Preparation for 2023 Fiscal Year-End SEC Filings and 2024 Annual Shareholder Meetings

Securities & Capital Markets Practice

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As our clients and friends know, each year Mintz provides an analysis of the regulatory developments that impact public companies as they prepare for their fiscal year-end filings with the Securities and Exchange Commission (SEC) and their annual shareholder meetings. This memorandum discusses key considerations to keep in mind as you embark upon the year-end reporting process in 2024.

In 2023, the SEC adopted its final rule on cybersecurity disclosure, which requires disclosure of cybersecurity risk management, strategy, and governance in the Annual Report on Form 10-K and disclosure of material cybersecurity incidents in a Current Report on Form 8-K. Many public companies have been reviewing their cybersecurity programs, updating their incident response plans, and preparing company-specific disclosure to comply with the new disclosure requirements in the upcoming Form 10-K, as well as updating their disclosure controls and procedures to address the new Form 8-K disclosure requirements. In addition, many companies that are not already subject to the new quarterly disclosure requirements with respect to Rule 10b5-1 trading plans will need to begin including this disclosure in their upcoming Form 10-K. Listed companies are now required to have clawback policies for compliance with new Nasdaq and NYSE rules, while public companies still have one more year to prepare for the new annual disclosure obligations relating to insider trading policies.

Like every year, companies will also need to review and update their MD&A and risk factors sections of their Form 10-K to reflect the key trends and risks facing the company. In this memorandum, we discuss a few key topics, including inflation, artificial intelligence, China-related risks, weather-related risks, and environmental, social and governance (ESG) risks, for companies to consider when updating their MD&A and risk factors.

In preparing for their 2024 annual shareholder meetings, public companies will need to consider early in their annual meeting preparations whether they will be pursuing a reverse stock split to address, for example, compliance with Nasdaq's minimum bid price requirements, and, for companies incorporated in Delaware that took a wait-and-see approach last year, whether they will seek to amend their charter documents to provide for the exculpation of officers for breaches of the fiduciary duty of care, following the success of many companies in obtaining such stockholder approval in 2023.

Throughout 2023, many public companies and their advisers have been anticipating that the SEC would issue its final rule on climate change disclosure, which the SEC's current timetable indicates will be finalized by April 2024. Beyond the SEC's climate change disclosure rule, during 2023, there has been a steady increase in government enforcement of ESG-related activities, California passed its own landmark ESG legislation requiring climate-related disclosure, and companies continue to review ESG priorities and prepare for anticipated disclosure requirements. In the coming year, the SEC has also indicated plans to propose rules relating to corporate board diversity and human capital management disclosure, among other things. Mintz is a leader in assisting companies and their boards in addressing the ESG movement, and the Mintz ESG Practice continues to work with clients on these important issues.

Other developments we discuss in this memorandum include trends in pay-versus-performance disclosure, proxy advisor voting guidelines, and recent litigation impacting corporate governance and disclosure.

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SEC Cybersecurity Disclosure Requirements

In July 2023, the SEC adopted the final cybersecurity disclosure rule.[1] The new rule, which was initially proposed in March 2022, is designed to enhance and standardize public company disclosures regarding cybersecurity risk management, strategy, governance, and incident disclosures. The rule requires both (1) annual disclosures on Form 10-K (or Form 20-F) regarding cybersecurity risk management, strategy, and governance practices, and (2) current reporting on Form 8-K (or Form 6-K) of cybersecurity incidents. To prepare for the additional disclosures required by the new rule, many public companies have been enhancing their cybersecurity and related reporting policies and practices.

Previous SEC Cybersecurity Guidance.

Until the adoption of the new rule, public companies were not required to comply with comprehensive cybersecurity disclosure requirements, but the SEC has issued important cybersecurity disclosure-related guidance for over a decade. For example, in its 2011 interpretative guidance, the SEC's Division of Corporation Finance indicated that "[a]lthough no existing disclosure requirement explicitly refers to cybersecurity risks and cyber incidents, a number of disclosure requirements may impose an obligation on registrants to disclose such risks and incidents. In addition, material information regarding cybersecurity risks and cyber incidents is required to be disclosed when necessary in order to make other required disclosures, in light of the circumstances under which they are made, not misleading," including, for example, disclosure in the risk factors, management's discussion and analysis of financial condition and results of operations, description of the business, legal proceedings, disclosure controls and procedures, and financial statement sections of a public company's periodic reports.[2] More recently, in its 2018 guidance, the SEC indicated that "[g]iven the frequency, magnitude and cost of cybersecurity incidents, the Commission believes that it is critical that public companies 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" and that "[c]rucial to a public company's ability to make any required disclosure of cybersecurity risks and incidents in the appropriate timeframe are disclosure controls and procedures that provide an appropriate method of discerning the impact that such matters may have on the company and its business, financial condition, and results of operations, as well as a protocol to determine the potential materiality of such risks and incidents."[3] To address this guidance, many public companies have been focusing on cybersecurity matters, including risk management and assessing the materiality of cybersecurity incidents, for a number of years. The new rule's comprehensive disclosure requirements, however, are driving many public companies to develop enhanced policies and procedures to ensure the disclosure requirements are met in a timely manner. In addition to focusing on the new rule, it would be prudent for public companies to review the 2011 and 2018 guidance, which continues to provide important direction for required cybersecurity-related disclosure.

Annual Disclosure of Cybersecurity Risk Management, Strategy, and Governance.

Under the new rule, public companies are required to include a new cybersecurity disclosure section under Item 1C of Form 10-K (or Item 16K of Form 20-F), which must include the disclosure required by Item 106 of Regulation S-K. In that section, public companies are required to address both (1) cybersecurity risk management and strategy and (2) cybersecurity governance. This new disclosure is mandated for all public companies in their annual reports for fiscal years ending on or after December 15, 2023. This means that for public companies with a December 31 fiscal year-end, the new disclosure will be required in their upcoming Form 10-K (or Form 20-F) for the fiscal year ending December 31, 2023.

Cybersecurity Risk Management and Strategy.

First, public companies are required to describe the company's processes for assessing, identifying, and managing material risks from cybersecurity threats.[4] These processes must be described in sufficient detail for a reasonable investor to understand them. The SEC has provided a non-exclusive list of disclosure topics that should be addressed in this disclosure, including: (1) whether and how any such processes have been integrated into the company's overall risk management system or processes; (2) whether the company engages assessors, consultants, auditors or other third parties in connection with any such processes; and (3) whether the company has processes to oversee and identify such risks from cybersecurity threats associated with its use of any third-party service provider. In addition, companies are required to describe whether any risks from cybersecurity threats, including as a result of any previous cybersecurity incidents,[5] have materially affected or are reasonably likely to materially affect the company, including its business strategy, results of operations, or financial condition, and if so, how.

Cybersecurity Governance.

Public companies are also required to describe both the board of directors' and management's roles in cybersecurity governance.[6] With respect to the board of directors, the company must include a description of the board of directors' oversight of risks from cybersecurity threats, including, if applicable, identifying any board committee or subcommittee responsible for the oversight of risks from cybersecurity threats and describing the processes by which the board or such committee is informed about such risks. With respect to management, the company must describe management's role in assessing and managing the company's material risks from cybersecurity threats. The SEC has provided a non-exclusive list of items to be disclosed, including (1) whether and which management positions or committees are responsible for assessing and managing such risks, and the relevant expertise of such persons or members in such detail as necessary to fully describe the nature of the expertise, such as prior work experience in cybersecurity, any relevant degrees or certifications or any knowledge, skills, or other background in cybersecurity; (2) the processes by which such persons or committees are informed about and monitor the prevention, detection, mitigation, and remediation of cybersecurity incidents; and (3) whether such persons or committees report information about such risks to the board of directors or a committee or subcommittee of the board of directors. The requirement to disclose board-level cybersecurity expertise was removed in the final rule.

Recommendations for Preparing for Annual Cybersecurity Disclosure.

As companies continue to prepare to make these disclosures in their upcoming Form 10-K or Form 20-F filings, companies should consider focusing on the following compliance steps to enhance their risk management processes, strategy, board oversight, and management's role in addressing cybersecurity risks:

- Complete a self-assessment of the company's cybersecurity risk management program to identify gaps and prepare for disclosure requirements under the new rule.
- Assess the company's current cybersecurity governance structure, including whether the oversight responsibility of the audit committee or other appropriate committee is sufficiently clear in the committee's charter, the frequency of reporting by management to the appropriate committee or the board on cybersecurity matters, whether the committee's or board's oversight is being appropriately documented, and whether appropriate resources and personnel are being devoted to cybersecurity management, including third-party resources, based on the company's size, industry, and other factors.
- Engage a working group that includes the company's cybersecurity professionals and members of the disclosure committee or other personnel involved in preparing disclosure for the company's SEC filings to prepare disclosure that is appropriately tailored to reflect the company's cybersecurity practices, policies, and governance structure, and to help ensure the company's cybersecurity program is appropriately documented to support the disclosures being made.
- Develop a timetable that allows for improvements in the company's cybersecurity risk management, strategy, and governance to be implemented in advance of the required disclosure.
- Periodically revisit and refine the process and scope for board and management oversight of cybersecurity risks and processes for addressing cybersecurity threats.

Current Disclosure of Material Cybersecurity Incidents.

Required Disclosure Under Item 1.05 of Form 8-K (or under Form 6-K).

Beyond the annual disclosure of cybersecurity risk management, strategy and governance, the cybersecurity disclosure rule also requires current disclosure of material cybersecurity incidents under new Item 1.05 of Form 8-K. Specifically, if the company experiences a cybersecurity incident that the company determines to be material, the company must describe the material aspects of the nature, scope, and timing of the incident, and the material impact or reasonably likely material impact on the company, including its financial condition and results of operations. This disclosure should focus on the material aspects of the incident and its material impacts, not simply describe the incident. However, the company does not need to disclose specific or 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 company's response or remediation of the incident. It is important to note that the term "cybersecurity incident" for purposes of Item 1.05 is the same as for purposes of Item 106 of Regulation S-K (referenced above) and includes not only isolated material cybersecurity incidents but also a series of related cybersecurity incidents that together are material. Material cybersecurity incidents will also be required to be reported by foreign private issuers on Form 6-K.

In determining whether a company experienced a material cybersecurity incident, the company is required to make a determination of materiality "without unreasonable delay" after the discovery of the incident. Disclosure of the material cybersecurity incident on Form 8-K will then be required within four business days after the company has made this determination of materiality. Allowing companies time to assess whether a cybersecurity incident is material acknowledges the complexity of investigating a cybersecurity incident and of working with advisors to formulate organizational consensus about the facts and impacts surrounding an incident. For similar reasons, the cybersecurity disclosure rule also makes clear that untimely filing of an Item 1.05 Form 8-K will not lead to a loss of Form S-3 eligibility. However, it is imperative that companies have disclosure controls and procedures in place to ensure that cybersecurity incidents are reported to appropriate personnel within the company to enable a prompt decision on whether a cybersecurity incident is material.

In addition, where a substantial risk to public safety or national security would arise as a result of a disclosure, Item 1.05 of Form 8-K allows for a delayed filing upon a finding of substantial risk to public safety or national security by the US Attorney General and a written notification of the same to the SEC. Item 1.05 of Form 8-K also allows for a delayed filing by certain telecommunications providers, who are required to first notify law enforcement officials of certain cybersecurity breaches before disclosing such breaches publicly. However, we would expect these opportunities for delayed filings to apply only to a limited number of public companies, such as those in the defense or telecommunications industries, and only in limited circumstances.

Further, to the extent that the required disclosure is not determined or is unavailable at the time of the Form 8-K filing, companies are required to so indicate in the initial Form 8-K filing and then provide the additional required information in a Form 8-K amendment, which must be filed within four business days of such information becoming available or being determined (without unreasonable delay).

The Form 8-K and Form 6-K disclosures for all registrants other than smaller reporting companies are required beginning on December 18, 2023, and smaller reporting companies must begin complying with the Form 8-K disclosure requirements on June 15, 2024.

Recommendations for Preparing for Disclosure of Material Cybersecurity Incidents.

As companies continue to prepare to make these disclosures in a timely manner, companies should consider the following compliance steps:

- Create or update the company's existing incident response plan, ensuring it includes specific procedures and identifies responsible parties for identifying, assessing, and managing cybersecurity incidents and making materiality determinations following a cybersecurity incident.
- Determine whether the company's disclosure committee, the company's general counsel or other committee, or management personnel will be tasked with making the determination of whether a cybersecurity incident is material.
- Ensure that the company's disclosure controls and procedures are developed to ensure that cybersecurity incidents that may be material are appropriately communicated so that a decision as to whether the incident is material can be made without unreasonable delay. Such controls and procedures should ensure that cybersecurity personnel understand the SEC reporting requirements and can identify and report up the cybersecurity incidents that may be required to be disclosed.
- Develop an understanding of the information that may or may not be available at the time of making a determination of whether a cybersecurity incident is material and discuss with the internal team how a determination of materiality would be made with limited information.
- Establish procedures for disclosing additional required information about a cybersecurity incident to the extent such information is not determined or available for disclosure in the initial Form 8-K, to facilitate timely Form 8-K amendment filings as needed.

Continued Focus on Cybersecurity Risks.

We expect that cybersecurity risk management will remain a top concern for public companies across industries for the foreseeable future. Indeed, according to a report by Audit Analytics cited in the final cybersecurity disclosure rule, over the last approximately 11 years, the number of cybersecurity incidents disclosed by public companies has increased by almost 600%, and between 2020 and 2021, the number of cybersecurity incidents increased by approximately 43.5%.[7] In addition, beyond compliance with the SEC's disclosure rules, cybersecurity remains important to investors. For example, in its 2024 Benchmark Policy Guidelines, Glass Lewis has indicated its belief that "cyber risk is material for all companies" and that it will closely evaluate the board's oversight of a company's response and disclosures to cyber-attacks that cause significant harm to shareholders, and may recommend voting against directors where the board's oversight, response, or disclosures are insufficient.[8] Public companies will need to, as a matter of corporate governance, SEC compliance and shareholder relations, ensure they have appropriate risk management, strategy, governance, and incident-reporting policies and procedures in place and to continue to evaluate and enhance them as cybersecurity risks continue to evolve.

For additional information about the SEC cybersecurity disclosure rule, please see our Mintz advisory titled SEC Adopts Final Cybersecurity Rules for Public Companies (August 1, 2023).

Recent Trends in Reverse Stock Splits

In recent years, according to data collected by the Nasdaq Stock Market (Nasdaq), the frenzied pace of reverse splits increased from 94 reverse stock splits by Nasdaq-listed issuers in 2020 and just 31 in 2021 to 196 in 2022 and 164 in only the first half of 2023 (through June 2023).[9] What caused this extreme jump in reverse split activity? In last year's memorandum, we discussed valuations of public companies and filer status transitions in the volatile stock market of the past few years. Many publicly traded companies (particularly those in the life science sector) experienced rapid and often substantial value growth in 2020 and 2021, only to be followed by equally (or more) substantial loss in market value in 2022 and 2023. As we approach the end of 2023, many companies are trading below even their cash value.

In connection with this often extreme loss in value and a corresponding drop in stock price, certain companies also faced threats of exchange delisting resulting from a failure to comply with minimum price requirements, such as Nasdaq's $1.00 minimum bid price rule.[10] Consequently, many companies sought to complete a reverse stock split to regain bid price compliance. As discussed below, this surge in reverse stock split activity spurred new regulatory changes from Nasdaq and the state of Delaware.

Understanding Reverse Stock Splits.

For corporations (*e.g.*, most publicly traded companies), a reverse stock split is typically a stockholder-approved process through which a corporation's charter or certificate of incorporation is amended to combine multiple outstanding shares of stock into one share of stock. As multiple shares are combined, the price per share increases. Selecting the best reverse stock split ratio (or ratio of the number of shares of stock to be combined into a single share of stock) for exchange compliance purposes can be a delicate balance. The ratio should be high enough to ensure trading over any minimum bid price (or higher target price, as some investment funds will not invest in stocks with a price less than $3.00 or $5.00) for at least some meaningful period of time, but not so high that the supply of common stock (*e.g.*, trading volume) is adversely affected. As a result, certain companies find themselves in a challenging predicament, akin to a Hobson's choice: they must decide between remaining listed on an exchange or decimating the market for their common stock.

Regulatory Changes from Nasdaq.

New Notification Process.

In November 2023, the SEC approved new Nasdaq rules that require, among other things, that companies provide Nasdaq certain details about a proposed reverse stock split using Nasdaq's "Company Event Notification Form" no later than 12:00 pm Eastern Time, five business days prior to the anticipated market effective date.[11] The new rules also specifically require that the company make public disclosure about the reverse split no later than 12:00 pm Eastern Time on the date that is two business days prior to the anticipated market effective date of the reverse stock split.[12]

Implementation of a reverse stock split for a publicly traded company requires an orchestrated process between a company's counsel, transfer agent, annual or special meeting provider and vote tabulator, investor relations professionals, the Depository Trust Company (DTC), the CUSIP Bureau and the applicable exchange. Prior to the new rules, Nasdaq required that companies submit the "Substitution Listing Event Form," which included detailed descriptions of the stock split, effective date, anticipated stockholder approval, trade date, and announcement date, at least 15 days in advance of a stock split. Prior Nasdaq rules further required that companies make prompt disclosure of the stock split (typically by press release) no later than approximately 1:00 pm Eastern Time on the trading day before a company's stock was first traded on a post-split basis.[13] In practice, many companies did not have full information to complete the Substitution Listing Event Form 15 days in advance of the stock split. Due to various contingencies, including those related to obtaining the stockholder vote, it was challenging to gather information to complete the Nasdaq notification in a timely way. Accordingly, Nasdaq staff and companies typically engaged in a protracted process of continually updating the form. The adjusted deadlines set forth in the new rules may lessen the administrative burden of the notification process.

Many companies completing a reverse split for Nasdaq compliance purposes are seeking to do so within a prescribed grace period or to comply with a Nasdaq-imposed deadline/compliance plan. It is vital for Nasdaq-listed companies to incorporate the timing considerations required by these new rules into their planning process when undertaking a reverse stock split.

Nasdaq Trading Halt Proposal.

In addition to the amended notification rules, Nasdaq also submitted a rule proposal to the SEC to establish a new regulatory halt procedure specific to securities undergoing a reverse split.[14] Failure to comply with Nasdaq's required notification processes and procedures may result in a trading halt in many situations, but this proposal would impose certain trading halts as a matter of course in connection with reverse stock splits.[15] As discussed in the September

2023 proposing release, Nasdaq has historically processed splits on an overnight basis where pre-market trading opens at 4:00 a.m. Eastern Time on a post-split adjusted basis. According to some market participants, this process is prone to errors. Nasdaq's proposing release specifically mentions an error in which a broker "s[old] more shares than customers held in their accounts, resulting in a temporary short position."[16] In an effort to better prevent such mistakes, Nasdaq is proposing a regulatory halt to prohibit pre-market trading immediately after a reverse stock split and to only open this trading again following a more rigorous "Halt Cross" process.

Amendments to Delaware Stockholder Approval Requirement.

One of the most challenging aspects for many companies seeking to obtain approval for a reverse stock split is obtaining the requisite stockholder approval. New stockholder approval standards for Delaware companies may be a favorable development on this front. In August 2023, Delaware amended its laws to, in many circumstances, reduce statutory stockholder approval thresholds for stock splits and increases or decreases in authorized shares.[17] In particular and with respect to reverse splits, these amendments now require only that the votes cast for the amendment exceed the votes cast against the amendment (versus the traditional majority of the votes outstanding) to approve a reverse stock split, provided, among other things, that the shares are exchange-listed immediately before the amendment and the corporation meets listing requirements for a minimum number of holders immediately after the amendment is effective.[18] This legislative change is a significant development for Delaware issuers seeking stockholder approval of a reverse stock split in order to regain compliance with the minimum bid price requirements of an exchange.

Insights from Stockholder Proposals on Officer Exculpation

As we discussed in last year's memorandum, Section 102(b)(7) of the Delaware General Corporation Law (DGCL) was amended, effective as of August 1, 2022, to permit Delaware corporations to include a provision in their certificate of incorporation to eliminate or limit the personal liability of certain officers of the corporation for monetary damages to the corporation or its shareholders for the breach of the fiduciary duty of care (an officer exculpation provision). Before this amendment, Section 102(b)(7) of the DGCL was only available to exculpate directors of a corporation from personal liability for the breach of the fiduciary duty of care and remained unavailable to corporate officers. The amendments to Section 102(b)(7) permit the certificate of incorporation to eliminate or limit the liability of officers on the same basis as directors, except it does not allow the certificate of incorporation to eliminate or limit shareholder derivative claims against officers for breach of the fiduciary duty of care.

During 2023, many Delaware corporations included a proposal in their annual meeting proxy statement seeking shareholder approval to add an officer exculpation provision to their certificate of incorporation, while many other Delaware corporations took a wait-and-see approach to observe whether other companies were successful in obtaining shareholder approval of such proposals. An important factor for many companies in deciding whether to move forward with an officer exculpation proposal was the views of proxy advisory firms, such as Institutional Shareholder Services Inc. (ISS) and Glass, Lewis & Co. (Glass Lewis). Going into the 2023 annual reporting season, in its Americas Proxy Voting Guidelines Benchmark Policy Changes for 2023, ISS announced its general voting guideline to vote proposals on officer indemnification, liability protection, and exculpation on a case-by-case basis.[19] In addition, Glass Lewis indicated that, although it would closely evaluate proposals to adopt officer exculpation provisions on a case-by-case basis, it would generally recommend voting against such proposals unless compelling rationale for the adoption is provided by the board, and the provisions are reasonable.[20]

Looking back on the 2023 annual stockholder meetings, shareholders generally have approved officer exculpation proposals unless the company had a supermajority voting threshold or not enough shareholders participated in the vote (due to a high retail shareholder base or for other reasons). According to Alliance Advisors:[21]

- Over 270 companies proposed adding an officer exculpation provision to their certificate of incorporation.

- Of the 249 officer exculpation charter amendments voted in the first half of 2023, all but 39 passed. Nearly half of those that failed had supermajority vote requirements, while the others had insufficient shareholder participation at the annual meeting, making it difficult to receive the approval of a majority of outstanding shares; and
- Proxy advisor recommendations did not appear to have any meaningful impact on pass/fail outcomes, as ISS recommended approval of more than 80% of such proposals while Glass Lewis opposed all of such proposals.

Given the outcome of these proposals in 2023, we anticipate many Delaware corporations that took a wait-and-see approach in 2023 are likely to seek shareholder approval of an officer exculpation proposal in 2024. However, notwithstanding the success of many of such proposals in 2023 and as we recommended last year, Delaware corporations considering an officer exculpation proposal in 2024 should (1) present a compelling rationale in their proxy statement for seeking approval of an officer exculpation proposal, (2) be mindful of ISS and Glass Lewis's views on such proposals and the importance of their views to the corporation's shareholders, and (3) ensure adequate planning since such proposals require the filing of a preliminary proxy statement.

Disclosure of Rule 10b5-1 Trading Plans and Insider Trading Policies

In December 2022, the SEC finalized amendments to Rule 10b5-1 under the Securities Exchange Act of 1934 (Exchange Act), introducing new disclosure requirements for Rule 10b5-1 trading plans and insider trading policies and practices. The effective dates of these rules commenced in 2023, introducing quarterly disclosure requirements regarding the utilization of Rule 10b5-1 trading plans by companies and their directors and officers, and in recent quarters, the first disclosures under the new rules have been included in Form 10-Q and Form 10-K filings. In addition, as discussed below, certain annual disclosure requirements introduced by these rules take effect in 2024.

Quarterly Disclosure of Rule 10b5-1 Trading Plans.

The recent quarters have seen companies adapting to the new disclosure mandate under Item 408(a) of Regulation S-K, which requires information about the adoption, modification, or termination of Rule 10b5-1 trading plans and non-Rule 10b5-1 trading plans. The disclosure must include a description of the material terms of the trading arrangement, excluding terms relating to the trading price. Such material terms include the name and title of the director or officer, the date on which the director or officer adopted or terminated the trading arrangement, the duration of the trading arrangement, and the aggregate number of securities to be purchased or sold pursuant to the trading arrangement. Notably, as confirmed by the SEC's Compliance and Disclosure Interpretations released in August 2023, disclosure regarding the termination of a trading plan is not required for a plan that ends due to its expiration or completion.

Companies have taken a varied approach in reporting the use of trading arrangements, with some companies opting for tabular disclosure and other companies setting forth the information in a narrative format. We expect an ongoing evolution of best practices as these disclosures become more common.

Insider Trading Policies.

In the upcoming year, companies have an opportunity to plan for the new annual disclosure obligations related to insider trading policies. The disclosure requirement will begin to take effect in 2024, with the first set of disclosures required in the first filing that covers the first full fiscal year starting on or after April 1, 2023. For smaller reporting companies, this timeline extends to filings covering the first full fiscal year beginning on or after October 1, 2023. Companies with a fiscal year ending on December 31 will need to include these disclosures in their Form 10-K for the year ending December 31, 2024.

Although this disclosure requirement is a year away for most companies, it is advisable for issuers to proactively review and, if necessary, amend their insider trading policies. In cases where such a policy is not currently in place, issuers should consider adopting one.

Under Item 408(b) of Regulation S-K, companies will be required to disclose whether they have established insider trading policies and procedures that govern the purchase, sale, or other dispositions of the company's securities by directors, officers, and employees or by the registrant itself, and are designed to be in compliance with insider trading laws. In situations where a company has not adopted such policies and procedures, an explanation for this absence must be provided. Furthermore, if the registrant has implemented insider trading policies and procedures, the policies must be filed as an exhibit to Form 10-K.

As part of Form 10-K, Part III disclosure, disclosure regarding the insider trading policies and procedures can be incorporated by reference from the company's proxy statement. However, the company's insider trading policies and procedures must still be filed as an exhibit to Form 10-K.

For additional information about the amendments to Rule 10b5-1, please see our Mintz advisory titled SEC Adopts Amendments to Rule 10b5-1 Insider Trading Arrangements (December 27, 2022).

Current State of Environmental, Social, and Governance Matters

Companies continue to navigate the evolving landscape of Environmental, Social, and Governance (ESG) issues that have come to increasing prominence among regulators, corporations, the media, and the public. Among many current developments in this area, we highlight in this section a rise in ESG-related litigation and the increased focus on corporate governance. In addition, although the highly anticipated SEC rulemaking on climate disclosures has not yet progressed to a final rule, the state of California has moved forward with approving new legislation that will mandate disclosure of emissions information and climate-related financial risks for certain companies doing business in California.

Increased ESG Litigation.

The increase in ESG-related litigation is both significant and multifaceted.

First, there has been a steady increase in government enforcement related to ESG activities. While the SEC has brought relatively few ESG-specific prosecutions as yet, additional enforcement actions are expected due to the SEC's creation of a Climate and ESG Task Force. Additionally, the SEC has promulgated new rules to combat "greenwashing," including the Investment Company Names Rule and the Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies, and is expected to soon issue its rule concerning climate disclosures — the Enhancement and Standardization of Climate-Related Disclosures for Investors — and all of these rules, in concert, are expected to constitute the basis for attendant enforcement actions. The CFTC's creation of an Environmental Fraud Task Force is also expected to bring actions in connection with "potential fraud and manipulation" in the "voluntary carbon credit market[,]" including the purchase and sale of carbon offsets. There has also been an uptick in lawsuits by local and state governments (and private plaintiffs) against major oil and gas producers alleging claims concerning their products' roles in contributing to climate change.

Second, there has been a proliferation of private shareholder litigation. This increase has taken a variety of forms, including (i) shareholders challenging fiduciaries' decisions to adopt or adhere to ESG-based policies and procedures; (ii) shareholders asserting *Caremark* claims seeking to hold corporate directors liable for failure to oversee or monitor "mission-critical" ESG-related aspects of their business; (iii) securities and consumer class actions alleging greenwashing against various companies; and (iv) challenges to diversity mandates and, on the other side of the spectrum, to companies' alleged failure to satisfy stated diversity goals.

For additional information about the recent increase in ESG-related litigation, please see our recent Mintz report titled *A Mintz ESG Primer, The Current State of Environmental, Social, and Governance Matters in American Corporations* (October 24, 2023).

California Climate Disclosure.

California continues its trend of passing landmark ESG legislation with two notable recent bills. The Climate Corporate Data Accountability Act (SB253)[22] was signed into law in October 2023. This bill requires the development of regulations, on or before January 2025, requiring all companies (both publicly traded and privately held) doing business in California with revenues in excess of $1 billion to publicly disclose comprehensive emissions information on an annual basis. A second bill, SB 261[23], was also signed into law in October 2023, and requires the development of regulations to require companies (again, both publicly traded and privately held) doing business in California with revenues in excess of $500 million to disclose their climate-related financial risks and mitigation strategies every two years. There are indications that California will adopt an expansive definition of "doing business in California" to bring companies within the remit of this legislation. While the laws have some limited exceptions for certain types of companies, these laws are much broader than any SEC rule in that they apply to both private and public companies. As these regulations become available, companies will likely need to work with a cross-disciplinary team on these disclosures. While it may be too early to tell, there is already speculation that these laws will be challenged in the courts.

Corporate Governance Considerations.

In planning for year-end reporting and the 2024 annual shareholder meeting, we recommend that companies and their boards conduct a thoughtful review of corporate governance practices and ESG priorities. With the increasing complexity of ESG challenges, it is crucial for both board members and management to ensure their company's governance frameworks and procedures effectively address these factors.

Our recent Mintz advisory titled ESG Governance Considerations for Public Company Boards underscores the importance of assessing governance practices, risk management, and ESG strategy. Key to this process is a comprehensive evaluation of the current board committee structure and oversight functions, aiming to pinpoint both strengths and areas needing improvement. Such an analysis is instrumental in enhancing the board's effectiveness and ensuring alignment with the company's priorities and challenges. Further, it is imperative for boards to clearly define their scope of responsibilities. This includes delineating areas of oversight, decision-making authority, and strategic involvement. Establishing a well-structured reporting procedure is critical to this endeavor, as it ensures transparency and facilitates informed decision-making.

Board assessment should also include an examination of board composition and a review of board expertise, both in areas pertinent to the business of the company and areas representing contemporary risks, such as cybersecurity, climate change disruptions, and (diversity, equity and inclusion) DEI initiatives. Recognizing the evolving nature of ESG issues, we recommend regular training sessions for board members. These sessions are key to enhancing understanding and preparedness for emerging ESG challenges, thereby positioning the board to proactively address these issues.

We also recommend periodic review and refreshment of the company's ESG strategy to ensure that the strategy remains relevant and effectively aligns with the company's business objectives and priorities. In addition, we advise undertaking a comprehensive gap assessment in the areas of risk management, compliance, and audit functions. This involves a careful review of existing processes to spot any deficiencies in addressing ESG-related risks, thereby enhancing the company's risk management framework. Alongside this, an examination of the company's progress towards established ESG targets will help assess the company's commitments and identify areas for improvement.

ESG issues continue to draw the attention of regulators, investors, and the public. It is incumbent upon boards to consider these issues in corporate strategy and decision-making and to establish processes to strengthen their governance practices. Conducting board assessments, reviewing corporate commitments, and focusing on appropriate ESG oversight and risk management are important steps for navigating the complex landscape of ESG considerations.

For additional information about current ESG issues facing public companies, please visit our Mintz ESG Viewpoints.

Updating the Risk Factors and MD&A in 2024

As we begin 2024, we recommend that companies take a fresh look at their disclosures, particularly their risk factors and Management's Discussion and Analysis of Financial Condition (MD&A) section of their Annual Report on Form 10-K. Among other things, public companies are required to describe in the MD&A any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales, revenues, or income from continuing operations, as well as any known trends or demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the company's liquidity increasing or decreasing in any material way and any known material trends, favorable or unfavorable, in the company's capital resources.[24] Public companies are also required to include in the risk factor section of Form 10-K a discussion of the material factors that make an investment in the company speculative or risky.[25] Importantly, risks that have begun to materialize should not be discussed in a hypothetical way. Instead, risk factors should describe how a risk has materialized and what the current risks are to the company.

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

Inflationary Pressures.

Disclosure about the impacts of inflation on a company's business has become a renewed focus area for the SEC in recently issued comment letters. Prior to 2020, companies were explicitly required to disclose in their MD&A under Item 303 of Regulation S-K the impact of inflation and changing prices where material. In 2020, that explicit requirement was eliminated to encourage companies "to focus their MD&A on material information that is tailored to their respective facts and circumstances," as the SEC was concerned that "a specific reference to inflation and changing prices may give undue attention to the topic," as companies were "already expected to discuss the impact of inflation or price changes if they are part of a known trend of uncertainty that has had, or is reasonably likely to have, a material favorable or unfavorable impact on net sales, revenue, or income from continuing operations."[26] Indeed, from 2000 to 2020, year-over-year inflation in the United States ranged from only approximately 0.1% to 4.1%,[27] and therefore, for many years, was not a material concern for many companies operating in the United States. In 2021 and 2022, however, year-over-year inflation in the United States increased to approximately 7.0% and 6.5%, respectively, and has had a substantial impact on many companies, including through increases in the costs of raw materials and components as well as the sales prices of companies' products and services.[28] This has led to the SEC Staff issuing a number of comments to public companies about their inflation-related disclosure in their risk factors and MD&A.

Many companies include in their SEC filings risk factors that generally address how inflation and other macroeconomic factors could adversely affect the company. In its recent comments, however, the SEC has requested that companies update their inflation-related risk factor if recent inflationary pressures have materially impacted the company's operations, including by identifying the types of inflationary pressures the company is facing and how its business has been affected.[29] The SEC Staff has also requested companies provide more detail on impacts of inflation in their MD&A. For example, the SEC Staff has asked companies:[30]

- To expand upon the principal factors contributing to the company's inflationary pressures, the actions planned or taken, if any, to mitigate the inflationary pressures, and quantify the resulting impact on the results of operations and financial condition.
- To disclose any known trends or uncertainties that have had or are reasonably likely to have a material impact on the company's cash flows, liquidity, capital resources, cash requirements, financial position, or results of operations arising from, related to, or caused by inflation.

In addition, the SEC Staff has commented where management has discussed inflationary pressures on earnings or other investor calls but has not disclosed the impacts of inflation in the company's SEC filings, in which case the SEC has requested disclosure in the SEC filings of the impacts of inflation and the actions taken or planned to mitigate inflationary pressures.[31]

In light of these comments, in preparing for their upcoming Form 10-Ks and Form 10-Qs, it is important for companies to:

- Consider updating the inflation-related risk factor and disclosure in the MD&A, particularly if inflation has had a material impact on the company's business, to ensure that the company discusses the principal factors contributing to the company's inflationary pressures, the actions the company has taken or plans to take to mitigate those pressures, and quantifies, where material, the resulting impact on the company's results of operations and financial condition.
- Plan to address in the MD&A any known trends or uncertainties that have had or are reasonably likely to have a material impact on the company's cash flows, liquidity, capital resources, cash requirements, financial position, or results of operations arising from, related to, or caused by inflation.
- Ensure that disclosures about inflationary pressures on earnings or other investor calls are included in and consistent with disclosures made in the company's SEC filings.

Artificial Intelligence.

Another area where the SEC has been focused is the emerging area of artificial intelligence (AI). As we have discussed in one of our recent client alerts, The US Securities & Exchange Commission Targets AI on Multiple Fronts – *AI: The Washington Report*, the SEC has become highly focused on regulating the use of AI by financial service providers and recently released proposed rules for conflicts of interest in the use of AI, predictive data analytics, and similar technologies by broker-dealers and investment advisers. AI presents a number of potential benefits and risks to and impacts on companies across industries and has, therefore, become a focus area of company management. Indeed, at least 110 of the S&P 500 companies used the term "AI" in their earnings calls for the first quarter of 2023, which represented a substantial increase from 78 companies for the fourth quarter of 2022.[32] As this emerging technology develops, companies will need to consider disclosure of these opportunities and risks. In remarks to the National Press Club in July 2023, SEC Chair Gary Gensler remarked that "public companies making statements on AI opportunities and risks need to take care to ensure that material disclosures are accurate and don't deceive investors."[33]

As companies prepare their upcoming Form 10-K and Form 10-Qs, we recommend they consider, to the extent applicable, the potential risks of AI on their business and add or update their AI-related risk factor to disclose potential risks. These potential risks could include:

- Leakage of sensitive information in connection with employees' or vendors' use of AI technologies.
- Inability to realize the anticipated benefits of AI technology that the company develops or acquires.
- Failure to invest in AI technologies or investment in less successful or optimal AI technologies that may put the company at a significant competitive disadvantage.
- Uncertainties surrounding evolving laws and regulations regarding the use of AI and changes in operations or products and services that may result from, and costs that will be required to comply with, such laws and regulations.
- Failure to obtain patent or other intellectual property protection of AI-related technologies or the risk of infringing on the AI-related technologies of others.

China-Specific Risks.

The SEC continues to focus on ensuring companies are adequately disclosing material risks relating to operations in the People's Republic of China (PRC or China). In November 2020, the SEC's Division of Corporation Finance provided guidance for companies that are based in or that have a majority of their operations in China (China-based companies) about disclosure of China-related risks, particularly since the SEC's ability to promote and enforce disclosure standards may be materially limited.[34] The risks the division highlighted include limitations on US regulators' access to information and ability to investigate or pursue remedies with respect to China-based companies, risks related to investing in variable interest entity (VIE) structures used to address China's foreign ownership restrictions, risks related to China's regulatory environment, and risks related to limits on shareholder recourse and differences in corporate governance and corporate law in China, among others. In 2021, SEC Chair Gary Gensler issued a Statement on Investor Protection Related to Developments in China, and the division issued a sample letter to China-based companies focusing on, among other things, risks associated with the VIE structure.[35]

More recently, in July 2023, the SEC's Division of Corporation Finance issued an additional sample letter to companies regarding China-specific disclosures. The letter emphasized that "[t]he Division continues to believe that companies should provide more prominent, specific, and tailored disclosures about China-specific matters so that investors have the material information they need to make informed investment and voting decisions." The July 2023 letter focused on three specific disclosure areas: (1) the disclosure obligations of Commission-Identified Issuers (CIIs) under the Holding Foreign Companies Accountable Act (HFCAA), (2) more specific and prominent disclosure about material risks related to the role of the PRC government in the operations of China-based companies, particularly the material impacts of intervention or control by the PRC on the company's operations, and (3) disclosures related to the material impacts of certain statutes, such as the Uyghur Forced Labor Prevention Act.

In connection with preparing for the upcoming Form 10-K and Form 10-Q, we recommend that, in addition to China-based companies, companies that have any operations in, manufacturing, or supply from, or otherwise do business in China revisit their China-related disclosures to ensure that material risks are disclosed. These may include risks from:

- Potential tariffs on imported goods from China, such as raw materials, components, or finished products.
- The regulatory environment in China.
- Competition from products manufactured and sold by others in China.
- Changes in political and economic policies in China.
- Uncertainties in the PRC legal system that could limit legal protections available to the company.

Weather-Related Risks.

Over the past few years, the United States has experienced a number of severe weather events. According to the US Environmental Protection Agency, heat waves and large storms are likely to become more frequent or more intense with human-induced climate change.[36] Depending on their geographical location, industry, and supply chain, among other things, companies face various degrees of risks from severe weather events and natural disasters, such as tornados, hurricanes, wildfires, windstorms, flooding, droughts, blizzards, and earthquakes. As companies prepare their upcoming Form 10-K and Form 10-Qs, it would be prudent for companies to assess (1) whether severe weather events and natural disasters have affected the company and, if so, how, and (2) what are the material risks to the company from such events. For example, weather events and natural disasters can have a direct impact on a company's operations by causing damage to its physical locations or requiring closures due to power outages and increases in energy costs, interfering with communication systems, negatively impacting the company's manufacturing or distribution capabilities, preventing employees from doing their work or resulting in other human capital issues, all of which can drive up insurance costs. Severe weather events and natural disasters can also impact, either negatively or positively, demand for a company's products and services. They can impact a company's supply chain by creating shortages and impacting the availability of raw materials and commodities while increasing their cost. They can adversely impact vendors' ability to perform services for the company. Further, they can negatively affect the local economy where the company operates.

Environmental, Social and Governance Risks.

ESG issues, including greenhouse gas emissions and climate-related risks, renewable energy, diversity, equality and inclusion, supply chain, human rights, and social responsibility, continue to play a prominent role among public companies, investors, regulators, the media, and the public. Notably, in recent years, there has been considerable investor and regulatory pressure to incorporate ESG issues in corporate strategy and decision-making, while ESG has recently become more politically fraught. Another challenge is that the ESG landscape has been in a constant state of flux as a result of new developments. As companies prepare their upcoming Form 10-K and Form 10-Q, companies should revisit their ESG-related risk factors to ensure they reflect the current risks facing the company based on the company's ESG-related programs and the broader ESG landscape. Some of these risks may include:

- The company's ESG initiatives and goals, which may involve collecting, measuring, and reporting ESG-related information and metrics, often require significant resources and expenses, and changing laws and regulations and evolving stakeholder expectations may further increase the company's compliance and other costs necessary to meet those expectations.
- If the company is unable to achieve, or is perceived to be unable to achieve, its ESG-related goals or meet stakeholder expectations and standards, customers may choose not to purchase products or services from the company, investors may choose to sell their stock, the company may face challenges with employee retention, and the company's reputation and revenues may suffer.
- The company may be criticized by regulators, investors, the media, or other stakeholders for the accuracy, adequacy, or completeness of its ESG-related disclosure, and lawsuits or regulatory actions alleging "greenwashing" or other false and misleading statements could adversely impact the company's reputation and financial position.
- ESG detractors may criticize the company for the scope or nature of its ESG initiatives or goals and could subject the company to consumer boycotts or anti-ESG governmental action.

Compensation Matters

Implementing Clawback Policies.

In our previous annual memorandum, we highlighted the SEC's adoption of new listing standards for the recovery, or "clawback," of executive compensation. Building on this development, on June 9, 2023, the SEC ratified the listing standards proposed by the New York Stock Exchange (NYSE) and Nasdaq. Both the NYSE's and Nasdaq's new listing standards closely align with the language of Rule 10D-1 under the Exchange Act. Starting December 1, 2023, issuers listed on both the NYSE and Nasdaq are required to establish and enforce compensation recovery policies consistent with Exchange Act Rule 10D-1 and the applicable listing standards. In addition, no later than December 31, 2023, NYSE-listed issuers are required to confirm via Listing Manager the adoption of a compensation recovery policy or their reliance on an exemption from this requirement.

Administration.

Issuers adopting compensation recovery policies in compliance with the new listing standards should consider how such policies will be implemented and enforced, if and when required. The SEC's rules require that a committee of independent directors that is responsible for executive compensation decisions, or in the absence of a compensation committee, a majority of the independent directors serving on the board, must make any determination that the recovery of erroneously awarded compensation would be impracticable. Although the SEC rules do not specifically dictate which governing body within a company is responsible for administering other elements of the clawback policy, it is anticipated that the majority of companies will opt to manage their clawback policies through the compensation committees of their boards. In alignment with best practices, we advise issuers to consider incorporating the responsibility for overseeing and administering the clawback policy into their compensation committee charters, provided that this responsibility is not already included.

Documentation and Acknowledgments.

Companies should assess all compensation arrangements with executive officers to identify those relying on financial reporting measures. The terms embedded in incentive compensation plans and award agreements should explicitly indicate that awards are subject to the company's clawback policies. In this context, companies are encouraged to explore the possibility of securing written acknowledgment from covered executives, affirming their understanding and acceptance of the application of the company's Rule 10D-1 clawback policy. While the new listing standards do not mandate acknowledgments from covered officers, it is advisable for companies to seek guidance from outside legal counsel when deciding on this matter. Boards can make well-reasoned determinations about the necessity of requiring such acknowledgments.

The scope of the clawback requirement encompasses incentive-based compensation received by both current and former executive officers in the event of a material restatement. The definition of "incentive-based compensation" under Rule 10D-1 includes any form of compensation linked, wholly or partially, to the attainment of a financial reporting measure. Accordingly, it is essential for issuers to undertake a comprehensive evaluation and, where necessary, revision of existing incentive compensation structures. We recommend collaborating with compensation consultants and legal counsel to review and consider amendments to cash incentive plans, equity incentive plans, award agreements, employment contracts, and performance metrics. Particular attention should be paid to metrics tied to stock price and total shareholder return (TSR) to ensure compliance with the new listing standards.

Moving forward, issuers and their compensation committees should institute a practice of documenting instances when executive compensation decisions and awards are tied to financial reporting measures. This documentation will serve an important function in the event of a material restatement to help establish any required recovery and to prepare related disclosures, as discussed below. In addition, companies should review and, if necessary, amend the form of indemnification agreement used for executive officers, as well as bylaws or equivalent governing documents, to clarify that executive officers may not be indemnified for the loss of compensation under a Rule 10D-1 clawback policy.

Clawback Disclosure.

Beginning with the first annual report required to be filed after December 1, 2023, a listed issuer is required to file its Rule 10D-1 clawback policy as an exhibit to its annual report on Form 10-K or Form 20-F, as applicable, and disclose how it has applied the policy. Companies that retained an existing compensation recovery policy in addition to adopting a new Rule 10D-1 compliance clawback policy only need to file the policy that is compliant with the new SEC rules pursuant to Rule 10D-1.

As discussed above, the scope of the clawback requirement encompasses incentive-based compensation received by both current and former executive officers in the event of a material restatement. A material restatement may include any restatement, including both restatements classified as "little r" restatements that correct errors that are not material to previously issued financial statements but that would result in a material misstatement if the errors were left uncorrected in the current report and "big R" restatements that correct errors that are material to previously issued financial statements. The process of identifying and assessing errors in financial statements requires careful analysis by management and external auditors under the oversight of the audit committee. If the company determines that an error is immaterial, the company is not required to disclose the materiality analysis of the error.

In the event a company is required to issue an accounting restatement that triggers the clawback of improperly awarded incentive-based compensation, two new disclosure requirements under Item 402 of Regulation S-K, as well as analogous disclosure provisions applicable to Foreign Private Issuers and Multi-Jurisdictional Disclosure System filers in Forms 20-F and 40-F, will apply. Under the new Item 402(w) of Regulation S-K, a company is required to provide specific information in its proxy statement (and Part III of the Annual Report on Form 10-K) if, at any time during the last completed fiscal year or thereafter, it was required to prepare an accounting restatement that necessitated recovery under the clawback policy. This includes situations where there was an outstanding balance at the end of the last completed fiscal year of erroneously awarded compensation yet to be recovered due to a prior restatement.

The required disclosure must set forth the date when the company was required to prepare the accounting restatement and the total dollar amount of erroneously awarded incentive-based compensation attributable to the restatement. This should include an analysis of how the recoverable amount was calculated. In cases where the amount is yet to be determined, the company must explain the reasons and instead disclose the amount and related details in its next filing subject to Item 402 of Regulation S-K. The disclosure must also set forth the total amount of incentive-based compensation that was erroneously awarded and remains unrecovered at the end of the last completed fiscal year.

If the financial reporting measure is related to a stock price or TSR metric, the company should disclose any estimates used in determining the recoverable amount and explain the methodology applied for such estimates. This includes identification of any outstanding amounts owed by any current or former named executive officer for 180 days or more, with separate identification for each named executive officer. Furthermore, companies are required to report in the Summary Compensation Table any effects of amounts recovered by deducting these from the relevant column in the table for the year in which the amount was initially reported. This adjustment should be clearly identified in a footnote accompanying the table. Additionally, a company must indicate through specific checkboxes on its Form 10-K (or an equivalent form) whether the financial statements in the filing incorporate corrections to errors in previously issued financial statements, and whether any of these corrections constitute restatements that necessitate an analysis of the recovery of incentive-based compensation received by its executive officers.

Rule 10D-1 includes limited exceptions for impracticability, including circumstances where the cost of recovering the funds would exceed the funds to be recovered, recovery would violate home country law, or recovery would cause an otherwise tax-qualified retirement plan to fail to meet the requirements of the Internal Revenue Code. Issuers are responsible for ensuring that clawbacks are made where appropriate and must disclose their decision not to pursue recovery. If recovery is deemed impracticable, for each current and former named executive officer, as well as for all other current and former executive officers collectively, the company must disclose the amount of recovery that was not pursued. Additionally, a concise explanation of the rationale behind the decision not to seek recovery in each instance must be provided by the registrant.

For additional information about the SEC clawback requirements and listing standards, please see two of our Mintz advisories, SEC Adopts New Incentive-Based Compensation “Clawback” Rule (November 30, 2022) and SEC Approves NYSE and Nasdaq Compensation “Clawback” Listing Standards; Compliance Required by December 1, 2023 (June 23, 2023).

Close-in-Time Equity Awards.

The SEC’s rules added new Item 402(x) to Regulation S-K, which requires executive compensation disclosure of the issuer’s policies and practices related to granting certain equity awards close in time to the release of material nonpublic information. These disclosures will be required in Form 10-K and Schedule 14A. The disclosure obligations pursuant to new Item 402(x) will begin to take effect in 2024, with the first set of disclosures required in the first filing that covers the first full fiscal year starting on or after April 1, 2023. For smaller reporting companies, this timeline extends to filings covering the first full fiscal year beginning on or after October 1, 2023. Companies with a fiscal year ending on December 31 will need to include these disclosures in their Form 10-K for the year ending December 31, 2024.

These new requirements aim to enhance transparency around the timing of stock option grants, providing investors with a more comprehensive understanding of the relationship between executive compensation practices and the release of material nonpublic information. The disclosure requirements include both narrative and tabular elements, with the narrative component encompassing a detailed explanation of how the board determines the timing of such awards. For instance, companies are expected to clarify whether these awards follow a predetermined schedule.

In addition, the new rules introduce a tabular disclosure requirement applicable when an issuer awards options to a named executive officer within a specific timeframe. This timeframe spans from four business days before the filing of a Form 10-Q or Form 10-K or the filing or furnishing of a Form 8-K disclosing material nonpublic information (excluding Form 8-Ks reporting material new option awards under Item 5.02(e)) and concludes one business day after the filing or furnishing of such a report.

The tabular disclosure, as outlined by the new rules, includes information about each such award in a structured format. This includes key details such as the recipient’s name, grant date, number of securities underlying the award, per-share exercise price, grant date fair value, and the percentage change in the market price of the underlying securities between the closing market price one trading day prior to and one trading day following the disclosure of material nonpublic information.

In anticipation of the new requirements, companies and their compensation committees should evaluate their grant practices and establish procedures for tracking awards made during 2024 that will be subject to the new disclosure requirements. We encourage companies and their compensation committees to consult with legal counsel and compensation consultants to address concerns about close-in-time awards. Companies and their counsel should assess the company’s grant practices and consider establishing a grant schedule for awards to executive officers.

Preparing for the Second Year of Pay-Versus-Performance Disclosure.

As discussed in our Mintz advisory titled SEC Adopts Pay Versus Performance Compensation Disclosure Requirements (September 26, 2022), the SEC adopted new pay-versus-performance (PvP) disclosure rules in August 2022 requiring the disclosure of compensation actually paid (CAP) to certain named executive officers (NEOs) of a company in relation to the company’s financial performance. The 2023 proxy season gave us our first look at these newly required PvP disclosures by reporting companies, and we observed the following notable trends in the content and structure of the disclosure.

Company-Selected Measure.

Reporting companies must include a company-selected measure, a financial measure selected by a company as its most important financial performance indicator, in its PvP disclosure. This measure links the company’s performance for the most recently completed fiscal year to the CAP to its NEOs. Companies can use a non-GAAP financial measure but would need to disclose how the number was calculated from its audited financial statements.

The most common company-selected measures used by reporting companies in 2023 were non-GAAP, profit-based measures, with many companies using the financial performance measure most heavily weighted in its annual or long-term equity incentive plan that was not already otherwise required to be disclosed in its PvP table.

Tabular List of Financial Performance Measures.

Reporting companies are also required to include a tabular list of between three and seven of their most important financial performance measures in an effort to link CAP for the most recently completed fiscal year to the company’s performance. This list does not need to rank the selected measures and can also include non-financial measures, as long as it includes at least three financial performance measures.

In 2023, most companies disclosed three to five financial performance measures in their tabular list and did not include any non-financial measures. The most common measures listed were profit-based measures.

Total Shareholder Return Peer Group.

A company's PvP disclosure must also include the total shareholder return (TSR) of a specified peer group, including either a peer group disclosed in the Compensation Discussion and Analysis (CD&A) or the published industry or line-of-business index used in the Form 10-K stock performance graph.

For the 2023 proxy season, peer group TSR was typically based on the Form 10-K stock performance graph industry index rather than the peer group used in the CD&A. This trend was predictable given that additional disclosure often will be required when using the CD&A peer group.

Clear Description Requirement.

Companies must provide a "clear description" of the relationships between CAP to its principal executive officer and its NEOs to (a) the company's TSR, (b) the company's net income, and (c) the company-selected performance measure, as well as a comparison of the company's TSR to the peer group TSR. The only guidance provided by the SEC regarding this "clear description" requirement is that companies may use graphs.

For the first year of this required disclosure, most reporting companies used line graphs, bar charts, or both to describe these relationships, with a small minority providing only a narrative discussion.

Additional Notable PvP Trends from 2023.

We also observed notable trends concerning the location of PvP disclosure within the proxy statement, the use of outside consultants, and the reporting of negative CAP values:

- Most companies included its PvP disclosure near the end of their proxy statements, typically following the company's required compensation tables.
- Many companies hired outside consultants to determine the equity fair value and pension service cost adjustments required to calculate CAP.
- Many companies reported negative CAP amounts in their PvP disclosure, especially with respect to 2022 CAP, due to share price declines for many companies.

Next Steps for the 2024 Proxy Season.

Based on the PvP Compliance & Disclosure Interpretations (C&DIs) released by the SEC in February 2023[37] and in fall 2023[38] along with the SEC staff comment letters[39] issued in connection with its targeted review of PvP disclosures during the 2023 proxy season, the SEC clearly has a strong interest in PvP disclosure quality and accuracy. As such, reporting companies should focus on ensuring the clarity, accuracy, and thoroughness of the information provided in their PvP disclosures.

Additionally, reporting companies should be prepared to answer questions from investors and other stakeholders regarding their PvP disclosure. In addition to explaining their specific PvP disclosures, companies may need to provide education on PvP in general, as many stakeholders may not understand the concept or the specifics of the required PvP calculations and comparisons.

Finally, reporting companies should monitor policy updates from the proxy advisory firms to determine how they will be using PvP data in their recommendations.

Revisiting Repricing Underwater Options.

Continuing volatility in equity values in 2023, especially affecting pre-commercial and early commercial technology and biotechnology companies, has led many management teams and compensation committees to consider possible retention strategies for their employees. Many of these companies have followed the common practice of incentivizing their employees with options during the pre-commercial or early commercial phase. At current stock prices, these options may be so significantly out of the money that employee equity is not providing adequate incentive and retention value.

For companies with sufficient equity available in their equity plan pools, granting new supplemental equity awards may be the most efficient way to provide a quick retention boost. However, for companies where equity plan shares need to be more carefully conserved, a stock option repricing or stock option exchange may ultimately be considered the best approach. Despite the perceived misalignment with shareholder purchase prices that can result from a repricing, in industries where companies risk losing employees to competitors that will grant new hire options at today's lower stock prices, companies may see a repricing as the best response to a labor market that is still competitive for talent.

In our previous annual memorandum, we outlined the three different alternative repricing formats commonly followed and summarized the securities laws, governance, accounting, tax, and other considerations raised by a repricing. As companies plan for their 2024 annual meetings, we highlight that any proposed repricing will require substantial lead time and careful consideration of the possible need for shareholder approval of the repricing and/or the preparation of tender offer materials for distribution to employees and filing with the SEC.

Shareholder Approval.

Listed companies must obtain shareholder approval of option repricings unless the underlying equity plan specifically allows options to be repriced. Under NYSE rules, a plan that does not contain a provision specifically permitting the repricing of options will be considered to prohibit repricing.[40] Nasdaq requires companies to use "explicit terminology" to clearly refer to the possibility of repricing.[41]

ISS voting guidelines for approval of equity plans consider the inclusion of repricing authorization in an equity plan to be an "egregious" feature that triggers a negative recommendation on the plan regardless of how the plan otherwise scores on the ISS "equity plan scorecard." As a result, many companies have declined to include explicit equity plan repricing authorization in the company's equity plan, and consequently, shareholder approval of a repricing will be required. Moreover, even if repricing authority is contained in the equity plan, companies may be reluctant to proceed without shareholder approval if awards to executives and directors will be included in the repricing. If shareholder approval of the repricing is required, thoughtful attention should be paid to the preparation of the required proxy statement disclosure, including a considered rationale for the repricing and the benefits of the chosen repricing structure.

A proxy statement containing a repricing proposal must be filed in preliminary form with the SEC and may be filed in final form after 10 calendar days if there is no SEC review.

Tender Offer Rules.

The SEC has taken the position that a stock option repricing in the form of an exchange program involves an investment decision by employees, and if the offer is addressed to more than a small number of executive officers, the proposal will constitute an issuer tender offer. As a result, these exchange programs must comply with the requirements of Exchange Act Rule 13e-4,[42] the issuer tender offer rule, which, among other things, mandates the filing of a Schedule TO with the SEC, the distribution of related materials to employees, and a 20-business-day period for employees to consider the proposal. Depending on the specific provisions of a company's equity plan and whether incentive stock options (ISOs) are to be repriced, it is possible that a straight repricing of stock options, where only the exercise price of the award is affected, will not implicate the tender offer rules. However, even in a straight repricing, if ISOs are repriced, the resulting need to restart the required ISO holding periods may result in option holders needing to make an investment decision as to whether the reduced exercise price is worth restarting their holding periods.

As with other retention initiatives, companies should carefully consider how well a repricing program will be received by both employees and the investor community, as well as how best to structure and position the program to balance the possible need for shareholder approval, proxy advisory firm reaction to the repricing, and employee appreciation of the repricing program. For a possible option repricing in 2024, these considerations should be addressed well in advance of the upcoming annual meeting of stockholders.

Notable Decisions in Securities and Corporate Governance Litigation

In 2023, securities litigation (including regulatory and criminal proceedings) relating to crypto assets dominated the headlines. In addition, securities and corporate governance litigation involving ESG and DEI initiatives also continued to make headlines. One of the more notable developments in this area was the decision by the United States Court of Appeals for the Fifth Circuit refusing to overturn the SEC's approval of a Nasdaq rule requiring certain disclosures by listed companies with respect to the diversity of their boards.[43] Our more thorough analysis of that decision can be found in our Mintz advisory titled Keeping Tabs On Fight Over Board Diversity Rule At 5th Circ. (November 8, 2023).

Below is a summary of some of the other notable proceedings and decisions impacting public company disclosures and corporate governance from 2023.

Circuit Split on Enforceability of Forum Selection Bylaws for Section 14(a) Derivative Actions.

In its June 1, 2023 opinion in *Lee v. Fisher*,[44] the United States Court of Appeals for the Ninth Circuit affirmed the district court's judgment dismissing a derivative action brought under Section 14(a) and Rule 14a-9 of the Exchange Act, which prohibit, *inter alia*, misleading statements in proxy solicitations. In affirming the lower court's dismissal, the Ninth Circuit relied on the fact that the company at issue, The Gap, Inc., had a bylaw stating that the Delaware Court of Chancery "shall be the sole and exclusive forum for...any derivative action or proceeding brought on behalf of the Corporation." This type of bylaw essentially forecloses plaintiffs from bringing any derivative actions alleging violations of Section 14(a) and Rule 14a-9 because such claims cannot be maintained in state court due to the fact that Section 27(a) of the Exchange Act provides that the federal courts shall have exclusive jurisdiction over violations of the Exchange Act.

One key aspect of the court's *Lee* decision was its finding that the bylaw did not render shareholders without any recourse under Section 14(a) because they could still bring direct actions in federal court for violations of Section 14(a). While correct, this finding ignores the practical reality that derivative actions are much more attractive suits for plaintiffs to bring because, if successful, they have the opportunity to recoup their attorneys' fees from the company. In addition, derivative actions arguably provide additional types of equitable remedies not necessarily available in direct actions.

The *Lee* decision conflicts with the 2022 decision by the United States Court of Appeals for the Seventh Circuit in *Seafarers Pension Plan v. Bradway*,[45] which held that a nearly identical corporate bylaw as the one at issue in *Lee* was invalid because it would eliminate any forum for a derivative action alleging violations of Section 14(a), and was therefore inconsistent with Delaware law.

Ultimately, the U.S. Supreme Court will need to resolve this Circuit split to bring uniformity to the federal courts on this issue.

SEC Brings Enforcement Action Against Company CISO for Alleged Deficient (and Undisclosed) Cybersecurity Practices.

On October 30, 2023, the SEC filed a complaint in the United States District Court for the Southern District of New York against Solarwinds Corporation and Timothy Brown, who, during the relevant period covered by the suit, served as Solarwinds' Vice President of Security and Architecture and then its Chief Information Security Officer.[46] The SEC's claims are premised on alleged violations of the federal securities laws based on, among other things, allegedly false and misleading public statements concerning the company's cybersecurity practices and risks.

This action is the first by the SEC to name as a defendant a company's Chief Information and Security Officer as part of a proceeding alleging disclosure issues concerning a company's information security. So, what led the SEC to take this unprecedented step in this case? There are several facts that can be gleaned from the SEC's complaint that provide insight into the SEC's thinking:

- The SEC relied heavily on a "Security Statement" that was allegedly associated with Mr. Brown and that Solarwinds posted to its website in advance of its IPO but then allegedly never updated. For the direct disclosure-related charges against Mr. Brown, the complaint relies on press releases, blog posts, and podcasts by or that quoted Mr. Brown. The SEC also relied on a Form 8-K, on which the SEC alleges Mr. Brown worked, that was issued after a cyber-attack and was allegedly misleading with respect to that attack.
- The SEC relied on numerous detailed allegations concerning internal presentations, communications, and analysis involving Mr. Brown that highlighted how deficient the company's data security practices were and how the "generic" data security disclosures the company made were allegedly inadequate to disclose these issues.
- The SEC believed that Mr. Brown failed to resolve these issues or sufficiently elevate them and allegedly signed several sub-certifications that failed to disclose these issues.
- The SEC also noted how Mr. Brown allegedly sold Solarwinds stock during the time when its stock price was inflated due to the allegedly misleading disclosures.

For its relief against Mr. Brown, the SEC is seeking civil monetary penalties, disgorgement, and an officer and director bar.

***Caremark* Developments in Delaware: Company Officers Can Owe *Caremark* Duties, and *Caremark* Claims that Survived a Motion to Dismiss.**

"*Caremark*" claims refer to breach of fiduciary duty claims brought against corporate directors for allegedly failing to exercise proper oversight or supervision of a company's operations. These duties were first most prominently articulated in the 1996 decision, *In re Caremark International Inc. Derivative Litigation*.[47] The scope and contours of these "*Caremark*" duties have been evolving since that decision, and the biggest development with respect to *Caremark* duties from this past year was the Delaware Court of Chancery's decision in *In re McDonald's Corporation Stockholder Derivative Litigation*, which held — for the first time — that corporate officers also owe *Caremark* duties to the corporation.[48] Notably, the court did recognize that the contours of these duties that are owed by officers are more "context-driven" and can differ from company to company (or case to case). For our more detailed analysis of this decision, please see our Mintz advisory titled Delaware Court of Chancery Extends the Fiduciary Duty of Oversight (*i.e.*, *Caremark* Claims) to Corporate Officers (February 15, 2023).

Because it is still difficult for plaintiffs to adequately allege a *Caremark* violation, the instances where they do can be instructive. The Court of Chancery's decision in *Ontario Provincial Council of Carpenters' Pension Trust Fund v. Walton* provides just such an example of an instance where the court allowed *Caremark* claims to proceed.[49] The *Ontario Provincial* case involves *Caremark* claims brought against Walmart's directors in connection with Walmart's distribution of opioids. In analyzing demand futility and concluding that the claims could proceed, the *Ontario Provincial* decision found that the allegations in the complaint sufficiently supported an inference that (a) the directors knew that

Walmart was not complying with a settlement with the DEA and did not take sufficient steps to bring Walmart into compliance, and (b) the directors consciously continued Walmart's business of not complying with the Controlled Substances Act. This decision is consistent with prior decisions from Delaware allowing *Caremark* claims to move forward in situations involving alleged legal violations by companies, and should be a reminder to directors facing these situations that their conduct will be put under a microscope.

"Traceability" Requirement for Section 11 Claims Upheld by the United States Supreme Court.

On June 1, 2023, the United States Supreme Court issued its decision in *Slack Technologies, LLC v. Pirani*, which held that a plaintiff bringing a claim under Section 11 of the Securities Act for allegedly misleading statements in a registration statement must be able to "trace" its purchases to the allegedly misleading registration statement.[50] This means that a plaintiff must allege (and ultimately prove) that it purchased securities that were specifically registered under the allegedly defective registration statement.

The *Pirani* case involved a direct listing where registered shares were sold simultaneously with non-registered shares. From a practical perspective, requiring "traceability" makes it very difficult for plaintiffs to bring a Section 11(a) claim in a direct listing where registered and unregistered shares can be sold side by side because it would be difficult, if not impossible, for a plaintiff to be able to identify whether it purchased registered or unregistered shares. Reducing (or eliminating) the risk of a Section 11(a) claim for a direct listing is significant because Section 11(a) is virtually a "strict liability" statute, which does not require a plaintiff to demonstrate scienter and has no reliance or causation elements that are the equivalent of what plaintiffs must allege and prove to bring a claim under Section 10(b) of the Exchange Act.

2024 Proxy Advisors Voting Guidance Updates

Selected noteworthy updates to the U.S. corporate governance and executive compensation policy guidelines of proxy advisor Glass Lewis[51] (GL) are outlined in the chart below.[52]

	GL
Board Accountability for Climate-Related Issues	S&P 500 index companies operating in industries where the Sustainability Accounting Standards Board (SASB) has determined that the companies' GHG emissions represent a financially material risk or any other companies posing a financial material risk: May recommend voting against responsible directors in instances where disclosures in line with the Task Force on Climate-related Financial Disclosures (TCFD) or board-level oversight responsibilities for climate-related issues are absent or significantly lacking.
Clawback Provisions	In recoup circumstances, rationale should be provided if the company determines ultimately to refrain from recouping compensation as well as disclosure of alternative measures that are instead pursued, such as the exercise of negative discretion on future payments.
Executive Ownership Guidelines	Advise companies to facilitate an alignment between the interests of the executive leadership with those of long-term shareholders — by adopting and enforcing minimum share ownership rules for their named executive officers by providing clear disclosure in the Compensation Discussion and Analysis section of the proxy statement of their executive share ownership requirements and how various outstanding equity awards are treated when determining an executive's

	GL
	level of ownership. Companies should provide a cogent rationale should they count these awards towards shares held by an executive.
Proposals for Equity Awards for Shareholders	Proposals seeking approval for individual equity awards: Included new discussion of provisions that require a non-vote, or vote of abstention, from a shareholder if the shareholder is also the recipient of the proposed grant.
Net Operating Loss (NOL) Pills	When the NOL pill is implemented following the filing of a Schedule 13D by a shareholder or there is evidence of hostile activity or shareholder activism as part of our considerations: Recommend shareholders vote against a management-proposed NOL pill.
Control Share Statutes	Generally, recommend voting for proposals to opt out of control share acquisition statutes, unless doing so would allow the completion of a takeover that is not in the best interests of shareholders; and recommend voting against proposals to amend the charter to include control share acquisition provisions. In cases where a closed-end fund or business development company has received a public buyout offer and has relied on a control share statute as a defense mechanism in the prior year: Generally, recommend shareholders vote against the chair of the nominating and governance committee, absent a compelling rationale as to why a rejected acquisition was not in the best interests of shareholders.
Board Diversity	
Gender Diversity	When boards have provided a sufficient rationale or plan to address the lack of diversity on the board, including a timeline of when the board intends to appoint additional gender-diverse directors (generally by the next annual meeting or as soon as is reasonably practicable): May refrain from recommending that shareholders vote against directors.
Underrepresented Community Diversity	When boards have provided a sufficient rationale or plan to address the lack of diversity on the board, including a timeline of when the board intends to appoint additional directors from an underrepresented community (generally by the next annual meeting or as soon as is reasonably practicable): May refrain from recommending that shareholders vote against directors.
Material Weaknesses	Advise that it is the responsibility of audit committees to ensure that material weaknesses are remediated in a timely manner and that companies disclose remediation plans that include detailed steps to resolve a given material weakness. When a material weakness is reported and the company has not disclosed a remediation plan, or when a material weakness has been ongoing for more than one year, and the company has not disclosed an updated remediation plan that clearly outlines the company's progress toward remediating the material

	GL
	weakness: May consider recommending that shareholders vote against all members of a company's audit committee who served on the committee during the time when the material weakness was identified.
Board Responsiveness	GL has clarified its discussion of board responsiveness to remove a reference to shareholder proposals from its discussion of when 20% or more of shareholders vote contrary to management. In addition, GL clarified that its calculation of opposition includes votes cast as either AGAINST and/or ABSTAIN.
Non-GAAP to GAAP Reconciliation Disclosure	GL has emphasized the need for thorough and transparent disclosure in the proxy statement that will assist shareholders in reconciling the difference between non-GAAP results used for incentive payout determinations and reported GAAP results. The lack of such disclosure will impact Glass Lewis's assessment of the quality of executive pay disclosure and may be a factor in their recommendation for the say-on-pay.
Pay-Versus-Performance Disclosure	Note that the pay-versus-performance disclosure mandated by the SEC may be used as part of GL's supplemental quantitative assessments supporting their primary pay-for-performance grade.
Company Responsiveness for Say-on-Pay Opposition	Note that GL's calculation of opposition includes votes cast as either AGAINST and/or ABSTAIN, with opposition of 20% or higher treated as significant.
Interlocking Directorships	On a case-by-case basis, GL evaluates other types of interlocking relationships, such as interlocks with close family members of executives or within group companies.
Board Oversight of Environmental and Social Issues	GL advises that the responsibility for overseeing environmental and social risks should be formally designated and codified in the appropriate committee charters or other governing documents.
Cyber Risk Oversight	In the absence of material cybersecurity incidents: Will not make voting recommendations on the basis of a company's oversight or disclosure concerning cyber-related issues. In instances where cyber-attacks have caused significant harm to shareholders: Will closely evaluate the board's oversight of cybersecurity as well as the company's response and disclosures. In instances where a company has been materially impacted by a cyber-attack: Shareholders can reasonably expect periodic updates from the company communicating its ongoing progress towards resolving and remediating the impact of the cyber-attack. In instances where a company has been materially impacted by a cyber-attack: May recommend against appropriate directors should GL find the board's

	GL
	oversight, response or disclosures concerning cybersecurity-related issues to be insufficient or not provided to shareholders.

2024 Periodic Report Filing Deadlines

For public companies that are large accelerated filers, annual reports on Form 10-K are due 60 days after the end of the fiscal year (Thursday, February 29, 2024 for large accelerated filers with a December 31, 2023 fiscal year-end). Annual reports on Form 10-K are due 75 days after fiscal year-end for accelerated filers (Friday, March 15, 2024 for accelerated filers with a December 31, 2023 fiscal year-end) and 90 days after fiscal year-end for non-accelerated filers (Monday, April 1, 2024 for non-accelerated filers with a December 31, 2023 fiscal year-end).

In addition, quarterly reports on Form 10-Q filed by accelerated filers and large accelerated filers continue to be due 40 days after the end of the fiscal quarter. The Form 10-Q filing deadline for non-accelerated filers continues to be 45 days after the end of the fiscal quarter. If the filing deadline would otherwise fall on a Saturday, Sunday or federal holiday, the filing is due on the first business day following such deadline.

These filing deadlines do not affect the existing proxy statement filing deadline of 120 days after fiscal year-end for companies that choose to incorporate by reference the disclosure required by Part III of Form 10-K from their definitive proxy statements.

* * *

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

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

ENDNOTES

1 SEC, *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure,* Release Nos. 33-11216, 34-97989, July 26, 2023.

2 SEC, *CF Disclosure Guidance: Topic No. 2 – Cybersecurity*, October 13, 2011.

3 SEC, *Commission Statement and Guidance on Public Company Cybersecurity Disclosures, R*elease Nos. 33-10459, 34-82746, February 21, 2018.

4 See Item 106(b) of Regulation S-K, 17 CFR § 229.106(b). Under Item 106 of Regulation S-K, "cybersecurity threat" means "any potential unauthorized occurrence on or conducted through a registrant's information systems that may result in adverse effects on the confidentiality, integrity, or availability of a registrant's information systems or any information residing therein." "Information systems" means "electronic information resources, owned or used by the registrant, 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 registrant's information to maintain or support the registrant's operations."

5 Under Item 106 of Regulation S-K, 17 CFR § 229.106, "cybersecurity incident" means "an unauthorized occurrence, or a series of related unauthorized occurrences, on or conducted through a registrant's information systems that jeopardizes the confidentiality, integrity, or availability of a registrant's information systems or any information residing therein."

6 See Item 106(c) of Regulation S-K, 17 CFR § 229.106(c).

7 Audit Analytics, *Trends in Cybersecurity Breach Disclosures,* April 2022.

8 Glass Lewis, *2024 Benchmark Policy Guidelines – United States*, November 15, 2023.

9 See Nasdaq Proposed Rule, Release No. 34-98014; File No. SR-NASDAQ-2023-025, July 28, 2023.

10 Nasdaq Stock Market Listing Rules, Rule 5550(a)(2).

11 Nasdaq Stock Market Listing Rules, Rule 5250(e)(7).

12 Nasdaq Stock Market Listing Rules, Rule 5250(b)(4).

13 SEC, *Order Approving a Proposed Rule Change Related to Notification and Disclosure of Reverse Stock Splits*, November 1, 2023.

14 SEC, *Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Amend Rule 4120 and Rule 4753,* Release Nos. 34-98489, September 22, 2023.

15 *Id*.

16 *Id*. at page 3.

17 See Delaware General Corporation Law, Section 242(d).

18 *Id*.

19 ISS, *Americas Proxy Voting Guidelines Benchmark Policy Changes for 2023: U.S., Canada, Brazil, and Americas Regional,* November 30, 2022.

20 Glass Lewis, *2023 Policy Guidelines United States,* December 15, 2022.

21 Alliance Advisors, *2023 U.S. Proxy Season Review by Shirley Westcott*, August 14, 2023.

22 See California Senate Bill No. 253.

23 See California Senate Bill No. 261.

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

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

26 SEC Final Rule, *Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information,* November 19, 2020.

27 The Balance, *US Inflation Rate by Year From 1929 to 2023 by Kimberly Amadeo*, March 31, 2023.

28 *Id*.

29 See, *e.g.*, SEC Staff Comment Letter to Philip Morris International Inc. dated June 29, 2023, SEC Staff Comment Letter to Rise Companies Corp. dated August 11, 2023, and SEC Staff Comment Letter to NVIDIA Corporation dated June 15, 2023.

30 See, *e.g.*, SEC Staff Comment Letter to Philip Morris International Inc. dated June 29, 2023, SEC Staff Comment Letter to Ambev S.A. dated September 19, 2023 and SEC Staff Comment Letter to FedEx Corporation dated September 1, 2022.

31 See, *e.g.*, SEC Staff Comment Letter to Dine Brands Global, Inc. dated September 18, 2023 and SEC Staff Comment Letter to Bright Horizons Family Solutions Inc. dated June 5, 2023.

32 FactSet, *Highest Number of S&P 500 Companies Citing 'AI' on Q1 Earnings Calls in Over 10 Years by John Butters*, FactSet, May 26, 2023.

33 Gary Gensler, '*Isaac Newton to AI' Remarks before the National Press Club*, July 17, 2023.

34 SEC Division of Corporation Finance, *Disclosure Considerations for China-Based Issuers, CF Disclosure Guidance: Topic No. 10,* November 23, 2020.

35 Gary Gensler, *Statement on Investor Protection Related to Recent Developments in China*, July 30, 2021; SEC Division of Corporation Finance, *Sample Letter to China-Based Companies*, December 20, 2021.

36 See US Environmental Protection Agency, *Climate Change Indicators: Weather and Climate*, last updated July 26, 2023.

37 SEC, Compliance & Disclosure Interpretations of Regulation S-K, Section 128D.

38 *Id.*

39 See Compensation Advisory Partners, *SEC Comment Letters on Implementation of Pay versus Performance Disclosure by Louisa Heywood*, September 29, 2023.

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

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

42 See 17 CFR § 240.13e-4.

43 *Alliance for Fair Board Recruitment v. SEC*, No. 21-60626 (5th Cir. 2023).

44 *Lee v. Fisher*, D.C. No. 3:20-cv-06163-SK (9th Cir. 2023).

45 *Seafarers Pension Plan v. Bradway*, 23 F.4th 714 (7th Cir. 2022).

46 Complaint, *SEC v. SolarWinds Corporation and Timothy G. Brown*, Civil Action No. 23-cv-9518 (S.D.N.Y. Oct. 30, 2023).

47 *In re Caremark International Inc. Derivative Litigation,* 698 A.2d 959 (Del. Ch. 1996).

48 *In re McDonald's Corporation Stockholder Derivative Litigation,* C.A. No. 2021-0324-JTL (Del. Ch. 2023).

49 *Ontario Provincial Council of Carpenters' Pension Trust Fund v. Walton et al.*, C.A. No. 2021-0827-JTL (Del. Ch. 2023).

50 *Slack Technologies, LLC v. Pirani*, 598 U.S. ___ (2023).

51 Glass Lewis, *2024 Policy Guidelines United States,* November 16, 2023.

52 Proxy advisor ISS did not include any proposed voting policy changes for the U.S. in its *Proposed ISS Benchmark Policy Changes for 2024*, released on November 21, 2023. The open comment period on ISS's proposed changes to its benchmark voting policies, of which there were much fewer than in past years, was from November 21, 2023 to November 30, 2023. As of the date of publication of this memorandum, the final policy guidelines were not yet released.