Harvard Law School Forum on Corporate Governance

2023 US Proxy and Annual Reporting Season

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With the calendar just turning to autumn, the proxy and annual reporting season may seem a long way off. However, in light of the amount of work and planning that goes into the proxy statement, annual report, and annual meeting of shareholders, this is the ideal time to begin preparations. This post provides an overview of key issues that companies should consider as they get ready for the upcoming 2023 proxy and annual reporting season.

This post describes pending and announced US Securities and Exchange Commission (SEC) rulemaking, based on the US Securities and Exchange Commission's (SEC) spring 2022 regulatory agenda (SEC Regulatory Agenda),[1] that potentially could impact the 2023 or subsequent proxy seasons. While these discussions reference the dates targeted in the SEC Regulatory Agenda for final or proposed rules, he actual dates for SEC action could be earlier or later.

Pay Versus Performance

In August 2022, the SEC finally adopted a "pay versus performance" rule in accordance with a Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) mandate that requires SEC-reporting companies to disclose in a clear manner the relationship between executive compensation actually paid September 22, 2022 and the financial performance of the company.[2] As adopted, the rule generally requires disclosure of five years of pay versus performance data in proxy and information statements in which executive compensation information is required to be included pursuant to Item 402 of SEC Regulation S-K. The new pay versus performance disclosures must be included in proxy and information statements that are required to include such compensation information for fiscal years ending on or after December 16, 2022. Thus, the new rule will generally apply for the upcoming 2023 proxy season.

As adopted, new Item 402(v) of Regulation S-K requires:

- New pay versus performance table,

[1] https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3235&csrf_token=C3F61296B896EEB30E0DB0BF6800703CB28489E9081F8F5D325D6B4BD47976AA2C146534BEF01AA9E7A5029B8C150A52F066.

[2] https://www.sec.gov/rules/final/2022/34-95607.pdf

- Clear description of the relationship between the compensation actually paid to the principal executive officer (PEO) and to the other named executive officers (Remaining NEOs) and the company's performance across each of the measures included in the pay versus performance table, which may be presented as a narrative, a graph or a combination of the two, and
- Tabular list of the most important financial performance measures that the company uses to link named executive officer compensation to company performance.

The pay versus performance table must disclose the compensation paid to the PEO and the average compensation paid to the Remaining NEOs as compared to four performance measures. The performance measures required to be included are:

- Company total shareholder return (TSR),
- Peer group TSR,
- Net income, and
- Company-selected financial performance measure (Company-Selected Measure).

The new table will eventually contain data for five years, except that smaller reporting companies (SRCs) are permitted to provide three years of data. Newly reporting companies do not need to include pay versus performance information for fiscal years prior to their first completed fiscal year as a reporting company.

The general phase-in for the rule will require pay versus performance disclosure for three years in the first proxy or information statement in which such disclosure is required for all companies, other than SRCs, for fiscal years ending on or after December 16, 2022. In each of the two subsequent years, another year of disclosure would be added. SRCs would only need to provide information for two years for the first filing required for years ending on or after December 16, 2022, with a third year added in their next annual proxy or information statement that requires executive compensation disclosure.

The pay versus performance table, footnotes and related disclosures all must be separately tagged using Inline XBRL. The footnotes and description of the relationship may be tagged using block-text tags, while individual data points must be separately tagged. SRCs will not have to comply with the XBRL requirement until the third annual filing containing pay versus performance disclosure.

For additional information regarding pay versus performance, see our Legal Update "SEC Adopts Pay Versus Performance Disclosure Rule," dated August 31, 2022.[3]

Compensation Agenda Items

Say-on-Pay. During the 2022 proxy season, the say-on-pay proposal at most companies once again received majority approval. According to Semler Brossy, only 3.3 percent of Russell 3000

[3] https://www.mayerbrown.com/en/perspectives-events/publications/2022/08/sec-adopts-pay-versus-performance-disclosure-rule

companies and 4.3 percent of S&P 500 companies had a failed say-on-pay vote during the 2022 proxy season.

Misalignment between pay and performance, problematic pay practices, special awards such as incentive awards without performance conditions or particularly large grants were among the factors likely contributing to a failed say-on-pay vote. The average vote results were 89.4 percent for Russell 3000 companies and 87.6 percent for S&P 500 companies.[4]

An "Against" recommendation from a proxy advisory firm does not always result in a failed say-on-pay vote, but it will likely cause shareholder support to decline, which may influence the ongoing level and tone of shareholder engagement on compensation matters and director nominees in the coming year, as well as future votes on say-on-pay and director elections. If a company receives a negative proxy voting recommendation from a proxy advisory firm, it often (but not always) prepares additional material in support of its executive compensation program. In order to use such newly prepared materials, companies must file them with the SEC as definitive additional soliciting material not later than the date first distributed or used to solicit shareholders.

Say-When-on-Pay. Rule 14a-21(b) of the Securities Exchange Act of 1934, as amended (Exchange Act) first required public companies to conduct an advisory vote on the frequency of the say-on-pay vote at the first annual or other meeting of shareholders on or after January 21, 2011, with subsequent frequency votes no more than every six years thereafter. Public companies that last included a say-when-on-pay agenda item for their 2017 annual meetings will need to include that agenda item for their 2023 annual meetings, asking shareholders if the say-on-pay vote should occur every one, two or three years. This will need to be done even if the company is already conducting its say-on-pay vote annually and intends to continue this practice. In addition, the Form 8-K reporting voting results will need to disclose not only the results of the say-when-on-pay vote, but also the frequency with which the company intends to conduct the say-on-pay vote in light of the results of the advisory frequency vote. The intended frequency may be disclosed by amendment to that Form 8-K filed within 150 calendar days after the shareholders' meeting, as long as the disclosure is made within 60 days prior to the deadline for shareholder proposals. Because the failure to disclose the frequency decision by the deadline will affect a company's eligibility to file a registration statement on Form S-3, it is advisable to disclose the decision in the same Form 8-K filed to report the voting results, if at all possible.

Shareholder Proposals

Changes in Staff Review of Shareholder Proposals. In November 2021, the staff of the Division of Corporation Finance (Staff) of the SEC issued Staff Legal Bulletin No. 14L (SLB 14L),[5] rescinding Staff Legal Bulletins Nos. 14I, 14J and 14K (Rescinded Bulletins). SLB 14L reversed course on positions the Staff had taken since 2017 with respect to the ordinary business grounds for excluding shareholder proposals from company proxy statements pursuant to Rule 14a-8(i)(7) and the economic relevance grounds for excluding shareholder proposals pursuant to Rule 14a-8(i)(5). Specifically, SLB 14L announced that when evaluating whether a proposal may be excluded pursuant to Rule 14a-8(i)(7), the Staff "will no longer focus on determining the nexus

[4] See Semler Brossy "2022 Say On Pay & Proxy Results Report," dated July 14, 2022, available at https://semlerbrossy.com/wpcontent/uploads/2022/05/SBCG-2022-SOP-Report-2022-07-14.pdf

[5] https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals

between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal." As a result, proposals that the Staff "previously viewed as excludable because they did not appear to raise a policy issue of significance for the company may no longer be viewed as excludable under Rule 14a-8(i)(7)." In addition, the Staff now applies a "measured approach to evaluating companies' micromanagement arguments for exclusion pursuant to Rule 14a-8(i)(7) – recognizing that proposals seeking detail or seeking to promote timeframes or methods do not per se constitute micromanagement," and focuses "on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management." According to SLB 14L, proposals raising issues of broad social or ethical concern related to the company's business may not be excluded under the economic relevance test set forth in Rule 14a-8(i)(5), even if the relevant business falls below the "economic thresholds" specified by that grounds for exclusion. SLB 14L made it much more difficult for companies to exclude proposals under Rule 14a-8(i)(7) or Rule 14a-8(i)(5) during the 2022 proxy season, particularly shareholder proposals addressing climate change or other environmental, social and governance (ESG) issues. For additional information regarding SLB 14L, see our Legal Update "SEC Staff Issues Legal Bulletin Announcing Shift in Shareholder Proposal Review Process Ahead of 2022 Proxy Season," dated November 8, 2021.[6]

In at least one no-action letter, the Staff highlighted that alternative arguments, such as arguing both that (i) a proposal was so vague and indefinite that the company would not know how to implement it if adopted and (ii) the company already substantially implemented the proposal, were inconsistent, which presumably had some impact on the Staff's decision not to concur with the company's arguments. Historically, it has been common for companies to present alternative arguments under multiple Rule 14a-8 grounds of exclusion. If the Staff accepted any argument, it issued a no-action letter on those grounds, without addressing the other arguments that the company raised. In preparing no action requests for the 2023 proxy season, companies many want to assess whether the inclusion of any particular argument might have the effect of weakening another argument.

The Staff is once again providing formal, written responses to Rule 14a-8 no-action requests, as opposed to documenting its decisions in a chart as it had done in recent proxy seasons.

Shareholder Proposals in the 2022 Proxy Season. The number of shareholder proposals submitted for inclusion in company proxy statements for the 2022 proxy season increased, spanning a wide range of topics including climate change, diversity and anti-discrimination, lobbying and political contributions, severance agreement approvals, non-disclosure clauses in harassment and discrimination settlements, special shareholder meetings and independent board chairs. While the number of shareholder proposals rose, the number of proposals that the Staff permitted to be excluded pursuant to Rule 14a-8 decreased. As a result, the number of shareholder proposals submitted for the 2022 proxy season that were voted upon increased.

According to Alliance Advisors, 74 shareholder proposals on topics addressing governance, environmental, social and compensation issues received majority support during the 2022 proxy season through August 5, 2022, but that number was smaller than the number of shareholder

[6] https://www.mayerbrown.com/en/perspectives-events/publications/2021/11/sec-staff-issues-legal-bulletin-announcing-shift-inshareholder-proposal-review-process-ahead-of-2022-proxy-season

proposals in the corresponding period of 2021.[7] Among the topics garnering shareholder approval in 2022 were proposals involving climate change, special shareholder meetings, civil rights/racial equity audits, pay equity and political contributions and lobbying. However, overall average support for environmental and social proposals fell during the 2022 proxy season.[8]

Ownership Thresholds. When the SEC amended Rule 14a-8 in 2020, among other changes, it replaced the former ownership threshold, which had required a shareholder to hold at least $2,000 or 1 percent of a company's securities for at least one year in order to submit a proposal for the company's proxy statement, with three alternative thresholds requiring a shareholder to demonstrate continuous ownership of at least:

- $2,000 of the company's securities for at least three years,
- $15,000 of the company's securities for at least two years, or
- $25,000 of the company's securities for at least one year.

The SEC had provided a transition period that allowed shareholders that met specified conditions to rely on the $2,000/one-year ownership threshold for proposals submitted for an annual or special meeting to be held prior to January 1, 2023. However, that transition period is about to expire, which means that shareholders relying on the $2,000 threshold must have held that minimum level of company securities for three years.

Proposed Amendments to Rule 14a-8. In July 2022, the SEC proposed amendments to revise three of the substantive bases for exclusion of shareholder proposals under Rule 14a-8 of the Exchange Act that may make it even more difficult to exclude shareholder proposals from proxy statements. The proposal would amend the substantial implementation exclusion set forth in Rule 14a-8(i)(10) by specifying that the "essential elements" of the proposal must have been substantially implemented. The proposal would also modify the duplication exclusion contained in Rule 14a-8(i)(11) by specifying that "substantially duplicates" means that a proposal "addresses the same subject matter and seeks the same objective by the same means" as a previously submitted proposal. Consistent with the proposed standard for Rule 14a-8(i)(11), the proposal would revise the Rule 14a-8(i)(12) exclusion for resubmissions by changing the "addresses substantially" standard to "substantially duplicates," specifying that substantially duplicates means addressing the same subject matter and seeking the same objective by the same means as a proposal, or proposals, previously included in the company's proxy materials. The proposing release provides examples of how the applications of the proposed rules would differ from the current application of the Rule 14a-8. In addition, the proposing release also "reaffirmed" the standards of the ordinary business exclusion contained in Rule 14a-8(i)(7) relating to significant social policy issues and micromanagement. If the proposed amendments are adopted substantially as proposed, there may be an increase in shareholder proposals submitted for inclusion in proxy statements, with companies receiving multiple proposals on similar topics containing sufficiently different details so that the objective and means can be readily distinguished from each other. It is not clear as of the date of this post whether the SEC intends to adopt the amendments to Rule 14a-8 to be in effect for the 2023 proxy season. For additional

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[7] See Alliance Advisors, "2022 Proxy Season Review," dated August 2022, available at 2022 Proxy Season Review - Alliance Advisors Multi-faceted proxy solicitation and corporate advisory firm

[8] See PwC's Governance Insights Center, "Boardroom recap: The 2022 proxy season," dated August 2022, available at https://www.pwc.com/us/en/services/governance-insights-center/assets/pwc-boardroom-recap-2022-proxy-season.pdf

information regarding the Rule 14a-8 proposal, see our Legal Update "SEC Votes on Changes to Shareholder Proposal and Proxy Solicitation Rules," dated July 18, 2022.[9]

Shareholder Engagement

Shareholder engagement is not limited to conducting an annual shareholder meeting but is a year-round process. Shareholder engagement is an important tool for companies to receive investor feedback, both on matters that were the subject of shareholder votes, including board composition, say-on-pay and shareholder proposals, as well as on how the company is performing generally. The specific proposal that was voted on and the specific investor's vote may not convey the totality of the investor's views on complicated, nuanced subjects, such as executive compensation, climate change or human capital matters. Through shareholder engagement, companies may get a better understanding of the rationale behind specific voting decisions and what changes, if any, key investors may be advocating.

Shareholder engagement following a shareholder meeting can be very important. During proxy season, institutional shareholder may be too busy reviewing proxy statements to meet with individual companies. In addition, engagement presentations made during proxy season might be viewed as solicitations and could require the filing of additional solicitation materials with the SEC. Scheduling shareholder engagement meetings during the months after the annual meeting therefore may be a more effective engagement tool. The conversations may result in recommendations, for example regarding governance, compensation or ESG initiatives. Holding meetings outside proxy season gives companies time to evaluate the feedback and consider whether there are any changes they want to implement in response before the next proxy season, which they can then highlight in the next proxy statement.

Universal Proxy

Universal Proxy Cards. The universal proxy rules that the SEC adopted in November 2021 apply to shareholders meetings held after August 31, 2022, and therefore will be effective for the 2023 proxy season. The key amendments to implement use of universal proxy cards are contained in Rule 14a-19, "Solicitation of proxies in support of director nominees other than the registrant's nominees," with related proxy card provisions set forth in amendments to Rule 14a-4, "Requirements as to proxy."

The universal proxy rules provide for mandatory use of a universal proxy card for all proxy solicitations in connection with contested elections for directors that are not exempt under Rule 14a-2(b). Each party in a contested election would distribute its own universal proxy card. Each universal proxy card would include the names of all nominees for director for whom proxies are solicited, either by the company or by dissident shareholders, enabling shareholders voting by proxy to pick and choose among the different slates of candidates, similar to the manner in which they would be able to vote for directors in person at a contested shareholders meeting. The universal proxy card must clearly distinguish between registrant and dissident nominees, as well

[9] https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2022/07/sec-votes-on-changes-to-shareholderproposal-and-proxy-solicitation-rules.pdf

as proxy access nominees, if applicable. If there are proxy access nominees but no dissident nominees, the universal proxy rules will not apply.

Within each group on a universal proxy card, the nominees must be listed in alphabetical order by last name. All nominees have to be presented in the same font type, style and size on the proxy card. The proxy card will have to prominently disclose the maximum number of nominees for which voting authority can be granted. It will also have to prominently disclose the treatment and effect of a proxy that is executed in a manner that grants authority to vote for fewer or more nominees than the number of directors being elected or that does not grant authority to vote with respect to any nominees.

A dissident that intends to solicit proxies for its own nominees in a contested election for directors will have to give the company notice of the names of its nominees at least 60 calendar days prior to the anniversary of the previous year's annual meeting date. The notice requirement is in addition to any advance notice requirements set forth in the company's governing documents, which frequently provide for earlier notice of director nominations by dissidents.

The dissident engaging in a contested director election must file its definitive proxy statement with the SEC by the later of 25 calendar days prior to the meeting date or five calendar days after the company files its definitive proxy statement. The dissident will be required to solicit the holders of shares representing at least 67 percent of the voting power for the election of directors in order to trigger the universal proxy card requirements. The universal proxy rules require the company to disclose in its proxy statement how it intends to treat proxies granted in favor of a dissident's nominees if the dissident abandons its solicitation or if it fails to comply with the universal proxy rules.

By consenting to be named in the company's proxy statement, the nominee would also be consenting to be named in the dissident's proxy statement, and vice versa. This enables both the company and the dissident to include the other party's nominees on their universal proxy cards even if a nominee's consent did not expressly mention that party's proxy statement. Both the company and the dissident would have to refer to the other party's proxy statement for information about that party's nominees and explain how shareholders can access that proxy statement.

Amendments Applicable to All Director Elections. As part of the universal proxy rulemaking, the SEC also amended proxy rules relating to voting options and standards that are applicable to all director elections, which also apply to the 2023 proxy season. The SEC has amended Rule 14a-4(b) to require proxy cards for all director elections to include an "against" option instead of a "withhold authority to vote" option if governing law gives legal effect to a vote against a nominee. When applicable state law does not give legal effect to votes cast against a nominee, the form of proxy may not provide a means to vote against any nominee, and the form of proxy must clearly provide specified means to withhold authority to vote for each nominee. The amendments also provide that when a director election is governed by a majority voting standard, shareholders that neither support nor oppose a nominee be given the opportunity to "abstain" as opposed to withholding authority to vote. In addition, under the amendments, proxy statements will be expressly required to disclose the methods by which votes will be counted, including the treatment and effect of a "withhold" vote in an election of directors.

Compliance and Disclosure Interpretations. In August 2022, the issued three Compliance and Disclosure Interpretations (C&DIs) relating to the universal proxy rules.

C&DI 139.01 specifies that the Rule 14a-19(b) notice must contain only the names of nominees for whom the dissident shareholder intends to solicit proxies and that dissidents should not submit the names of more nominees than there are director seats up for election, with the intention of finalizing the actual slate of nominees after the notice deadline.

C&DI 139.02 indicates that in a contested director election where more than one dissident shareholder intends to present a slate of director nominees, the company should inform each dissident shareholder of the Rule 14a-19(b) notice received with respect to persons nominated by other dissident shareholders.

C&DI 139.03 provides that when a company's advance notice bylaw provision requires earlier notice than Rule 14a-19(b)(1), the company would satisfy Rule 14a-5(e)(4) by disclosing only the earlier advance notice bylaw deadline in the proxy statement. However, to the extent the advance notice bylaw provision does not require the same information as that required by Rule 14a-19(b), the company's proxy statement must clearly state the need for a dissident shareholder to comply with the additional requirement of Rule 14a-9(b).

For additional information regarding universal proxy, see our Legal Update "SEC Adopts Universal Proxy Rules," dated November 23, 2021.[10]

Board Diversity

Board diversity and disclosure of specific details of board diversity continues to be an important proxy season topic.

In August 2021, the SEC approved Nasdaq's board diversity rule, requiring Nasdaq-listed companies to have, or to explain why they do not have, at least two diverse directors, including (1) at least one director who self identifies as female (regardless of gender designation at birth) and (2) at least one director who self-identifies as either an "Underrepresented Minority," as defined in the Nasdaq rule, or as LGBTQ+ and to annually disclose directors' self-identified gender, race and ethnicity in a standardized board diversity matrix.[11] Nasdaq has provided a transition period for its diversity objective that varies based on the company's listing tier and board size which initially will require Nasdaq companies to have one diverse director by August 7, 2023, or explain why they do not. In addition, Nasdaq already requires board diversity matrix disclosure, either in a company's proxy statement or on a company's website. For more information, see our Legal Update, "SEC Approves Nasdaq Board Diversity Rule," dated August 10, 2021.[12]

[10] https://www.mayerbrown.com/en/perspectives-events/publications/2021/11/sec-adopts-universal-proxy-rules
[11] https://www.sec.gov/rules/sro/nasdaq/2021/34-92590.pdf
[12] https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2021/08/sec-approves-nasdaq-board-diversity-rule.pdf

Advocacy for board matrix disclosure is not limited to Nasdaq companies. The NYC Comptroller has been promoting board matrices as part of its boardroom accountability project and has been negotiating with large companies to provide such disclosure.

The SEC Regulatory Agenda targets April 2023 for proposed rule amendments to enhance company disclosures about the diversity of board members and nominees. While that timing suggests that amendments to the SEC's board diversity requirements will not be in effect for 2023 proxy statements, the proposal may still influence what investors expect and possibly investor voting guidelines and voting recommendations from proxy advisory firms.

There are other drivers of board diversity, such as voting policies established by proxy advisory firms, voting policies and engagement priorities of large institutional investors and public perception. At least one underwriter has established minimum board diversity requirements for the clients it assists with initial public offerings. A few states have adopted or considered board diversity legislation, either as a mandate or as a disclosure requirement. However, California's two board diversity statutes for companies with principal executive offices in the state (one requiring board members from underrepresented communities, such as people of specified races and ethnic groups and people who identify as gay, lesbian, bisexual or transgender, and one requiring women board members), have each been held to violate the California Constitution by the Superior Court of California.

If a company's nominating committee changes its process for identifying and evaluating nominees for director, revised disclosure may be required in the company's proxy statement or Form 10-K, in response to Item 407(c)(vi) of Regulation S-K. Additionally, according to C&DIs 116.11 and 133.13, if a board or nominating committee has considered self-identified diversity characteristics such as the race, gender, ethnicity, religion, nationality, disability, sexual orientation or cultural background of an individual in determining whether to recommend a person for board membership, and the individual has consented to the company's disclosure of those characteristics, the Staff expects that the company's proxy statement will include, but not necessarily be limited to, identification of those characteristics and how they were considered. Similarly, in such a circumstance, the Staff expects the proxy statement's description of company diversity policies to discuss how the company considers the self-identified diversity attributes of nominees, as well as any other qualifications its diversity policy takes into account, such as diverse work experiences, military service, or socio-economic or demographic characteristics.

Director Expertise and Board Governance

There are board composition matters in addition to diversity that companies may want to take into consideration when recruiting nominees for directors. Nominating and governance committees may have areas of focus for board candidates specific to their companies. In addition, recent SEC rulemaking highlights climate change and cybersecurity expertise of directors as areas appropriate for disclosure. These initiatives pose more than disclosure issues. They may prompt recruiting of nominees and training of directors in this area.

The SEC's cybersecurity disclosure proposal would require companies to disclose whether any board member has cybersecurity expertise, and, if so, the nature of such expertise. As proposed, the rule would not define what constitutes "cybersecurity expertise," but would include a non-exclusive list of criteria that should be considered, including prior work experience, possession of

a cybersecurity certification or degree or other knowledge, skills or background in cybersecurity. For additional information on the SEC's cybersecurity disclosure proposal, see our Legal Update, "SEC Proposes New Rules on Public Company Cybersecurity Disclosures," dated March 14, 2022.[13] Similarly, the SEC's multi-faceted climate change disclosure proposal, which is discussed in more detail below, would require companies to specify whether any directors have expertise in climate-related risks, providing specific details as to the nature of the expertise. Although neither the cybersecurity nor climate change disclosure proposals have been adopted as of the date of this Legal Update, nominating and governance committees may want to consider well in advance of 2023 annual shareholder meetings whether they want to enhance board-level cybersecurity or climate change expertise.

The SEC's climate change proposal goes beyond disclosure of board-level climate change expertise. It also requires detailed governance disclosures specific to a company's climate change oversight. For example, under the proposal companies would be required to discuss whether and how the board or relevant board committee considers climate-related risks as part of the company's business strategy, risk management and financial oversight. Companies would have to describe the processes and frequency of board or board committee discussions of climate-related risks. In response to this proposed item, companies would also have to disclose whether and how the board sets climate-related targets or goals and how it oversees progress against those targets or goals, including the establishment of any interim targets or goals. Although the proposal has not been finalized, in light of growing governmental and investor scrutiny of climate change matters, companies may want to consider whether they want to structure and implement any changes to their climate change oversight procedures at this time, enabling them to include expanded disclosures highlighting their climate change governance practices in their 2023 proxy statements. Even if companies do not want to revise climate change governance practices before the SEC adopts a final rule, it may be worthwhile for companies to consider what governance steps, if any, they would take in this area to comply with the rule if adopted as proposed.

Be aware that the Staff has been providing comments to a cross section of companies, seeking expanded proxy statement disclosures regarding board leadership structure and board oversight of risk. The context for this disclosure review project is that the Staff feels that the disclosures required by Item 407(h) of Regulation S-K have become increasingly standardized and are not tailored to how board leadership structure and risk oversight reflects the particular circumstances of a company and its unique challenges. The Staff recognizes that such governance disclosures are dynamic, with companies preparing them throughout the year. Therefore, these Staff comments are being given with a view to enhancing disclosures in future proxy statements as opposed to requesting revised language for the Staff to review at this time. Companies should consider expanding their disclosures relating to board leadership structure and risk oversight in their 2023 proxy statements to provide more detailed insights on these topics— whether or not they received comment letters as part of the Staff's disclosure review project. Also, as noted above, a number of the recently proposed rules include new disclosure requirements related to board oversight of risk. Copies of the comment letter correspondence for this project will become publicly available on EDGAR but no sooner than 20 business days after the Staff completes its

[13] https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2022/03/legal-update--sec-proposes-new-rules-oncybersecurity-disclosures.pdf

review of a company's response. It is possible that the Staff will issue a sample comment letter on this review project as it has done in other situations.

Virtual Annual Shareholder Meetings

Virtual shareholder meetings, both solely virtual meetings and hybrid meetings allowing for either in person or virtual participation, have become a commonplace practice for which companies and service providers have become experienced. An initial decision that companies planning for the 2023 proxy season need to make is what format their 2023 annual meetings will take, whether physical, virtual or a combination, so that necessary arrangements can be booked well in advance of the SEC filing and annual meeting dates in order to obtain the desired dates, times and services.

Companies considering a virtual meeting should familiarize themselves with applicable laws and governance requirements for holding and conducting virtual meetings. Specifically, companies should review the current laws of their jurisdiction of incorporation, as well as the provisions of their charters and bylaws, applicable to convening, postponing, adjourning and reconvening virtual shareholders' meetings. Companies should build time into their annual meeting schedule for dry runs with the virtual systems, even if companies have conducted virtual meetings in the past.

The proxy statement disclosure for a virtual meeting must disclose all necessary information for shareholders to attend and vote their shares, including what information and documentation is needed in order to vote at the meeting and differences in procedures for record shareholders and beneficial shareholders to participate. It is helpful to indicate when the virtual meeting website will be open to log in, ideally at least 15 minutes before the meeting is scheduled to begin, and whether there is a telephone number, email address or chat feature available to report and resolve technical problems.

Question-and-answer sessions can be an important component of an annual meeting, and, as a result, many investors expect the proxy statement to clearly disclose how this will be handled at the meeting, such as whether questions may (or must) be submitted in advance of the meeting or only during the meeting and whether proof of share ownership must be provided when submitting a question. If a company is scheduling the question-and-answer session to occur after the voting is completed and the formal meeting is adjourned in order to minimize the impact of technical glitches on the proposals being voted upon, the company should clearly disclose that fact in its proxy statement. From an investor relations perspective, companies should be sure they have a way to track who submits questions so they have the ability to follow up for further engagement. Some companies may also choose to post unanswered questions and answers online following the meeting for transparency.

If shareholder proposals are on the agenda for a virtual meeting, companies should coordinate with the proponents in advance of the meeting regarding the logistics for presentation of the proposals at the meeting.

Regulation FD applies in the virtual meeting context, including in situations where a technical difficulty occurs. Therefore, if it happens that some, but not all, participants at a virtual meeting are able to hear some or a portion of the proceedings, the company will need to assess whether

material, non-public information was involved, in which case a press release or Form 8-K would be needed to comply with Regulation FD.

Delaware Amendments. Delaware corporations conducting virtual meetings should be aware that Delaware recently amended Section 219 of the Delaware General Corporation Law (DGCL) so that the list of stockholders entitled to vote no longer needs to be made available during stockholder meetings. While this change applies to in person as well as virtual stockholder meetings, it will be particularly helpful in simplifying the platform for virtual meetings because the stockholders list does not have to be electronically available at the meeting. Instead, Delaware corporations will need to make the list of stockholders open for examination for a 10-day period ending on the day before the meeting date, either on a reasonably accessible electronic network or during ordinary business hours at the corporation's principal place of business.

In addition, Delaware amended Section 222 of the DGCL to clarify that a notice of a stockholders meeting may be given in any manner permitted by Section 232 of the DGCL, which expressly allows notice by electronic transaction. Section 222 was also amended to clarify that the adjournment provision applies to adjournments taken to address technical failure to convene or continue a meeting using remote communication, unless the bylaws otherwise require. While it is still possible to announce the adjournment at the meeting being adjourned, there are two new alternatives: the adjournment notice may be (1) displayed during the time scheduled for the meeting on the same electronic network used to enable stockholders and proxy holders to participate in the meeting by means of remote communication or (2) set forth in the notice of stockholders meeting. To take advantage of this flexibility, Delaware corporations conducting virtual meetings should consider adding language to their notices of stockholders meeting and posting on their meeting websites what their adjournment procedures are in the event of a technical failure during a virtual meeting.

Proxy Voting Advice

In July 2020, the SEC adopted amendments applicable to proxy voting advice produced and disseminated by proxy advisory firms. However, in November 2021, the SEC proposed rescinding key aspects of those 2020 amendments, which it did in July 2022. Specifically, the SEC rescinded the condition to the availability of certain exemptions from the information and filing requirements of the federal proxy rules for proxy voting advice businesses. In addition, the SEC deleted a note to Rule 14a-9 that provided examples of situations in which the failure to disclose certain information in proxy voting advice may be considered misleading within the meaning of the federal proxy rules' prohibition on material misstatements or omissions. Litigation has been commenced regarding the SEC's actions on proxy voting advice from both the reporting company and proxy advisory firm perspectives. In any event, the action that the SEC took in July 2022 is not likely to impact the 2023 proxy season since in June 2021 the Staff announced that it would not recommend enforcement of the 2020 proxy voting advice amendments while the SEC is considering further regulatory action in this area.

SEC Clawback Regulation

In 2015, in accordance with a Dodd-Frank Act mandate, the SEC proposed rules prohibiting the listing of any security of a company that does not adopt and implement a written policy requiring

the recovery, or "clawback," of certain incentive-based executive compensation payments. The SEC reopened the comment period for this clawback listing standard rule in October 2021 to request comments on its proposal in 10 multifaceted areas. In June 2022, the SEC made available a memorandum prepared by the staff of the SEC's Division of Economic and Risk Analysis that discusses the increase in voluntary adoption of compensation recovery policies by issuers and provides estimates of the number of additional restatements that would trigger a compensation recovery analysis if the rules were extended to include all required restatements made to correct an error in previously issued financial statements, including "little r" restatements. At that time the SEC reopened the comment period for a second time to allow interested persons to consider and comment on the analyses and data set forth in the staff memorandum. The comment period on the SEC's clawback listing standard rules is now closed. The SEC Regulatory Agenda targets October 2022 for consideration of final clawback listing standard rules. Depending on the content and effective date of a final listing standard rule, companies may want to add or revise clawback disclosures in their proxy statements.

Climate Change

The SEC proposed very extensive climate change disclosure rules in March 2022. According to the SEC Regulatory Agenda, the SEC is targeting October 2022 for consideration of final rules, but as of the date of this post, final rules have not yet been adopted. In any event, the SEC's climate change disclosure proposal indicated that the new requirements will not apply to 2022 annual reports, which means that it will not directly impact the 2023 proxy season. However, climate change is an increasingly important topic to investors and, therefore, is an area that should be carefully considered for upcoming proxy statements and annual reports. For more detail on the SEC's climate change proposal, see our Legal Update, "SEC Proposes Climate Change Disclosure Rules Applicable to Public Companies," dated March 24, 2022.[14]

The SEC has many rules outside its recent climate change disclosure proposal that can require disclosures regarding climate change, as it explained in its 2010 "Commission Guidance Regarding Disclosure Related to Climate Change."[15] In September 2021, the SEC's Division of Corporation Finance published a sample letter[16] containing comments that the Staff intends to issue to public companies regarding their climate change disclosures—or lack thereof—in SEC filings. The sample comments could apply to many companies, and request analysis, as well as disclosure, to the extent material. As an example, one comment states

We note that you provided more expansive disclosure in your corporate social responsibility report (CSR report) than you provided in your SEC filings. Please advise us what consideration you gave to providing the same type of climate-related disclosure in your SEC filings as you provided in your CSR report.

Other sample comments addressed climate change risk factors, such as the material effects of transition risks and material litigation risks. In addition, the sample comment letter raised climate change issues that potentially could require disclosure in management's discussion and analysis

[14] https://www.mayerbrown.com/en/perspectives-events/publications/2022/03/sec-proposes-climate-change-disclosure-rulesapplicable-to-public-companies

[15] https://www.sec.gov/rules/interp/2010/33-9106.pdf

[16] https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures?utm_medium=email&utm_source=govdelivery

of financial condition and results of operations (MD&A), including the impact of climate-related legislation, regulation, capital expenditures, compliance costs, business trends, physical effects on operations and carbon credits and offsets.

In getting ready for the 2023 proxy season, and regardless of whether a company has received an SEC comment letter, it would be prudent for companies to review the SEC's 2010 guidance and the sample comment letter on climate change disclosures to consider whether they should update, expand or modify any of their climate change disclosures. Companies should also ensure that they have effective disclosure controls and procedures in place to facilitate disclosure of material climate change information in their SEC filings.

While upcoming 2022 annual reports do not need the new climate change section set forth in the SEC's proposed climate change disclosure rules, the proposal identifies topics that companies may want to address in some form during the 2023 proxy season. For example, in addition to the climate-change related governance matters, discussed above, companies may want to consider:

- Expanding their discussions of climate change risk and addressing how they manage climate change risk,
- Discussing plans and costs for climate change mitigation strategies in their management discussion and analysis,
- Addressing the extent to which they currently, or plan to, calculate greenhouse gas emissions, and
- Addressing whether they currently have, or are planning to have, climate change goals.

Increased focus on climate change among investors and other constituencies, as well as companies themselves, has prompted a growing number of companies to include sustainability initiatives in distinct sections of their proxy statements in addition to disclosures in annual reports. The approach of adding voluntary climate change and other ESG disclosure in the proxy statement may provide an opportunity for companies to control their message and provide a basis to direct shareholder engagement in this area.

When preparing climate change disclosure for the proxy statement or annual report, companies should be cognizant of the securities laws and other legal ramifications of such disclosure. Misleading climate change disclosures can give rise to SEC or state enforcement proceedings and hefty monetary penalties. From a liability perspective, it may be prudent to describe corporate climate change initiatives in aspirational terms rather than as commitments to achieve specific results, unless the company is actively working towards reaching those goals within a designated time frame and is prepared for increased follow-up disclosure in subsequent years. Companies may need to expand their disclosure controls and procedures, and possibly their internal control procedures, to take climate change disclosures into account. The team involved in drafting and approving climate change disclosure should develop a process to fact-check disclosures. Board oversight and review of climate change disclosure may help to confirm alignment with company initiatives. There should be consistency between a company's climate change disclosures in its SEC filings and the company's disclosures in any sustainability report it publishes and other climate change disclosures it makes on its website or in public statements. It is important that public companies draft climate change disclosure in a manner that is not susceptible to a characterization that it is inaccurate or misleading.

Human Capital Management

For the past two years, companies have been required to discuss in the business section of their annual reports on Form 10-K, to the extent material, their human capital resources, including the number of employees, as well as any human capital measures or objectives that the company focuses on in managing its business. This requirement, set forth in Item 101(c) of Regulation S-K, is principles-based, although it specifies the types of information that may be material to certain companies. For example, the regulation identifies measures or objectives addressing the development, attraction and retention of personnel as types of disclosures that may be appropriate to discuss, depending on the nature of a company's business and workforce.

There has been wide variation in how companies implemented the human capital disclosure in their annual reports on Form 10-K, including with respect to the amount of detail given and the human capital measures discussed. Some companies also included human capital disclosure in their proxy statements. Many investors now identify human capital management as an important topic of engagement.

There are a number of measures and objectives that have commonly been discussed as part of human capital management disclosures. For example, diversity, equity and inclusion (DEI) with respect to the workplace was a frequent human capital management topic of discussion, but some companies addressed DEI in general terms while other provided quantitative metrics on various characteristics, such as race, ethnicity, gender and gender identity, sexual orientation, disability and age. In addition to the number of employees, some companies provided a breakdown of employees based on geographic location or type of position. Other human capital disclosures covered employee recruitment, turnover, retention, training and engagement, as well as labor relations. Discussions regarding workers' health and safety (as a result of the COVID-19 pandemic or otherwise) and remote and hybrid working arrangements have also been included as part of human capital management disclosures.

Companies should recognize that institutional investors have increasingly made human capital management disclosure and engagement a priority. In addition, there have been shareholder proposal initiatives that requested companies to disclose the workforce data by race/ethnicity, sex and job categories that they submitted to the US Equal Opportunity Commission on EEO-1 reports, and some companies have agreed to make such data public. As a result, when drafting human capital management discussions, companies may want to take into account the perspectives of their shareholders in addition to SEC disclosure requirements. Companies should also be aware that proxy advisory firms are focusing on human capital management disclosures. And, because human capital management is important to employee relations, companies should consider the points of view of various employees when drafting human capital management discussions.

In light of these developments, many companies supplement their Form 10-K human capital management disclosure with additional proxy statement discussion. While the Form 10-K requirement is qualified by a materiality standard, voluntary proxy statement disclosure on human capital topics can be drafted in a way that communicates the information to interested shareholders without implying that it is important to how management runs the business. This proxy statement discussion can be placed in the context of the company's approach on other ESG matters. The proxy statement platform provides companies with the opportunity to focus

their corporate messaging in a reader-friendly manner, often enhanced with graphics, on key human capital topics they chose to highlight, such as DEI, employee development and retention and workplace culture.

Human capital management continues to evolve as a disclosure topic. While the current human capital management disclosure requirement is principles-based, there has been a push to add additional prescriptive requirements. For example, Congresswoman Maxine Waters, Chairwoman of the House Financial Services Committee and Senator Sherrod Brown, Chairman of the Senate Banking, Housing and Urban Affairs Committee, have urged the SEC to require disclosure of standardized data regarding race, ethnicity, gender, sexual orientation, and disability status.[17] In addition a group composed of academics, former SEC officials, and market participants have petitioned the SEC to develop human capital disclosure rules, recommending (a) Form 10-K MD&A disclosure of the portion of workforce costs that should be considered an investment in the firm's future growth, (b) expensing of workforce costs for accounting purposes but requiring disclosure so that investors may capitalize workforce costs in valuation models as appropriate, and (c) greater disaggregation of the income statement to give investors more insight into workforce costs.[18]

The SEC Regulatory Agenda indicates that the SEC is targeting October 2022 for proposed amendments to enhance human capital disclosures. Although it is unlikely that any final amendment would be adopted in time to require compliance in annual reports for the year ended December 31, 2022, companies should monitor that potential rulemaking to consider if it makes sense to adopt any aspects of the proposal voluntarily in their next annual report.

Russia/Ukraine Disclosures

In May 2022, the Staff has issued a sample comment letter and guidance to companies regarding disclosures pertaining to Russia's invasion of Ukraine and related supply chain issues.[19] This sample comment letter provides guidance on the types of direct or indirect consequences that the Russian war in Ukraine and the international response, including sanctions, may have on their businesses. Among other things, the letter identifies as possible areas of disclosure impacts suffered by companies on their business, operations, or prospects due to changes in their employee base; disruptions to their supply chain; nationalizations of assets; sanctions, exports or capital controls; changes in their business relationships; heightened cybersecurity risks or threats; and increased volatility in the trading prices of commodities. It also addresses non-GAAP financial measures in the context of the Russian/Ukrainian situation. Companies should review this sample letter when they are preparing annual reports on Form 10-K, even if they previously reviewed it in connection with their quarterly reports on Form 10-Q, and evaluate whether they should be including disclosure relating to this situation in any sections of their Form 10-K. In particular, consider whether any such disclosure would be appropriate for risk factors, MD&A, business discussion (including human capital management) or financial statement footnotes. As a related matter, companies should assess whether they need to update their disclosure controls

[17] https://financialservices.house.gov/uploadedfiles/sec_disclosures_waters-brown.pdf
[18] https://www.sec.gov/rules/petitions/2022/petn4-787.pdf
[19] https://www.sec.gov/corpfin/sample-letter-companies-pertaining-to-ukraine

and procedures or their internal control over financial reporting to be sure they are encompassing the Russia/Ukraine conflict.

Risk Factors

Risk factor disclosure is an important feature of an annual report. It must focus on the material factors that make an investment in a company speculative or risky, tailored to the specific reporting company. The disclosure must be organized under relevant headings. If a company chooses to disclose a risk that could apply to other companies or securities offerings without explaining why the identified risk is specifically relevant to investors in the company's securities, the rule requires such generic disclosure to be placed at the end of the risk factor section under the caption "General Risk Factors." If the risk factor discussion exceeds 15 pages, a risk factor summary of not more than two pages is needed.

Among things companies should consider when updating their annual report risk factors is whether risks relating to supply chain, inflation or recession need to be addressed in upcoming annual reports. To the extent the Russian war in Ukraine or related sanctions is a material risk to a company, that will need to be discussed in the company's risk factors. Given the heightened focus on climate change, companies should consider whether they need to add or expand or otherwise update climate change risk factor disclosure. Cybersecurity and data privacy continue to be risks that many companies need to address in their annual reports. And, COVID-19 risks may have evolved over time so they may need modification, especially as a result of vaccines, vaccine hesitancy, variants and break-through infections. Some companies may have risks related to return to work policies. Because risks for a company may change from year to year, and because material risks can arise from various aspects of a company's business, it is important from a disclosure control perspective that the full set of risk factors contained in an annual report be reviewed by the appropriate departments within the company to determine whether any new risks need to be added or any existing risk factor disclosure needs to be revised.

While taking a fresh look at risk factor disclosures each year is an important exercise for the entire risk factor section, companies should be particularly sensitive to situations where they previously described a risk in hypothetical terms and subsequently an actual event of that nature occurred. In these circumstances an update to the risk factors may be needed to avoid securities law liability for misleading risk factors. This has become an issue in the cybersecurity area, both for SEC and private litigation, where a prior risk factor discussed the potential of a data breach or ransomware attack and thereafter the company suffered a cyber-event, but it may also be a relevant consideration for risk factors on other topics.

Management's Discussion and Analysis

As expressly stated in Regulation S-K, the MD&A's objective "is to provide material information relevant to an assessment of the financial condition and results of operations of the registrant," focusing "specifically on material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition," including "descriptions and amounts of matters

that have had a material impact on reported operations, as well as matters that are reasonably likely based on management's assessment to have a material impact on future operations."

To achieve the MD&A's objective, companies should approach the MD&A section of their annual reports on Form 10-K from a fresh perspective each year. While the MD&A discussion may need to update prior year strategies and discuss how results and financial condition changed from the prior period, it also needs to provide insight into the company's current operations and trends that are likely to materially affect the company. The MD&A is a key element of the Form 10-K and it should be thoughtfully drafted and carefully reviewed.

Among other matters that should be discussed in the MD&A, companies may want to consider addressing topics that are of particular interest to investors in their MD&A, including ESG matters such as climate change and human capital, even if pending rulemaking in those areas is not yet in effect.

Although the SEC's 2020 amendments to the MD&A requirements eliminated specific references to disclosure with respect to the impact of inflation and changing prices, companies are required to discuss these matters in the MD&A if they are part of a known trend or uncertainty that has had, or is reasonably likely to have, a material impact on net sales or revenue. Given the impact of inflation on the economy this year, many companies may need to discuss the effect of inflation on their businesses in the MD&A, as well as uncertainties related to potential recession.

Share Repurchase Disclosure

In December 2021, the SEC issued proposed amendments to its rules regarding disclosures about purchases of a company's equity securities by or on behalf of the company or an affiliated purchaser, commonly referred to as "buybacks." In addition to proposing detailed disclosures of buybacks to be reported on a next business day basis on a new Form SR, the SEC proposed amendments to periodic reports that would require disclosure of:

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

For more detail on the SEC's proposed share repurchase disclosure modernization, see our Legal Update, "SEC Proposes New Share Repurchase Disclosure Rules," dated December 20, 2021.[20]

[20] https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2021/12/sec-proposes-new-rules-on-sharerepurchase-disclosure.pdf

The SEC Regulatory Agenda targets October 2022 for its share repurchase disclosure modernization rules. As of the date of this post, it is not known what the effective date of the final rules will be and whether there will be any transition period. Therefore, companies should monitor this rulemaking to determine if the amendments to periodic reports will apply to upcoming annual reports.

EDGAR Submission of "Glossy" Annual Reports

There is a new requirement for the upcoming proxy season regarding "glossy" annual reports. Many companies use a glossy annual report as part of their proxy materials, for example, wrapping additional pages around the Form 10-K that typically contain photographs, graphics, and reader-friendly descriptions of their business and its achievements.

In June 2022, the SEC updated electronic filing requirements which, among other things, amended Rule 14a-3(c) to make it mandatory for glossy annual reports to be submitted to the SEC, in accordance with the EDGAR Filer Manual.[21] This requirement is in addition to the EDGAR filing of the annual report on Form 10-K itself. The compliance date for the mandatory electronic filing of glossy annual reports begins on January 11, 2023.

The electronic submission of the glossy annual report to the SEC must capture the graphics, styles of presentation, and prominence of disclosures (including text size, placement, color, and offset, as applicable) contained in the reports and should not be re-formatted, re-sized, or otherwise redesigned for purposes of the submission on EDGAR. Currently, the only format that EDGAR supports for this requirement is PDF. If, in the future, EDGAR is upgraded to accommodate other formats appropriate for electronic filing of the glossy annual report, the SEC will adopt an updated EDGAR Filer Manual that supports such formats.

Under the amendments, foreign private issuers that furnish their glossy annual report in response to the requirements of Form 6-K will also have do so via EDGAR.

According to amended Rule 14a-3(c), the glossy annual report must be submitted to the SEC, solely for its information, not later than the date on which such report is first sent or given to security holders, or the date on which preliminary copies, or definitive copies, if preliminary filing was not required, of the proxy statement are filed with the SEC pursuant to Rule 14a-6, whichever date is later. The glossy annual report will not deemed to be "soliciting material" or to be "filed."

Because the EDGAR submission of glossy annual reports will be in effect for the 2023 proxy season, companies should add this requirement, and related coordination with their service providers, to their proxy season calendars.

ITRA Compliance

The Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA) continues to require Form 10-K and Form 10-Q disclosure if, during the period covered by the report, the company or any

[21] https://www.sec.gov/rules/final/2022/33-11070.pdf

affiliate knowingly engaged in certain sanctionable activities, regardless of whether those actions violate US law and without any materiality threshold. If a company is required to report this activity in its annual or quarterly report, it must also separately file with the SEC, at the same time it files its annual or quarterly report, a notice that such disclosure is contained in the report. The ITRA disclosure requirement is statutory and is not referenced in the instructions for SEC annual or quarterly report forms.

Although ITRA disclosure requirements are typically framed in terms of Iran, some of the statutory provisions are broader, such as Section 13(r)(1)(d) of the Exchange Act that requires reporting if the issuer or an affiliate:

(D) knowingly conducted any transaction or dealing with

. . .

(ii) any person the property and interests in property of which are blocked pursuant to Executive Order No. 13382 (70 Fed. Reg. 38567; relating to blocking of property of weapons of mass destruction proliferators and their supporters).

Since March 2021, several Russian entities and individuals have been designated as subject to Executive Order No. 13382, including the Federal Security Service of the Russian Federation (FSB). Companies dealing with Russia or Russian entities or individuals should consider whether they need to make any modifications to their disclosure controls and procedures with respect to ITRA to assess whether such Russian involvement gives rise to required disclosure and notice requirements.

Director and Officer Questionnaires

To the extent that companies are required or choose to include self-identified diversity characteristics in their proxy statements or on their websites, they may need to develop or expand questions for their director and officer questionnaires to elicit such information or otherwise develop a mechanism to gather it. The questionnaires or other procedures should include obtaining the director's or nominee's consent to disclosure. In addition, if companies need to provide diversity data on directors and officers for other purposes, such as a state law requirement, adding one or more questions to the director and officer questionnaire process may be the best vehicle for gathering that information.

In light of universal proxy requirements, companies should review the consent language in their director and officer questionnaires and consider updating it to clarify that the consent to be named as a nominee for director is sufficiently broad to cover not only the company's proxy statement but any proxy statement of a dissident that triggered the universal proxy requirement.

Companies may want to update ITRA questions in their director and officer questionnaires to the extent they have not previously done so to clarify that some Russian entities and individuals are covered.