationship.[178]

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(l) Please identify and describe any relationships you have with any other director or *executive officer* of the Company (other than serving as a director of the Company), whether personal or professional. This could include serving in some capacity in a charitable organization or other non-public entity, overlapping membership in an association or club and any other relationship in which you periodically interact with such person.[179]

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(m) Please provide any additional information that would be relevant, appropriate or helpful for the Company's board of directors to consider when evaluating your ability to exercise independent judgment in carrying out the responsibilities of a director and when determining whether you qualify as "independent" within the meaning of that term under the federal securities laws and the rules of **[Nasdaq] [the NYSE]**.[180] Please include in your response any information regarding relationships between you, your *family members* or your *associates* on one hand, and the Company or any of its *affiliates* on the other hand, that has not been fully described elsewhere in the Questionnaire. Such relationships may be either direct or as a partner, member, shareholder or officer of an organization or entity that has a material relationship with

178 This question permits the Company to inquire about overlapping affiliations as a component of its general independence review. See, e.g., the concerns raised in *In re Oracle Corp. Derivative Litig.*, 808 A.2d 1206 (Del. Ch. 2002), *summary judgment granted for defendant directors by*, *In re Oracle Corp. Derivative Litig.*, 2004 Del. Ch. LEXIS 177 (Del. Ch. Nov. 24, 2004). Note: the questionnaire could be revised to provide to the respondents a list of entities to which the Company donates, with a question to the respondents inquiring whether they have any relationships with any of the listed entities.

179 This question also addresses concerns raised in *In re Oracle Corp. Derivative Litig.*, 808 A.2d 1206 (Del. Ch. 2002), *summary judgment granted for defendant directors by*, *In re Oracle Corp. Derivative Litig.*, 2004 Del. Ch. LEXIS 177 (Del. Ch. Nov. 24, 2004).

180 Rule 5605(a)(2) of the Nasdaq Marketplace Rules; NYSE Listed Company Manual § 303A.02 and commentary thereto. See also Regulation S-K, Item 407(a)(3), which requires disclosure of the types of transactions, relationships or arrangements, if any, that were not disclosed pursuant to Item 404(a) but which the board considered in determining that the particular director was independent under the relevant listing standards.

the Company or any of its *affiliates*. Further, such relationships can include commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships, among others.

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QUESTION 49. Financial Experience and Expertise *(Directors and Director Nominees Only)*

The Company is required pursuant to the Exchange Act to determine and disclose whether it has at least one "audit committee financial expert" (as defined by the SEC) serving on its audit committee.[181] Additionally, the Company's audit committee members must meet certain minimum financial experience and expertise thresholds pursuant to **[Nasdaq] [NYSE]** rules. Please respond to the following questions and requests if you are currently a member of the Company's audit committee or if you may be eligible to serve on the audit committee in the future.

(a) Are you able to read and understand fundamental financial statements, including the Company's balance sheet, income statement, and cash flow statement?[182]

ANSWER: *YES* ☐ *NO* ☐

181 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(l). See Regulation S-K, Item 407(d)(5) and instructions thereto (which clarify that the disclosure is only required in a registrant's annual report). NYSE Listed Company Manual § 303A.12(c) requires the Company to submit an executed Written Affirmation to the NYSE annually and each time there is a change in the board or in any of these committees: nominating/corporate governance, compensation and audit. Nasdaq Marketplace Rule 5605(c)(4) requires the Company to provide notice to Nasdaq immediately upon learning of noncompliance with audit committee requirements; Rule 5625 requires prompt notification to Nasdaq when an executive officer becomes aware of material noncompliance with the Rule 5600 Series.

182 Rule 5605(c)(2)(A)(iv) of the Nasdaq Marketplace Rules. Although this qualification is only required for members of the Company's audit committee, it is advisable for the board to know which members would be eligible to serve on the Company's audit committee if the need arose. Additionally, the commentary to NYSE Listed Company Manual § 303A.07(a) states that each member of the audit committee must become financially literate (if not already literate) within a reasonable period of time after his or her appointment to the audit committee.

(b) Please describe any past employment experience in finance or accounting or any other comparable experience, education or background in finance or accounting (including whether you have previously served as a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities).[183]

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(c) To assist the Company's board of directors in determining whether you meet the definition of an "audit committee financial expert," please list below any experience that may be helpful in the board's determination. Pursuant to SEC rules, an "audit committee financial expert" is a person who has <u>each</u> of the following attributes[184]:

(i) An understanding of generally accepted accounting principles and financial statements;

(ii) The ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;

(iii) Experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the Company's financial statements, or experience actively supervising one or more persons engaged in such activities;

(iv) An understanding of internal controls and procedures for financial reporting; and

(v) An understanding of audit committee functions.

183 Rule 5605(c)(2)(A) of the Nasdaq Marketplace Rules; NYSE Listed Company Manual § 303A.07(a) and commentary thereto.

184 Form 10-K, Item 10; Schedule 14A, Item 7(b); Form S-1, Item 11(l). See Regulation S-K, Item 407(d)(5)(ii) and (iii). Note that the safe harbor described by Regulation S-K, Item 407(d)(5)(iv) emphasizes that a designation of audit committee financial expert does not impose additional duties, obligations or liability on the director; this information may be important to the directors filling out the questionnaire.

In your response, please address whether the above-listed qualifications were obtained through any of the following means:

(A) Education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor, or experience in one or more positions that involve the performance of similar functions;

(B) Experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;

(C) Experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or

(D) Other relevant experience that would be appropriate for the Company's board of directors to consider in determining your financial literacy or sophistication.

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(d) **[Do you currently serve, or have you been selected for future service, on an audit committee of any public company besides the Company?]**[185]

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please list the name of each public company on whose audit committee you currently or will serve.

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[185] NYSE Listed Company Manual § 303A.07(a) and commentary thereto.

QUESTION 50. Iran Sanctions[186]

Under the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA) the Company is required to disclose in its annual or quarterly filings under the Exchange Act whether it, or any affiliate, has during the period covered by the report knowingly engaged in any activity prohibited by the ITRA.

Are you aware of the Company, or any affiliate, knowingly engaging in any of the following activities during the past 2 years?

- Development of Iran's petroleum resources, production of refined petroleum products in or exportation of refined petroleum products from Iran, or development of Iran's weapons of mass destruction (WMD) or other military capabilities;
- Transactions with financial institutions facilitating terrorist organizations or acts, sanctioned-party activities, WMD development or other prohibited activities in Iran as described in the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA);
- Transactions with financial institutions engaging in transactions benefitting the Iranian Revolutionary Guard Corps, as described in Section 104(d)(1) of CISADA;
- Transfers of goods or technologies to Iran that are likely to be used to commit human rights abuses;
- Transactions with terrorists whose property is blocked pursuant to Executive Order 13224;
- Transactions with WMD proliferators whose property is blocked pursuant to Executive Order 13382; and
- Transactions with the government of Iran as defined in Section 560.405 of Title 31 of the Code of Federal Regulations, without specific authorization of the government of the United States.

ANSWER: *YES* ☐ *NO* ☐

[186] The Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA) requires any company that must file annual or quarterly reports under Section 13(a) of the Exchange Act to disclose in those reports whether, during the period covered by the subject report, it or any affiliate has knowingly engaged in certain sanctionable activities under the act. The company may prefer to utilize a different means to solicit this information from directors and officers and therefore omit it from this questionnaire. Note also that ITRA requires disclosure of any sanctionable activities under the act in quarterly as well as annual reports, so annual solicitation of this information may not be sufficient for the company's needs.

If your answer is "*YES*," please provide any information relevant, appropriate or helpful in the Company's evaluation of its obligations under the ITRA.

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[REPORTING OBLIGATIONS][187]

QUESTION 51. Reporting Obligations[188]

If you are an *executive officer*, director or owner of 10% of any class of the Company's equity securities, you are subject to the reporting requirements of Section 16(a) of the Exchange Act and the rules promulgated thereunder. These rules may require you to file, within forty-five (45) days of the end of the Company's fiscal year, an Annual Statement of Changes in Beneficial Ownership on Form 5 with the SEC reflecting certain of your transactions in the Company's equity securities.

It is not necessary to make this annual Form 5 filing if: (i) you have not engaged in any transactions in the Company's equity securities during the past year which require annual reporting on Form 5, or if you have made a prior, voluntary disclosure of such transactions on Form 4 prior to the date the Form 5 is due; and (ii) you have no holdings or transactions which you were otherwise required to report during Fiscal Year **[Insert Last Fiscal Year]** and which were not reported to the SEC.

NOTE: If you have already returned a separate Form 5 Certification or provided a Form 5 to the Company, you do not need to complete this question.

(a) On the basis of a review of all transactions in the Company's equity securities during Fiscal Year **[Insert Last Fiscal Year]** and all filings made by you or on your behalf with the SEC during such period, are you required to file a Form 5 with the SEC for the past fiscal year? **(Answering "No" shall constitute your representation that no Form 5 filing is required, and your agreement that the Company may retain this Questionnaire and provide it to the SEC upon request.)**

ANSWER: *YES* ☐ *NO* ☐

[187] Remove this section heading and the question entitled "Reporting Obligations" if the Questionnaire is being used in connection with a registration statement to be filed by a company that does not currently have a class of equity securities registered pursuant to Section 12 of the Exchange Act.
[188] Form 10-K, Item 10; Schedule 14A, Item 7(b). Regulation S-K, Item 405.

If you answered “*YES*,” please state the transactions that should be reported to the SEC.

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(b) Did you file any reports on Form 3 or Form 4 later than the deadline for filing such reports during Fiscal Year **[Insert Last Fiscal Year]** or any prior fiscal year (excluding any late reports that have previously been disclosed in the Company’s proxy statements)?

ANSWER: *YES* ☐ *NO* ☐

If you answered “*YES*,” please state the details of the transaction or provide the date on which the late Form 3 or Form 4 report was filed with the SEC.

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If any information furnished by me in this questionnaire becomes inaccurate, incomplete <u>or otherwise changes</u>, I will promptly advise the Company to that effect and furnish any supplementary information that may be appropriate as a result of any developments, including the passage of time and any new relationships that may develop in the future.

The foregoing answers are correctly and fully stated to the best of my knowledge, information and belief after a reasonable investigation.

____________________	____________________
Date	*Signature of Officer or Director*
	Print Name: ________________

DEFINITIONS

An *affiliate* is a person or entity that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with, another person or entity. The Company's *executive officers* would be considered *affiliates* of the Company.

Arrangement includes any contract, arrangement, agreement or understanding, whether written or oral.

Associate includes: (i) any corporation or entity (other than the Company) of which you are an officer, director or partner or of which you are, directly or indirectly, the beneficial owner of 10% or more of any class of equity securities; (ii) any trust or other estate in which you have a substantial beneficial interest or as to which you serve as trustee or in a similar capacity; (iii) your spouse; (iv) any relative of your spouse or any relative of yours who has the same home as you or who is a director or officer or key executive of the Company; and (v) any partner, syndicate member or person with whom you have agreed to act in concert with respect to the acquisition, holding, voting or disposition of shares of the Company's securities.

A *beneficial owner* of a security includes:

(i) any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares:

> (a) voting power, which includes the power to vote, or to direct the voting of, such security; and/or
>
> (b) investment power, which includes the power to dispose, or to direct the disposition of, such security.

(ii) any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement or device with the purpose or effect of divesting such person of beneficial ownership; and

(iii) a person who has the right to acquire beneficial ownership of such security, as defined in clause (i) above, within sixty (60) days, including but not limited to any right to acquire: (a) through the exercise of any option, warrant or right, (b) through the conversion of a security, (c) pursuant to the power to revoke a trust, discretionary account, or similar arrangement, or (d) pursuant to the automatic termination of a trust, discretionary account or similar arrangement.

Shares *beneficially owned* by you include not only securities you hold for your own benefit, but also securities others hold for your benefit (regardless of whether or how they are registered) such as, for example, securities held for you by custodians, brokers, relatives, trustees, and securities held for your account by pledgees, securities owned by a partnership in which you are a general or limited partner, and securities owned by any corporation which is or should be regarded as a personal holding corporation of yours. Bonus award shares held by a plan trustee, but as to which you cast votes and/or receive dividends, are deemed beneficially owned notwithstanding whether or not your complete rights in such shares have vested.

Change in control means a change in the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person or the Company, whether through the ownership of voting securities, by contract or otherwise.

Control (including the terms controlling, controlled by and under common control with) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

A *control person* of a specified person or entity is a person who, directly or indirectly, through one or more intermediaries, controls the specified person or entity.

Equity Incentive Plan means any Incentive Plan or a portion of an Incentive Plan under which awards are granted that fall within the scope of Financial Accounting Standards Board's Accounting Standards Codification No. 718, *Stock Compensation*, as modified or supplemented. Such awards generally would include stock awards (restricted or otherwise), stock option awards and any other equity instruments.

Executive officer means the president, principal financial officer, principal accounting officer or controller, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function or any other person who performs similar policy-making functions for the Company (or other entity that may be indicated).

Family member means a person's spouse, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and anyone (other than domestic employees) who shares the person's home. **[*Family member* does not include those who are legally separated or divorced, who are incapacitated, or who have died.[189]]** Please note that due to differences between SEC rules and the rules of [**Nasdaq**] [**the NYSE**], the definitions of *family member* and *immediate family member* are slightly different.

[189] General commentary to NYSE Listed Company Manual § 303A.02(b).

Immediate family member means a person's child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law or sister-in-law of such person, and any other individual (other than a tenant or employee) sharing the person's household. *Immediate family member* includes (1) only individuals who are currently related to the primary reporting person (e.g., a person who is divorced from a director's daughter would no longer be a son-in-law whose transactions must be reported) and (2) only those persons who are related by blood or step relationship to the primary reporting person or his or her spouse.[190] Please note that due to differences between SEC rules and the rules of [**Nasdaq**] [**the NYSE**], the definitions of *family member* and *immediate family member* are slightly different.

Incentive Plan means any plan providing compensation intended to serve as incentive for performance to occur over a specified period, whether such performance is measured by reference to financial performance of the Company or an *affiliate*, the Company's stock price, or any other performance measure.

Member means any individual, partnership, corporation or other legal entity admitted to membership in FINRA (formerly NASD), and any officer or partner of such a *member* or the executive representative of such a *member* or the substitute for such a representative.

Non-Equity Incentive Plan means any incentive plan or portion of an incentive plan that is not an *Equity Incentive Plan*.

Promoter includes:

(i) Any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the business or enterprise of an issuer; or

(ii) Any person who, in connection with the founding and organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, 10% or more of any class of securities of the issuer or 10% or more of the proceeds from the sale of any class of such securities. However, a person who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a *promoter* within the meaning of this paragraph if the person does not otherwise take part in founding and organizing the enterprise.

[190] SEC Staff Guidance, Item 404 of Regulation S-K, Interpretation 2.01.

Related person means any director or executive officer of the Company, any director nominee, any *immediate family member* of a director or executive officer of the Company, any security holder who owns more than 5% of any class of the Company's voting securities (i.e., common stock and preferred stock are treated as separate classes), and any *immediate family member* of such a security holder.

SARs are stock appreciation rights payable in cash or stock, including *SARs* payable in cash or stock at the election of the Company or the holder.

Stock options includes all options, warrants, or rights to purchase securities of the Company, other than those issued to security holders as such on a pro rata basis.

Subsidiary includes any company of which more than 50% of the voting shares are owned by the Company.

Transaction includes, but is not limited to, any financial transaction, arrangement or relationship (including any indebtedness or guarantee of indebtedness) or any series of similar transactions, arrangements or relationships.

Underwriter includes an underwriter, underwriters' counsel, financial consultants and advisers, finders, members of the selling or distribution group, any *member* participating in the public offering and any and all other persons associated with or related to the foregoing.