Vinson&Elkins

Navigating

Navigating the 2023 Annual Meeting and Reporting Season

November 17, 2022

Today's Panelists

Matthew Dobbins
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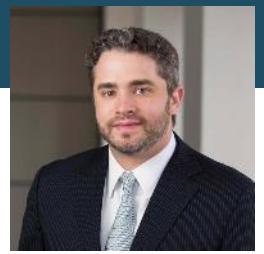
Houston



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New York

Rebecca Fike
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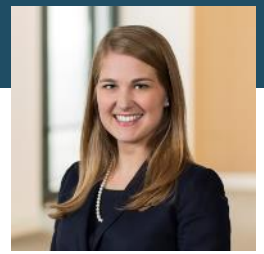
Dallas



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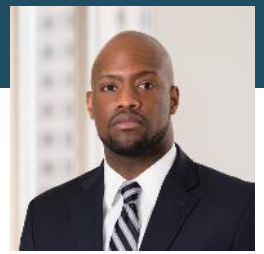

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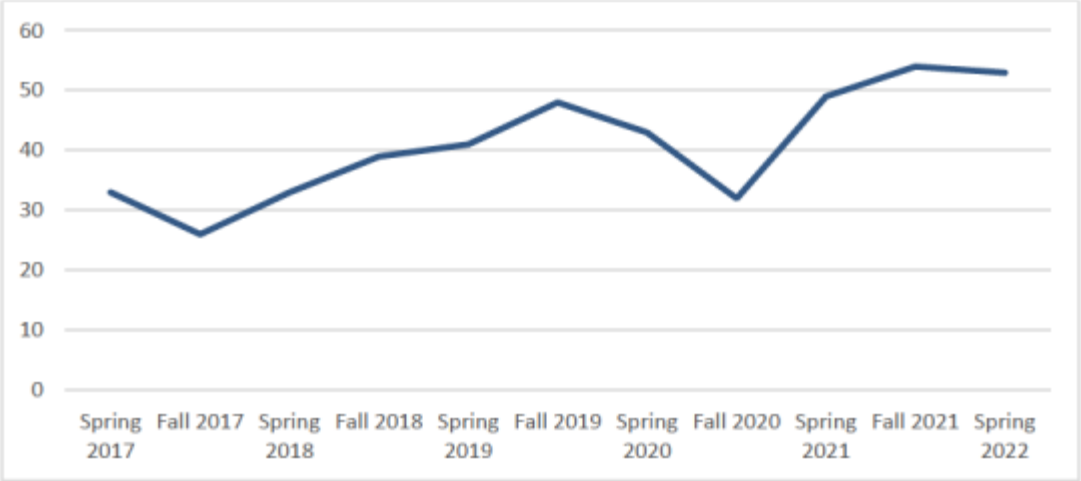
SEC Disclosure Updates

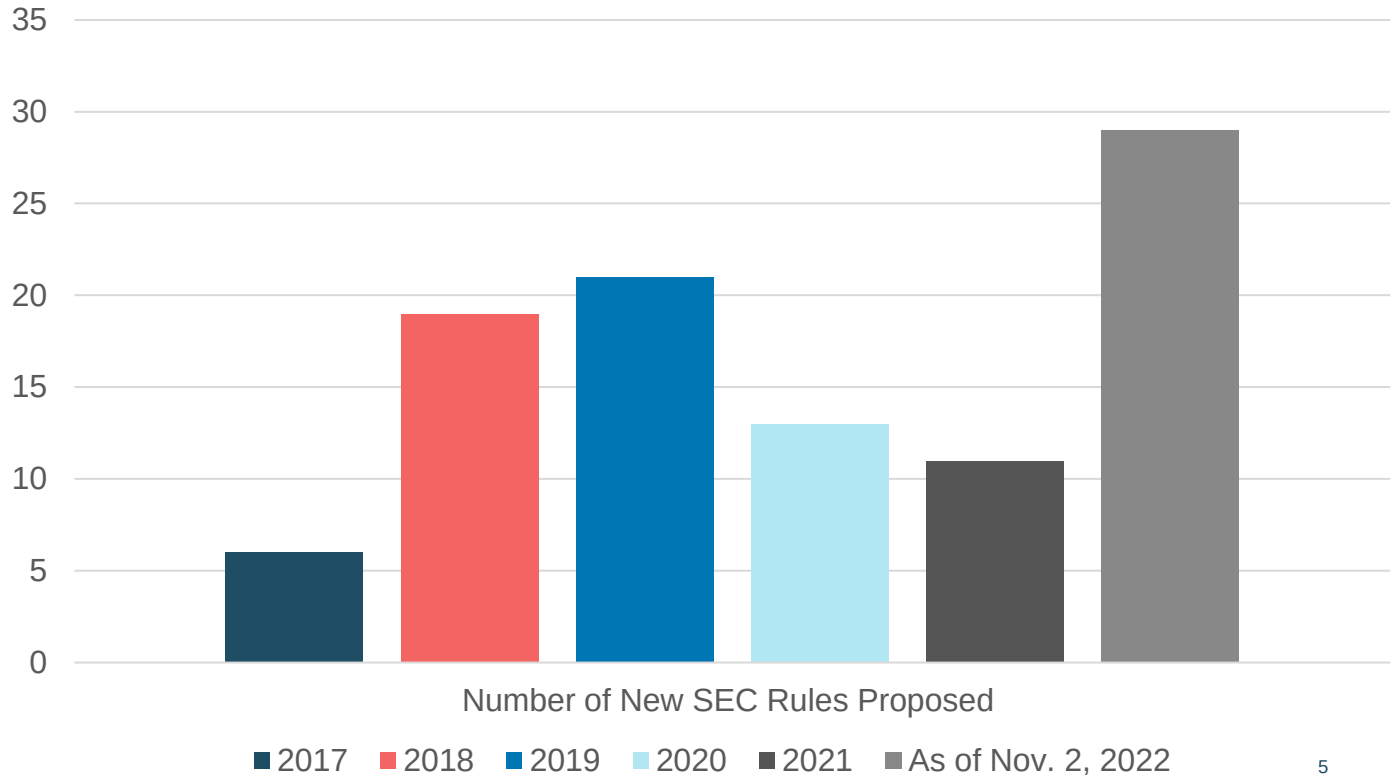
2022 SEC Rulemaking

Number of Rulemaking Activities on the SEC's Regulatory Agenda (Spring 2017 – Spring 2022)



Source: OIG-generated based on data from the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (https://www.reginfo.gov/public/ last accessed on September 8, 2022).

Number of New SEC Rules Proposed (2017 – November 2, 2022)



Required Changes in 2023

Summary Checklist

	Required Changes for 2023
☐	Universal Proxy Card
☐	Pay Versus Performance
☐	Disclosure of Payments by Resource Extraction Issuers
☐	MD&A Recent Events
☐	Board Risk Oversight and Effect on Board Structure
☐	Filing Fee Disclosure and Payment Methods Modernization
☐	Electronic Filing of Form 144 and Glossy Annual Reports
☐	Proxy Voting Advice
☐	Holding Foreign Companies Accountable Act

Universal Proxy Card

☐ Universal Proxy Card

- On November 17, 2021, the SEC adopted a final universal proxy rule, Exchange Act Rule 14a-19, which addresses the use of universal proxy cards in contested director elections held after August 31, 2022.
- A “universal proxy card” lists the names of all duly-nominated director candidates for election, regardless of whether the candidates were nominated by management or shareholders.
- The rule enables stockholders to mix and match candidates from the separate slates of the company and activist stockholders.
- The rule requires companies and activists to comply with several new requirements which include notice provisions, filing deadlines, and disclosure requirements.
- The rule may lead to more proxy contests, with challenges coming from newcomers in addition to more traditional activists (the potential effects of the rule will be further discussed during *Shareholder Proposals, Trends, and Activism*).

Pay Versus Performance

☐ Pay Versus Performance

- On August 25, 2022, the SEC adopted a final rule adding Item 402(v) under Reg. S-K that requires companies within proxy or information statements to disclosure the relationship between compensation paid to executives and the company's financial performance.
- The rule is effective October 11, 2022, requiring calendar-year companies to comply with the new disclosure requirements in their proxy or information statements filed in 2023.
  - The rule does not apply to EGCs, FPIs, and registered investment companies.
- The rule has three primary disclosure components:
  1) a pay-versus-performance table;
  2) additional disclosure of the relationships between the pay-versus performance table and compensation paid to named executive officers; and
  3) a list of the company's most important financial performance measures.
- The Pay Versus Performance Rule will be further discussed during *Compensation Disclosure Updates*.

Disclosure of Payments by Resource Extraction Issuers

☐ Disclosure of Payments by Resource Extraction Issuers

- Resource extraction issuers are oil, natural gas, and mining companies that are required to file reports under Section 13 or 15(d) of the Securities Exchange Act of 1934.
- On December 16, 2020, the SEC adopted final rules requiring resource extraction issuers to disclose payments that they (or their subsidiaries or any entities under their control) have made to foreign governments or the U.S. federal government for the purpose of the commercial development of oil, natural gas, or minerals.
- The information must be furnished annually on Form SD no later than 270 days following the end of the resource extraction issuer's most recently completed fiscal year.
- The compliance date for a resource extraction issuer with a December 31 fiscal year-end would be September 30, 2024 (*i.e.*, 270 days after its fiscal year end of December 31, 2023) in respect to payments made in 2023.
- V&E will be providing a full-length presentation regarding disclosure of payments by resource extraction issuers at a later date.

Be ready to gather your data beginning January 1, 2023!

MD&A Recent Events

☐ Updating MD&A

- Companies should refresh and revisit the MD&A section of their annual reports on Form 10-K each year.
- The SEC has emphasized that companies should consider whether the following trends are reasonably likely to have a material effect in the future:
  - The COVID-19 pandemic
  - Geopolitical tensions
  - Supply chain issues
  - Labor shortages
  - Rising inflation
  - Market volatility
  - Interest rate hikes
  - Reference rate reform
  - Cybersecurity
  - Climate change disclosure
  - Key performance indicators and metrics
- MD&A recent events will be further discussed during *MD&A*.

Board Risk Oversight and Effect on Board Structure

☐ Board Risk Oversight and Effect on Board Structure

- The Staff has indicated that it will be taking a hard look at disclosure regarding risk oversight provided pursuant to Reg. S-K item 407(h) this coming proxy season.
- The SEC has already issued a few comment letters regarding this Item. Common themes include:
  - For companies with a lead independent director, the SEC has asked for more disclosure regarding the role of the lead independent director in the board's risk oversight function.
  - The SEC has also asked for more detailed disclosure on the boards' administration of their risk oversight function generally, including:
    - The evaluation of risks over different time-frames (short-term, intermediate-term, or long-term), including whether different oversight standards are applied based upon the immediacy of the risk;
    - How often the company's risk environment is reassessed;
    - Consultation with outside advisors, experts and management;
    - Alignment of risk oversight with disclosure control and procedures;
    - If the company has a Chief Compliance Officer or Chief Risk Officer (or similar position), to whom does such person report; and
    - Whether and why the board has direct oversight for certain risks (*e.g.*, ESG) rather than assigning to a board committee.

Additional Required Changes for 2023

☐ Filing Fee Disclosure and Payment Methods Modernization

- Effective January 1, 2022, the SEC amended most of its fee-bearing forms and schedules to require filers to present the information required for filing fee calculation in a separate exhibit structured in Inline XBRL, and modernized filing fee payment methods (*i.e.*, allowing ACH, debit and credit card payments and eliminating paper check and money order payment options).
- Note that the amendments requiring Inline XBRL are phased-in depending on filer status:
  - Large Accelerated Filers: July 31, 2024
  - Accelerated Filers: July 31, 2025

☐ Electronic Filing of Form 144 and Glossy Annual Reports

- On June 3, 2022, the SEC adopted amendments to Rule 101 of Reg. S-T to eliminate the option for issuers and filing persons to file multiple forms in paper format, mandating that issuers and filing persons instead electronically submit on EDGAR, among other things:
  - Form 144 (compliance required by April 13, 2023)
  - Glossy annual reports (compliance required by January 11, 2023)

Additional Required Changes for 2023

☐ Proxy Voting Advice

- On July 13, 2022, the SEC adopted amendments to the 2020 rules governing proxy voting advice provided by proxy advisory firms (*e.g.*, ISS and Glass Lewis) that (1) removed certain conditions to the availability of exemptions from the information and filing requirements applicable to proxy advisory firms and (2) left intact (a) the determination that proxy voting advice is a solicitation subject to the proxy rules, including liability under Rule 14a-9 and (b) the conflicts of interest disclosure requirements.
- The following conditions from the 2020 rules were reversed:
  - Companies that are the subject of proxy voting advice must have such advice made available to them before or at the same time that such advice is made available to the proxy advisory firms' clients; and
  - Clients of proxy advisory firms must be notified of any written responses by companies to such proxy voting advice.

☐ Holding Foreign Companies Accountable Act

- Effective January 10, 2022, the SEC's final rules implementing the Holding Foreign Companies Accountable Act require issuers to submit certain documentation and disclosure if they have been identified by the SEC as having filed an annual report with an audit report issued by an audit firm located in a foreign jurisdiction that the PCAOB is unable to inspect or investigate.
- The final rules require all issuers in their annual report filings to (1) include a new Item 9C; and (2) Inline XBRL tag the (a) identity of their auditor, (b) location where the audit report was issued, and (c) PCAOB ID number of the audit firm providing the opinion.

Reminders from 2022

Summary Checklist

	Reminders from 2022
☐	MD&A, Selected Financial Data, and Supplementary Financial Information (Reg. S-K Items 301, 302, 303, and 914)
☐	Nasdaq Board Diversity Rules
☐	NYSE Votes Cast Standard
☐	NYSE Related Party Transaction Rule

Summary: Reminders from 2022

☐ Item 301 of Reg. S-K (Selected Financial Data)

- Eliminated.

☐ Item 302 of Reg. S-K (Supplementary Financial Information)

- Revised Item 302(a) to replace the requirement for quarterly tabular disclosure with a principles-based requirement for material retrospective changes.

☐ Item 303 of Reg. S-K (Management's Discussion and Analysis of Financial Condition and Results of Operations)

- Added new Item 303(a) (Objective) to codify the principal objectives of MD&A and apply them throughout Item 303.
- Amended Item 303(a)(1) and (2) (Liquidity and Capital Resources) to enhance and clarify disclosure requirements therein.
- Amended Item 303(a)(3) (Results of Operations) to clarify and streamline disclosure requirements therein.
- Added new Item 303(b)(3) (Critical accounting estimates) to require disclosure of critical accounting.
- Replaced Item 303(a)(4) (Off-balance sheet arrangements) with an instruction to discuss such obligations in the broader context of MD&A.
- Eliminated Item 303(a)(5) (Tabular disclosure of contractual obligations).
- Amended Item 303(b) (Interim Periods) to state that registrants will be permitted to compare their most recently completed quarter to either (1) the corresponding quarter of the prior year or (2) to the immediately preceding quarter.

Summary: Reminders from 2022

☐ Nasdaq Board Diversity Disclosure

- Nasdaq-listed companies must annually disclose information on the voluntary self-identified gender and racial characteristics and LGBTQ+ status of the company's board using a matrix template provided under Nasdaq Rule 5606.
- Between 2023 and 2026 depending on the company's tier, Nasdaq-listed companies must have, or explain why they do not have, at least two members of their boards who are diverse (including at least one director who self-identifies as female and at least one director who self-identifies as an underrepresented minority or LGBTQ+).
  - All companies are expected to have at least one diverse director by August 7, 2023.
  - Larger companies listed on the Nasdaq Global Select Market or Nasdaq Global Market tiers have four years from August 6, 2021 (by August 6, 2025) to have two diverse directors, and smaller companies listed on the Nasdaq Capital Market tier have five years (by August 6, 2026) to appoint a second diverse director.

☐ NYSE "Votes Cast" Standard

- A company must calculate "votes cast" on a proposal subject to Section 312.07 of the NYSE Listed Company Manual in accordance with its own governing documents and any applicable state law, which may alter the treatment of "abstentions" (affects shareholder votes required for (1) equity compensation plans; (2) stock issuances for related party transactions; (3) stock issuances of 20% or more; and (4) changes of control).

☐ NYSE Related Party Transaction Rule

- The NYSE amended its rule requiring reasonable prior review and oversight of related party transactions to define "related-party transaction" for the purpose of the rule as a transaction required to be disclosed pursuant to Item 404 of Reg. S-K.

New Rules, Proposed Rules and Expected Rulemaking

Summary Checklist

	New Rules	Rule Effective Date	Exchange Effective Date
☐	Clawback Rule	60 days after publication in the Federal Register	Not more than one year after the rule's effective date
	Selected Proposed Rules	**Comment Period Close**	**Final Rule Expected**
☐	Climate-Related Disclosures	November 1, 2022	Q4 2022 or Q1 2023
☐	Cybersecurity	November 1, 2022	Spring 2023
☐	SPAC	November 1, 2022	Unknown
☐	14a-8 Shareholder Proposals	September 12, 2022	Unknown
☐	Securities Transaction Settlement Cycle	April 11, 2022	Q4 2022
☐	Beneficial Ownership Reporting	April 11, 2022	Spring 2023
☐	Rule 10b5-1 and Insider Trading	April 1, 2022	Spring 2023
☐	Share Repurchase Disclosure	April 1, 2022	Was October 2022
	Expected Rulemaking		**Proposed Rule Expected**
☐	Human Capital Management		Was October 2022
☐	Corporate Board Diversity		April 2023

10b5-1 Plan Rules and Related Disclosures

- On December 15, 2021, the SEC proposed amendments to Rule 10b5-1 to enhance disclosure requirements and investor protections against insider trading.
- The proposed amendments would add new conditions to the availability of the Rule 10b5-1(c)(1) affirmative defense to insider trading liability, including:
  - 10b5-1 trading arrangements entered into by *corporate officers or directors* must include a 120-day cooling-off period before any trading can commence under the trading arrangement after its adoption, including adoption of a modified trading arrangement.
  - 10b5-1 trading arrangements entered into by *issuers* must include a 30-day cooling-off period before any trading can commence under the trading arrangement after its adoption, including adoption of a modified trading arrangement.
  - Officers and directors must certify that they are not aware of material nonpublic information about the issuer or the security when adopting a new or modified trading arrangement.
  - The affirmative defense under Rule 10b5-1(c)(1) will not apply to multiple overlapping Rule 10b5-1 trading arrangements for open market trades in the same class of securities.
  - 10b5-1 trading arrangements to execute a single trade are limited to one plan per 12-month period.
  - 10b5-1 trading arrangements must be entered into and operated in good faith.

10b5-1 Plan Rules and Related Disclosures – Cont'd

- Proposed new issuer disclosures:
  - An issuer must disclose in its annual reports whether (and if not, why not) the issuer has adopted insider trading policies and procedures. Additionally, issuers would be required to disclose their insider trading policies and procedures, if they have adopted such policies and procedures.
  - An issuer must disclose in its annual reports (Item 402 disclosures) its option grant policies and practices and provide tabular disclosure showing grants made within 14 days of the release of material nonpublic information and the market price of the underlying securities on the trading day before and after the release of such information.
  - An issuer must disclose in its quarterly reports the adoption and termination of Rule 10b5-1 trading arrangements and other trading arrangements by directors, officers, and issuers, and the terms of such trading arrangements.
- Proposed amendments to Section 16 reports:
  - Section 16 officers and directors must disclose by checking a box on Forms 4 and 5 whether a reported transaction was made pursuant to a 10b5-1(c) trading arrangement.
  - Section 16 officers and directors must disclose promptly bona fide gifts of securities on Form 4.

Boards should include review of Insider Trading Policies on upcoming meeting agenda in advance of a potential disclosure obligation.

SEC Enforcement

Enforcement Trends

What May Draw SEC Enforcement Action about MD&A?

- Inadequate disclosure of facts, trends, and uncertainties known by management (*e.g., Caterpillar*, *HP*, *GE*, *NVDIA*)
- Failing to disclose the effect of sales practices undertaken to meet quarterly sales and earnings targets (*e.g.*, *Under Armour*)
- Engaging in earnings management practices to meet expectations
- Inadequate disclosure regarding the effect of a particular line of business on the company's overall business or a segment of the business (*e.g.*, *GE*)
- Misleading disclosure of key performance indicators, including non-GAAP financial measures (*e.g.*, *BMW*, *Fiat Chrysler, GE*)
- Misleading disclosures about the effect of the COVID-19 pandemic on business operations and financial condition (*e.g.*, *Cheesecake Factory* ("operating sustainably"))
- Failure to disclose the effect of material cybersecurity breaches (*e.g.*, *Pearson*, *First American*)
- Enforcement Task Forces
  - ESG task force launched in 2021 focused on climate and ESG issues
  - Crypto Assets and Cyber Unit doubled in size in 2022

What Lessons May be Learned about MD&A from SEC Enforcement Action?

- MD&A in a quarterly report on Form 10-Q is as important as MD&A in the annual report on Form 10-K.
- Disclosure controls and procedures should identify the facts, trends, or uncertainties that have caused, or are reasonably likely to cause in the future, material changes or differences between financial reporting periods.
  - ***Those facts, trends or uncertainties must be disclosed in MD&A.***
- Information that is important to senior management and the board in evaluating financial performance should be made available to, and carefully considered by, those who draft MD&A.
- MD&A disclosure must be accurate as of the filing date of the report, not just as of the end of the fiscal period covered by the report.
- The SEC is willing to initiate enforcement action when it believes prior guidance has been sufficiently clear or the principles of MD&A have been violated.
- The SEC may be willing to initiate enforcement actions to establish principles that it has not yet enacted in rulemaking (*e.g.*, climate change costs and likely changes).
- MD&A enforcement is often coupled with enforcement for alleged violations of anti-fraud rules in the Securities Act of 1933 and the Securities Exchange Act of 1934, failures of disclosure controls and procedures, and material weaknesses in internal control over financial reporting.

How to Avoid SEC Attention (and Action)

How to Avoid SEC Attention (and Action)

- Insider Trading
  - Rule 10b5-1 Plans
  - Review insider trading policies: how is insider trading defined?
  - Review internal controls and procedures around the policy
- Section 17 negligence standard
  - *Scienter* (“knowing”) is not required
- Disclosure Controls & Procedures
  - Tailored, Evaluated, Updated, Implemented?
- Public Statements – think beyond SEC filings
  - Social Media
  - Media Interviews
  - Podcasts
  - Overview Triangle: Marketing / PR / Legal
- Overcommitting v. Under-Committing on ESG
  - ESG statements should be scrutinized and supported as much as financial statements and results

Sustainability and Climate Change Disclosure

Investor/Institutional Pressure to Address Climate Change

"Our question to these companies is: what are you doing to disrupt your business? How are you preparing for and participating in the net zero transition? As your industry gets transformed by the energy transition, will you go the way of the dodo, or will you be a phoenix?"

Investor/Institutional Pressure to Address Climate Change

"Vanguard considers climate change—and the evolving global policy responses required to mitigate its impact—to be a material and fundamental risk to companies and to their shareholders' long-term financial success. Accordingly, we have an important role to play in engaging and encouraging real progress by portfolio companies to mitigate the potential consequences of climate change. This is our fiduciary duty."

Vanguard's approach to climate change

Climate change will have far-reaching consequences that will shape future trends in economics, financial markets, politics, and society.

ISS & Glass Lewis 2022 Climate Related Proxy Voting Policies

- Glass Lewis
  - Environmental and Social Risk Oversight
    - Glass Lewis will generally recommend against the governance chair of companies in the S&P 500 index that do not provide explicit disclosure regarding the board's role in overseeing environmental and/or social issues.
    - Glass Lewis will note as a concern when companies in the Russell 1000 fail to provide clear disclosure concerning board-level oversight of environmental and/or social issues.
- ISS
  - For companies that are significant greenhouse gas emitters through their operations or value chain (defined as those on the current Climate Action 100+ Focus Group), ISS will generally recommend against the responsible incumbent director, committee or full board when the company is not taking the following minimum steps needed to understand, assess, and mitigate climate-related risks, which for 2022 are: (1) disclosure of climate-related risks faced by the company, such as according to the TCFD framework; and (2) adopting appropriate GHG emissions reduction targets that cover at least a significant portion of the company's direct emissions.
    - *Note that what constitutes "minimum steps" will increase over time.*
  - ISS will make voting recommendations on "Say-on-Climate" shareholder and management proposals on a case-by-case basis depending on several factors including (1) climate-related disclosure; (2) actual GHG emissions performance; (3) any recent, significant violations, fines, litigation or controversy related to GHG emissions; and (4) whether the request is unduly burdensome or overly prescriptive.

ISS 2023 Global Benchmark Policy Survey

- When asked what actions or omissions of “significant GHG emitters” would demonstrate such poor climate risk management as to rise to the level of a “material governance failure” and call for ISS to recommend against a director or multiple directors:
  - A significant majority of both investor and non-investor respondents agreed that there is a material governance failure if a significant contributor to climate change is not providing adequate disclosure with regards to climate-related oversight, strategy, risks and targets according to a framework such the TCFD.
  - Investors commonly chose the following as material governance failures: (1) not setting realistic medium-term targets (through 2035) for Scope 1 & 2 only; (2) not declaring a net-zero by 2050 ambition; and (3) not setting realistic medium-term targets (through 2035) for Scope 1, 2 & 3 if Scope 3 is relevant.
  - A significant majority of investors supported applying the ISS policy uniformly across markets, rather than continuing to differentiate by market.
- When asked about the top three priorities considered in determining whether a transition plan is adequate, the most popular responses were:
  - The extent to which climate-related disclosures are in line with TCFD recommendations and meets other market standards;
  - Whether the company has set adequately comprehensive and realistic medium-term targets for reducing GHG emissions (Scopes 1, 2 & 3 if relevant) to net-zero by 2050;
  - Whether short- and medium-term capital expenditures align with long-term strategy and the company has disclosed the technical and financial assumptions underpinning its strategic; and
  - A disclosed commitment to report on the implementation of the plan in subsequent years.
- When asked if they (1) favor seeing commentary from auditors in the audit report on climate-related issues (in the case of significant emitters) and (2) believe climate risk should be included among Critical Audit Matters / Key Audit Matters, a majority of investors agreed, whereas a majority of non-investors disagreed.
- Both investors and non-investors expressed that they expect investors’ minimum expectations and thresholds for climate-related disclosure and performance to increase over time.

Net Zero Pledges: Banks

- All six major US banks have made net zero pledges and three have announced their interim commitments under the Net Zero Banking Alliance, which includes Oil & Gas.
- What does this mean?
  - Potential impact upon access to capital: Banks may be less inclined to lend to companies with no commitments (or no inclination to commit).
  - Banks may require companies to share ESG reporting or require data to demonstrate progress toward climate targets/goals. They may also require voluntary disclosures aligned with voluntary reporting frameworks (*e.g.*, TCFD).

Bank	Oil & Gas
JP Morgan	35% reduction in operational carbon intensity and 15% reduction in end use carbon intensity by 2030
Goldman Sachs	17-22% reduction in GHG emissions intensity by 2030
Citi	29% reduction in absolute emissions by 2030

Who is Making Energy Transition Commitments

All banks have committed to net zero for some or all of their emissions by 2050

Bank	Net Zero Commitment	Investment Commitment
Morgan Stanley	Commitment includes financed emissions (Scope 3 emissions)	$1T to support sustainability solutions by 2030, including $750B of "low-carbon solutions"
JP Morgan Chase	Commitment includes "key sectors" of financing portfolio (some Scope 3 emissions) and a reduction of Scope 1 and Scope 2 GHG emissions by 40% by 2030 vs. a 2017 baseline	$2.5T over next 10 years for climate and sustainable development initiatives
Bank of America	Commitment includes financing activities, all bank operations and power generation, and supply chain (Scopes 1, 2 & 3)	$1T for its Environmental Business Initiative (in addition to $500B for social development target)
Wells Fargo	Commitment includes financed emissions (Scope 3 emissions)	$500B to support low-carbon transition by 2030
Citibank	Commitment includes net zero operations by 2030 and "carbon-intensive sectors with transition opportunities" of financing portfolio by 2050 (Scopes 1, 2 & some 3)	$1T in sustainable financing by 2030 ($500B for env. finance and $500B in affordable housing, economic inclusion, gender equity)
Goldman Sachs	Commitment includes achieving net zero for financing activities by 2050 and operations and supply chain by 2030 (Scopes 1, 2 & 3)	$750B in financing, investing, and advisory activity by 2030; by March 2021, had reached $156B of this goal

The Anti-ESG Movement & Anti-ESG Investors

- The Anti-ESG movement has emerged as a reactionary force as ESG practices have become more widespread among major U.S. public companies and primarily focuses on climate-related matters.
- Political leadership in some states have begun restricting the flow of state investment dollars to businesses that make climate-related goals or perform other ESG planning activities.
- Several ETFs have been launched in the past year focused on anti-ESG practices, including:
  - Only including companies frequently left out of ESG ETFs; and
  - Putting forward anti-ESG shareholder proposals.
- This trend often includes reframing a company's existing environmental and social practices and policies to differentiate them from climate-related and other "bad" ESG policies.

"The ESG movement has infiltrated investment standards with little scrutiny for several years . . ." – WSJ Editorial Board

"Your blatantly anti-fossil fuel policies would destroy Louisiana's economy" – Louisiana Treasurer, John Schroder, to BlackRock

"U.S. energy companies should evaluate all future and current investments . . . based on a financially measurable return on investment, regardless of any other social, political, cultural or environmental goals." – Strive Asset Management

Managing ESG Shareholder Proposals

Climate & Net Zero Shareholder Proposals
Set and publish medium- and long-term targets to reduce the greenhouse gas (GHG) of the Company's operations and energy products (Scope 1, 2, and 3) consistent with the goal of the Paris Climate Agreement.
Issue a report describing how the company could alter its business model to yield profits within the limits of a 1.5 degree Celsius global temperature rise by reducing its dependence on fossil fuels.
Issue an audited report to assess how the assumptions of the International Energy Agency's Net Zero by 2050 pathway would affect the assumptions, costs, estimates, and valuations underlying its financial statements, including long-term commodity and carbon prices, remaining asset lives, future asset retirement obligations, capital expenditures and impairments.
Issue a report analyzing the reliability of the Company's methane emission disclosures.

"Anti-ESG" Shareholder Proposals
Evaluate all projects based on financially measurable return on investment, without regard to any other social, political, cultural, or environmental goals.
Make capital investments in oil and gas production in a manner that maximizes long-run return on investment rather than to meet emissions reductions targets, net-zero goals, or other constraints not codified in law.
Rescind all commitments to emissions reductions.
Evaluate potential conflicts of interest borne by asset managers who pressure the board to adopt environmental or social policies.
Cease the use of corporate resources to publicly advocate for a carbon tax unless you can demonstrate that such activities contribute to creating shareholder value.
Cease the use of corporate resources to produce "sustainability" or "ESG" reports unless you can demonstrate that such activities contribute to creating shareholder value.

"Greenwashing"– Definitions and Issues

- The concept of "greenwashing" refers to false or misleading statements about the environmental impacts or sustainability of a particular practice or activity.
- For example, the SEC recently described "greenwashing" as occurring when companies "exaggerate their ESG practices or the extent to which their investment products or services take into account ESG factors." (87 Fed. Reg. 36,655 (June 17, 2022))
- Developing and asserting claims related to greenwashing appears to be a major priority for NGOs and could become an area of focus for government enforcement.
- Use of offsets will likely be a particular focus for greenwashing claims.

Greenwashing

- FTC Guidelines
  - Greenwashing and the FTC's "Green Guides" set out federal guidance on environmental marketing, warning what types of marketing claims the FTC might find to be deceptive or "greenwashing"
    - These are expected to be updated this year
  - Greenwashing under these Guidelines = Deceptive marketing tactics designed to convey a false impression of the company's or product's environmental soundness

- SEC Issues
  - Classic material misstatement and omissions framework
  - Be accurate; do what you say you're going to do
  - More detail required → more to get wrong / harder to call statements puffery or aspirational
  - New climate-related disclosures that will be included in annual reports and financial statements are subject to the officer certifications required by Exchange Act Rules 13a-14 and 15d-14
  - Liability easier to find under reporting requirements than previous anti-fraud framework
  - Materiality determinations of Scope 3 emissions will be a fact-specific inquiry
  - Possible reasonableness standard for incorporating supply chain data
  - Expanded liability under the proposed climate rules

Takeaways from the SEC Division of Examination April 2021 Risk Alert on Avoiding Greenwashing

☐ Standardization of terms

- Ensure the company's marketing and disclosure practices demonstrate a clear, standardized understanding of "ESG" and utilize consistent terminology to avoid misrepresentation, whether through false and misleading statements or simple confusion. Relatedly, substantiate the claims the company makes to include documentation (*e.g.*, research, selection, monitoring, and, where applicable, due diligence), clear records, and robust written policies and procedures.

☐ Be transparent as to the company's ESG strategy

- Make it clear to investors how ESG informs company decisions and how those metrics are measured.

☐ Be consistent

- Align disclosures concerning ESG approaches and strategies, as well as between actual company practice and marketing. Equally important: ensure that marketing, practices, and disclosures are updated as ESG strategies, approaches, and investing develop.

☐ Evaluate and adjust internal compliance and controls to adequately address ESG issues

- A company should develop, implement, and update all applicable policies and procedures regarding its ESG strategies to address, as appropriate, investing, analyses, processes, monitoring, and compliance. Additionally, a company's internal compliance should ensure accuracy and consistency is present across management practices and ESG-related disclosures.

☐ Educate personnel

- The importance of training a company's personnel on relevant ESG issues, such as disclosures, cannot be overstated. Knowledge is key here.

SEC Proposed Climate-Related Disclosure Rule

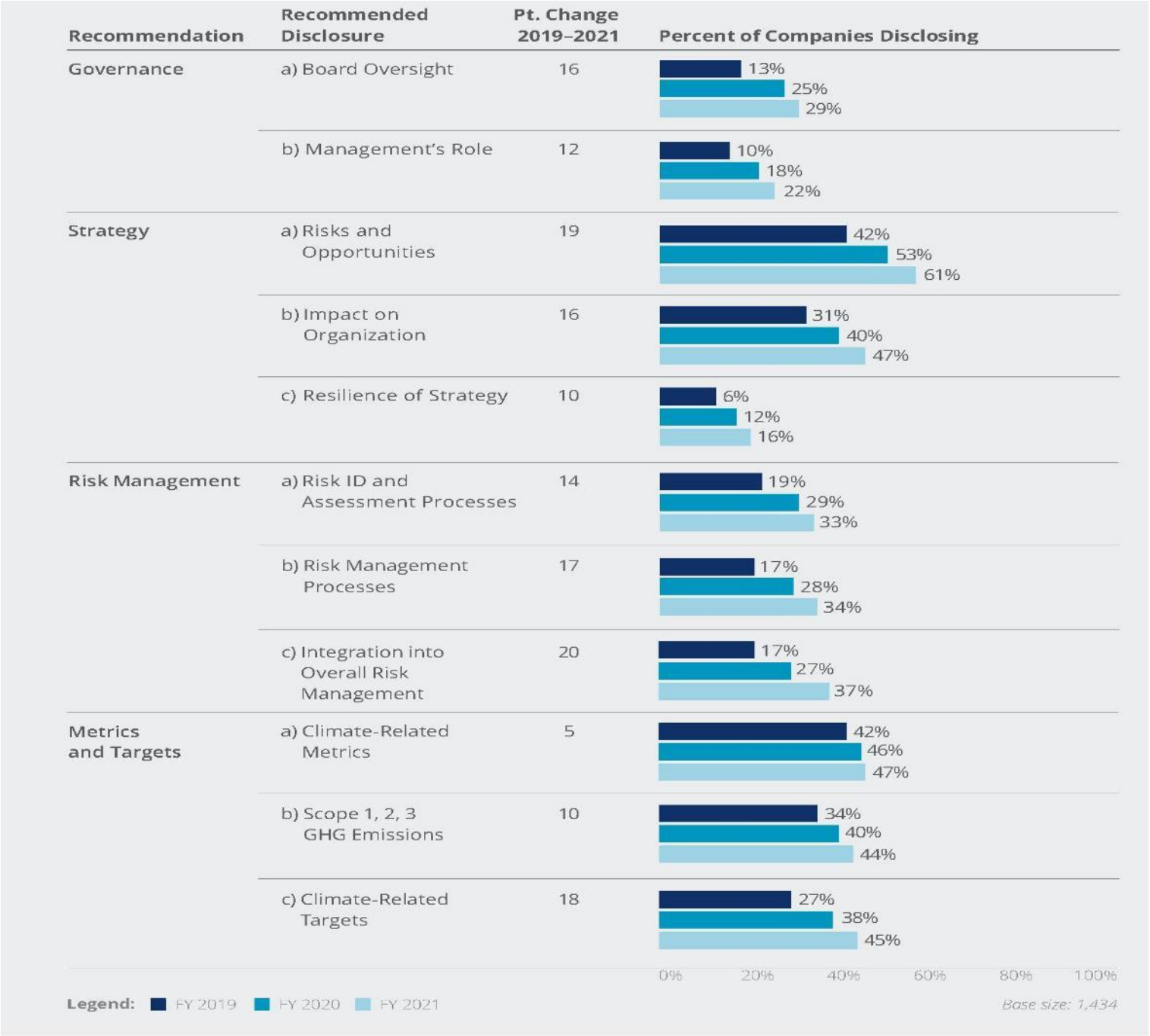
- Revisions to Regulation S-K
  - Required Disclosures on Governance, Strategy and Risk Management
  - Required Disclosures of GHG emissions
  - Attestation Requirements
  - Disclosure of certain other climate analyses, if being used
- Revisions to Regulation S-X
  - Disclosure on a line-item basis of
    - Financial impacts of severe weather events or other natural conditions
    - Financial impacts related to transition activities
    - Disclosure of aggregate expenditures to mitigate physical climate risks and exposure to transition risks
    - Disclosure of assumptions and estimates used in producing the climate-related financial disclosures
    - Impact of climate-related risks that are reasonably likely to have a material impact on the registrant on any of the required financial statement metrics
- Disclosure of climate opportunities is permitted but not required

Polling Question

Does your company publish a separate sustainability report?

A. Yes
B. No
C. N/A

More People Voluntarily Reporting: TCFD-Aligned Disclosures by Fiscal Year for 2019-2021



Managing SEC Inquiries

September 2021

Name
ABC Corporation
Address

Dear Issuer:

We have reviewed your filing and have the following comments regarding compliance with the topics addressed in the Commission's 2010 Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106 (Feb. 2, 2010). In some of our comments, we may ask you to provide us with information so we may better understand your disclosure. Please respond to these comments by providing the requested information and/or revising or updating your disclosure as applicable. If you do not believe our comments apply to your facts and circumstances, please tell us why in your response.

General

1. 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.

Risk Factors

2. Disclose the material effects of transition risks related to climate change that may affect your business, financial condition, and results of operations, such as policy and regulatory changes that could impose operational and compliance burdens, market trends that may alter business opportunities, credit risks, or technological changes.

3. Disclose any material litigation risks related to climate change and explain the potential impact to the company.

Management's Discussion and Analysis of Financial Condition and Results of Operations

4. There have been significant developments in federal and state legislation and regulation and international accords regarding climate change that you have not discussed in your filing. Please revise your disclosure to identify material pending or existing climate change-related legislation, regulations, and international accords and describe any material effect on your business, financial condition, and results of operations.

5. Revise your disclosure to identify any material past and/or future capital expenditures for climate-related projects. If material, please quantify these expenditures.

6. To the extent material, discuss the indirect consequences of climate-related regulation or business trends, such as the following:
   - decreased demand for goods or services that produce significant greenhouse gas emissions or are related to carbon-based energy sources;
   - increased demand for goods that result in lower emissions than competing products;
   - increased competition to develop innovative new products that result in lower emissions;
   - increased demand for generation and transmission of energy from alternative energy sources; and
   - any anticipated reputational risks resulting from operations or products that produce material greenhouse gas emissions.

7. If material, discuss the physical effects of climate change on your operations and results. This disclosure may include the following:
   - severity of weather, such as floods, hurricanes, sea levels, arability of farmland, extreme fires, and water availability and quality;
   - quantification of material weather-related damages to your property or operations;
   - potential for indirect weather-related impacts that have affected or may affect your major customers or suppliers;
   - decreased agricultural production capacity in areas affected by drought or other weather-related changes; and
   - any weather-related impacts on the cost or availability of insurance.

8. Quantify any material increased compliance costs related to climate change.

9. If material, provide disclosure about your purchase or sale of carbon credits or offsets and any material effects on your business, financial condition, and results of operations.

We remind you that the company and its management are responsible for the accuracy and adequacy of their disclosures, notwithstanding any review, comments, action or absence of action by the staff.

Enhanced Need for Disclosure Controls and Procedures

- You have Rule 10b-5 liability around any climate disclosures/commitments in sustainability reports and other materials NOW, creating litigation and enforcement risks.
- Under the proposed climate disclosure rules, many current climate disclosures/statements in sustainability reports and other publications will ultimately become part of ’33/’34 Act filings, enhancing litigation and enforcement risks.
- Both the SEC and the plaintiff’s bar are pursuing greenwashing claims.
- To mitigate these risks, companies should take steps now to:
  1. Develop disclosure controls across their respective organization to ensure accuracy of ALL climate-related statements – this review process would be similar to ’34 Act reports with back-up binders, layers of review across the organization, and external advisor review.
  2. Standardize disclosure of “ESG” terms and strategy (*i.e.*, are the company’s website, investors presentations, sustainability report and proxy all singing the same tune?).
  3. Tailor disclaimers specifically to climate-related risks (*e.g.,* cautionary language for forward-looking statements).
- Develop and document internal controls around climate in a risk management function.

TCFD and the GHG Protocol

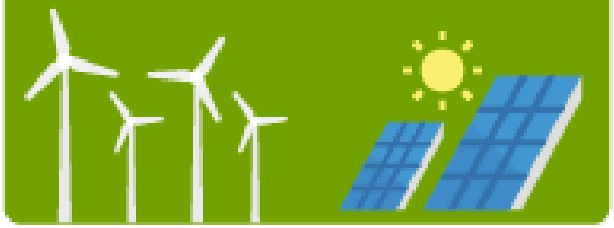
TCFD | TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES

Net Zero and GHG Reduction Targets

What Is Net Zero?

Measures to lower emissions

For example:
-Invest in green technology



+

Measures to remove emissions

For example:
-Forest expansions
-Direct air capture

=

Net Zero

Balance between amount of GHG produced and removed from the atmosphere

Getting to Net-Zero: Carbon Offset Certification & Voluntary Markets

Real	Results in actual carbon reduction, not relocation of emissions
Measurable	Each credit should represent one metric ton of greenhouse gas
Permanent	Reduction will continue for entire certification period
Additional	Carbon reduction would not have happened without the offset
Independently Verified	Multiple independent verifiers operate in the market
Unique	No double-counting offsets

Independent providers each have their own criteria

Ongoing efforts to centrally regulate to create fungible, trustworthy products

New Developments Could Impact Emission Reduction Goals

- New developments are expected with respect to the GHG Protocol and major offset registries that could restrict pathways to net-zero or add burdens.
  - GHG Protocol Carbon Removals and Land Sector Initiative Guidance (Forthcoming 2022)
    - Role of CCS and emission reductions outside the corporate value chain
  - American Carbon Registry
    - Additionality and stacking offsets with other CCS incentives (*i.e.*, 45Q, LCFS credits)
- Other Developments
  - International Sustainability Standards Board to make disclosure of Scope 3 emissions mandatory
  - COP27

Shareholder Proposals, Trends and Activism

Shareholder Proposals and SEC Rules

Universal Proxy Cards

- New Rule 14a-19 provides for, among other things, a “universal proxy card” which lists the names of all duly-nominated director candidates for election, regardless of whether the candidates were nominated by management or shareholders.
- While the new proxy season has only just begun, the first universal proxy cards have already hit EDGAR under the new rule:
  - Apartment Investment and Management Company (NYSE: AIV)
  - Argo Group (NYSE: ARGO)
- The Rule is largely silent as to how the proxy card (not the proxy materials) should set forth specific voting instructions, so we expect to see more companies and activists to test the boundaries of what the SEC will allow them to put on a proxy card.

Universal Proxy Cards

Apartment Investment and Management Company — **WHITE PROXY CARD**

THE BOARD OF DIRECTORS RECOMMENDS A VOTE "FOR" ALL THREE (3) COMPANY NOMINEES AND NOT TO VOTE FOR ANY OF THE REMAINING TWO (2) LAND & BUILDINGS NOMINEES LISTED IN PROPOSAL 1 BELOW.

1. To elect three (3) directors, for a term of two years each, to serve until the 2024 Annual Meeting of Stockholders and until their successors are duly elected and qualified – Vote "FOR" up to three (3) nominees in total. You are permitted to vote for fewer than three (3) nominees. If you vote "FOR" fewer than three (3) nominees, your shares will only be voted "FOR" those nominees you have so marked. If you vote "FOR" more than three (3) nominees, all of your votes on Item 1 will be invalid and will not be counted.

COMPANY NOMINEES

The Board of Directors recommends a vote "FOR" the following three (3) Company Nominees:

	FOR	WITHHOLD
(1A) Jay Paul Leupp	☐	☐
(1B) Michael A. Stein	☐	☐
(1C) R. Dary Stone	☐	☐

LAND & BUILDINGS NOMINEES OPPOSED BY THE COMPANY

The Board of Directors recommends that you do NOT vote for any of the following two (2) Land & Buildings Nominees:

	FOR	WITHHOLD
(1D) Michelle Applebaum	☐	☐
(1E) James P. Sullivan	☐	☐

BLUE UNIVERSAL PROXY CARD

[X] Please mark vote as in this example

LAND & BUILDINGS STRONGLY RECOMMENDS THAT STOCKHOLDERS VOTE "FOR" THE TWO LAND & BUILDINGS NOMINEES AND "FOR" ONE COMPANY NOMINEE UNOPPOSED BY LAND & BUILDINGS, AND NOT TO VOTE "FOR" EITHER OF THE REMAINING TWO COMPANY NOMINEES LISTED BELOW IN PROPOSAL 1.

YOU MAY SUBMIT VOTES "FOR" UP TO THREE NOMINEES IN TOTAL. YOU ARE PERMITTED TO VOTE FOR LESS THAN THREE NOMINEES. IMPORTANTLY, IF YOU MARK MORE THAN THREE "FOR" BOXES WITH RESPECT TO THE ELECTION OF DIRECTORS, ALL OF YOUR VOTES FOR THE ELECTION OF DIRECTORS WILL BE DEEMED INVALID. IF YOU MARK FEWER THAN THREE "FOR" BOXES WITH RESPECT TO THE ELECTION OF DIRECTORS, THIS PROXY CARD, WHEN DULY EXECUTED, WILL BE VOTED ONLY "FOR" THOSE NOMINEES YOU HAVE SO MARKED.

1. Election of three nominees to serve as directors until the Company's 2024 annual meeting of stockholders and until their successors have been duly elected and qualified.

LAND & BUILDINGS NOMINEES	FOR	WITHHOLD
a) Michelle Applebaum	☐	☐
b) James P. Sullivan	☐	☐

COMPANY NOMINEE UNOPPOSED BY LAND & BUILDINGS	FOR	WITHHOLD
a) Jay Paul Leupp	☐	☐

COMPANY NOMINEES OPPOSED BY LAND & BUILDINGS	FOR	WITHHOLD
a) Michael A. Stein	☐	☐
b) R. Dary Stone	☐	☐

Universal Proxy Cards

- AIM ImmunoTech (NYSE American: AIM) rejected a proxy contest by Jonathan Jorgl and other members of an activist group that sought to take control of the Company's board via universal proxy card.
- AIM argued that the activist's notice failed to disclose members of the activist group and arrangements and understandings involving the undisclosed group members as required by AIM's bylaws.
- The Delaware Court of Chancery denied the activist's motion for a mandatory preliminary injunction that sought to require the AIM board to accept the activist director nominations and include such nominees on a universal proxy card, finding that the activist failed to show its director nomination notice complied with AIM's bylaws and that evidence suggested that the activist's nomination notice was misleading.

Delaware Court Rules in Favor of AIM ImmunoTech and Declines to Declare Activist Group's Nominations Valid

Court Denies Jonathan Jorgl's Request for Preliminary Injunction; Finds that Jorgl Failed to Show Director Nomination Notice Complied with AIM's Bylaws and that Evidence Suggests Notice was Misleading

Activist Group Cannot Nominate Directors to AIM's Board this Year, and Proxies and Votes in Favor of Activist Group's Nominees Will Be Disregarded

Company Urges Shareholders to Support Continued Positive Momentum by Re-Electing the AIM Board at November 3, 2022 Annual Meeting

October 31, 2022 07:30 AM Eastern Daylight Time

Shareholder Proposal Trends

Shareholder Proposals Submitted				
Proposal Category[1]	2022	2021	2022 vs. 2021[2]	Largest Subcategory of Proposals
Governance	246	287	↓ 14%	• Shareholder Special Meeting Proposals (most often seeking to lower the applicable stock ownership threshold and/or eliminate any minimum holding period for satisfying that threshold)
Social	287	239	↑ 20%	• Anti-Discrimination Proposals • Diversity-Related Proposals • Pay Disparity Proposals

(1) Shareholder proposals are categorized based on subject matter as follows:

- **Governance proposals** include proposals addressing: (i) shareholder special meeting rights; (ii) proxy access; (iii) majority voting for director elections; (iv) independent board chairman; (v) board declassification; (vi) shareholder written consent; (vii) elimination/reduction of supermajority voting; (viii) director term limits; (ix) stock ownership guidelines; and (x) shareholder approval of bylaw amendments..
- **Social proposals** include proposals addressing: (i) discrimination and other diversity-related issues (including board diversity and racial equity audits); (ii) employment, employee compensation or workplace issues (including gender/ethnicity pay gap); (iii) board committees on social and environmental issues; (iv) social and environmental qualifications for director nominees; (v) disclosure of board matrices including director nominees' ideological perspectives; (vi) societal concerns, such as human rights, animal welfare, and the opioid crisis; and (vii) employment or workplace policies, including the use of concealment clauses, mandatory arbitration, and other employment-related contractual obligations.
- **Environmental proposals** include proposals addressing: (i) climate change (including climate change reporting, climate lobbying, greenhouse gas emissions goals, and climate change risks); (ii) plastics, recycling, or sustainable packaging; (iii) renewable energy; (iv) environmental impact reports; and (v) sustainability reporting.
- **Civic engagement proposals** include proposals addressing: (i) political contributions disclosure; (ii) lobbying policies and practices disclosure; and (iii) charitable contributions disclosure.
- **Executive compensation proposals** include proposals addressing (i) performance metrics, including the incorporation of sustainability-related goals; (ii) compensation clawback policies; (iii) severance and change of control payments; (iv) equity award vesting; (v) executive compensation disclosure; (vi) limitations on executive compensation; and (vii) CEO compensation determinations.

Shareholder Proposal Trends

Shareholder Proposals Submitted				
Proposal Category[1]	2022	2021	2022 vs. 2021[2]	Largest Subcategory of Proposals
Environmental	169	112	↑ 51%	• Climate Change Proposals (including climate change reporting, climate lobbying, greenhouse gas emissions goals, and climate change risk)
Civic Engagement	103	76	↑ 36%	• Lobbying Spending Proposals • Political Contribution Proposals • Charitable contribution
Executive Compensation	36	49	↓ 27%	• Proposals for Submitting Severance Agreements to a Shareholder Vote • Note: Proposals to tie ESG metrics to compensation declined significantly

(2) Data in this column refers to the percentage increase or decrease in shareholder proposals submitted in 2022 as compared to the number of such proposals submitted in 2021.

Polling Question

Does your organization have a separate ESG board committee?

A. Yes
B. No
C. N/A

Shareholder Proposal Trends

- Shareholder Proposal Trends
  - The number of proposals submitted increased in 2022, up by 8% from 2021 (the highest number of shareholder proposal submissions since 2016).
  - Sustainability remains a hot topic in shareholder proposals (as opposed to Governance and Compensation-related topics), representing 55% of proposals on ballots in 2022.
  - Although the rate of environmental and social shareholder proposals submitted increased in 2022, so did the failure rate of such proposals (up from 80.83% in 2021 to 88.81% in 2022), reversing a trend of decreasing failure rate from 2017 to 2021.
  - Climate-related proposals experienced a significant increase in volume in 2022, nearly doubling the number of climate-related proposals on the ballot in 2021. However, the median shareholder support for these proposals fell to the lowest level in the last five years (27% in 2022 vs. 53% in 2021).

2021 Guidance on 14a-8

- In 2021, the SEC issued Staff Legal Bulletin No. 14L, which rescinded Staff Legal Bulletins Nos. 14I, 14J and 14K, and provided new guidance that affected several arguments for proposal exclusion:
  - Economic Relevance Exception (Rule 14a-8(i)(5))
    - The SEC will not (1) allow exclusion of proposals that raise issues of broad social or ethical concern related to the company's business, even if the relevant business falls below the economic thresholds of Rule 14a-8(i)(5); and (2) expect companies to include a board analysis regarding the application of the exception.
    - This made it more difficult to exclude shareholder proposals with economic relevance arguments.
  - Ordinary Business Exception (Rule 14a-8(i)(7))
    - Nexus: Instead of focusing on the "nexus" between a significant policy issue and the company, the Staff now focuses on the social policy significance of the issue that is the subject of the proposal, considering whether it raises issues with a broad societal impact such that those issues transcend the ordinary business of the company. Additionally, the Staff no longer expects companies to include a board analysis regarding the application of the exclusion.
      - This made it more difficult to exclude environmental and social proposals based on Rule 14a-8(i)(7).

2021 Guidance on 14a-8

- Ordinary Business Exception (Rule 14a-8(i)(7))
  - Micromanagement: In considering micromanagement arguments, the Staff now focuses on the granularity sought in the proposal and whether and to what extent it inappropriately limits the discretion of the board or management. In determining whether a proposal probes matters “too complex” for shareholders, the Staff may consider the sophistication of investors generally on the matter, the availability of data, and the robustness of public discussion and analysis on the topic, as well as references to well-established national or international frameworks when assessing proposals related to disclosure, target setting, and timeframes as indicative of topics that shareholders are well-equipped to evaluate.
    - This made it more difficult to exclude proposals regarding environmental and social proposals that contain specific targets and timeframes, such as climate change proposals.

- **Effect of 2021 Guidance**
  - The 2021 updates to the guidance on Rule 14a-8 has already had a significant effect on shareholder proposal trends:
    - The overall success rate for no-action requests plummeted to 38%, marking a drastic decline from the success rates of 71% in 2021.
    - Success rates in 2022 declined on every basis for exclusion, with the most drastic decline in success rates for procedural (56% in 2022, down from 84% in 2021), substantial implementation (13% in 2022, compared with 55% in 2021), and ordinary business grounds (24% in 2022, compared with 65% in 2021).
    - For the first time in 2022, the majority of ESG submissions reached a vote.

Proposed 14a-8 Rules

- On July 13, 2022, the SEC proposed rules to amend Rule 14a-8 to revise three substantive bases for excluding shareholder proposals:
  - Substantial implementation exclusion
    - The proposed amendment provides that to exclude a proposal the company must have already “implemented the essential elements of the proposal”, with the SEC staff’s analysis in determining which elements are essential being guided by “the degree of specificity of the proposal and of its stated primary objectives.”
    - This would narrow this basis of exclusion by requiring the company to have implemented the essential *elements* of the proposal, rather than just the essential *objectives*.
  - Duplication exclusion
    - The proposed amendments would specify that a proposal "substantially duplicates" another proposal if it meets three conditions: (1) it addresses the same subject matter, (2) seeks the same objective, and (3) is by the same means.
    - This would narrow this basis of exclusion since two proposals would no longer be "substantially duplicative" if they seek different objectives and means despite addressing the same subject matter.
  - Resubmission exclusion
    - The proposed amendments would: (1) provide that a proposal constitutes a resubmission if it "substantially duplicates" a prior proposal; and (2) define "substantially duplicates" the same way as under the "duplication" standard.
    - This would limit this basis of exclusion by requiring that the proposal address the same subject matter as a prior proposal, ***and*** that the proposal seek the same objective by the same means.
- If finalized, the amendments would be to limit the bases of exclusions for companies seeking to exclude shareholder proposals and lead to more proposals making it on companies' ballots.

What To Do If You Receive a 14a-8 Proposal

- **Options for Responding**
  - Exclusion on Procedural Grounds
  - Exclusion on Substantive Grounds
  - Exclusion without a No-Action Letter
  - Voluntary Withdrawal of a Proposal
- **Recommendations**
  - Consider sending deficiency notices and other correspondence by more than one method, including through trackable first-class mail.
  - Stay informed on what the Staff considers to be significant policy issues given the changes to the ordinary business exclusion.
  - Consider providing email addresses in proxy statements.
  - Be ready to send more than one deficiency notice and consider sending more than one deficiency notice if any prior deficiency notices did not identify the specific defect(s) in a timely received proof of ownership.
  - Save, copy, and catalogue everything (*e.g.*, emails, letters, other correspondence, etc.) to preserve the record.

Glass Lewis Reminders

- Glass Lewis will generally vote against the chair of the nominating and/or governance committees:
  - At companies that have fewer than two gender diverse directors or, for boards with six or fewer total directors, one gender diverse director
  - At companies that have not provided required diversity disclosures
  - At companies in the S&P 500 index that have failed to provide diversity disclosure for each of the four categories tracked by Glass Lewis: (1) percentage of racial/ethnic diversity represented on the board, (2) whether the board's definition of diversity explicitly includes gender and/or race/ethnicity, (3) whether the board has a policy requiring women and other diverse individuals to be part of the director candidate pool, and (4) board skills disclosure
  - At companies in the S&P 500 index that do not provide explicit disclosure concerning the board's role in overseeing environmental and/or social issues
  - At companies with a multi-class share structure with unequal voting rights when the company does not provide for a reasonable sunset of the multi-class share structure (generally seven years or less)
  - At companies where the board has waived self-imposed term/age limits two years in a row unless a compelling rationale is provided for the waiver (*e.g.,* consummation of a corporate transaction)
- Beginning in 2023, Glass Lewis will generally vote against the chair of the nominating and/or governance committees:
  - At companies in the S&P 500 index that have failed to provide any disclosure of individual or aggregate racial/ethnic minority demographic information

ISS Reminders

- ISS will generally vote against:
  - For companies that are significant greenhouse gas emitters through their operations or value chain (defined as those on the current Climate Action 100+ Focus Group), the responsible incumbent director, committee or full board when the company is not taking minimum steps needed to understand, assess, and mitigate climate-related risks
  - For companies in Russell 3000 or S&P 1500, the chair of the nominating and/or governance committee if the board has no apparent racial or ethnic diversity, unless there was racial/ethnic diversity on the board at the preceding annual meeting and the board makes a firm commitment to return to a racially/ethnically-diverse status within a year
- Beginning in 2023, ISS will generally vote against:
  - The chair of the nominating and/or governance committee for any companies whose boards have no women, unless there was a woman on the board at the preceding annual meeting and the board makes a firm commitment to return to a gender-diverse status within a year
  - Directors individually, committee members, or the entire board (except new nominees, who will be considered on a case-by-case basis) at all companies with unequal voting rights (subject to certain exceptions, including for MLPs/REITs and for companies with a sunset of seven years or less)

BlackRock Reminders

- BlackRock may vote against:
  - Members of the compensation committee where a company has proposed an equity compensation plan that is not aligned with shareholders' interests
  - Boards that appear to have an insufficient mix of short-, medium-, and long-tenured directors (but will defer to boards' determinations regarding whether age limits or term limits are the most efficient and objective mechanisms for ensuring periodic board refreshment, considering average board tenure to evaluate board processes for ensuring adequate renewal)
- BlackRock may vote for:
  - Shareholder proposals asking companies to disclose climate plans aligned with several expectations
  - Shareholder proposals requesting additional disclosure regarding political activities where BlackRock (1) identifies a material inconsistency between the company's stated position on material policy matters and the material positions taken by industry specific groups of which the company is a member and (2) feels that further transparency may clarify how the company's political activities support its long-term strategy
- Additional Reminders:
  - BlackRock is asking companies to make several diversity related disclosures and encourages each board to have 30% diversity of membership, at least two directors who identify as female, and at least one director who identifies as a member of an underrepresented group.
  - BlackRock expects companies to demonstrate a robust approach to human capital management and provide shareholders with disclosure to understand how the company's approach aligns with its strategy and business model.

Other Updates: Guidance on Overly Prescriptive Proposals and BlackRock Voting Choice Program

- Changes to 14a-8 have led to more prescriptive proposals being included on the ballot, which certain proxy advisory firms and institutional investors have indicated they will not support:
  - ISS and Glass Lewis have been recommending that shareholders not support overly prescriptive or constraining proposals.
  - BlackRock and Vanguard have both expressed that they will not support proposals that are overly prescriptive and emphasized that their voting will reflect their overall concern for long-term value.
- BlackRock announced in 2021 that, beginning in 2022, it would launch its BlackRock Voting Choice Program, allows certain clients to participate in proxy voting decisions (including pension funds, insurance companies, and corporations invested in many index strategies), and since then has expanded eligibility.
  - As of September 2022, clients representing $452 billion in assets have used BlackRock Choice.
  - Charles Schwab and Vanguard have recently stated that they are exploring similar programs.
  - This could mean that companies will need to engage with a broader set of shareholders, and it could be more expensive to try to reach a more expansive base of voting investors.

Final Proxy Voting Advice Rule

- On July 13, 2022, the SEC adopted final rules (effective as of September 2022) regarding the applicability of the proxy rules to proxy advisory firms.
- The final rules rescinded two key sections applied to proxy advisory firms by the SEC in 2020:
  - Companies that are the subject of proxy voting advice have such advice made available to them before or at the same time proxy advisory firms make it available to their clients; and
  - Clients of proxy advisory firms are notified of any written responses by companies to such proxy voting advice.
- The rules also rescinded (1) the 2020 supplemental guidance regarding the proxy voting obligations of investment advisers and (2) a note to Rule 14a-9 that provided examples of situations when the failure to disclose material information regarding proxy voting advice may be misleading and discussed limited circumstances under which statements of opinion would subject proxy advisors to liability under the Rule.
- The final rules do however leave the other aspects of the 2020 rules intact, including:
  - The determination that voting advice is a solicitation subject to the proxy rules; and
  - The requirement that proxy advisory firms provide conflicts of interest disclosure in order to rely on the exemptions to the proxy rules' information and filing requirements.

Corporate Control Contests

Introduction to Shareholder Activism: Forms of Activism

Social Activism

- Activists promote social, political, economic or environmental change at target companies (e.g. “2 degrees Celsius,” no fracking, recycling, etc.)

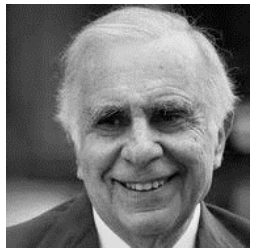
Governance Activism

- Activists call on the company to conform to so-called “best practices” related to corporate governance (e.g. proxy access, repeal poison pill, declassify staggered board, etc.)

Economic Activism

- Activists attempt to effect change at a public company in order to unlock value for themselves and other shareholders

Introduction to Shareholder Activism: Celebrity Activists



Carl Icahn

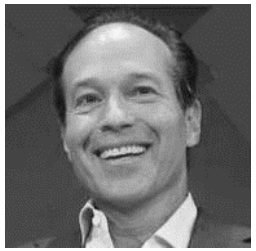
AIG, Chesapeake, CVR Energy, Transocean, Talisman Energy, Freeport-McMoRan, Cheniere

David Einhorn

Apple, Oil States, Civeo, GM, Pioneer Natural Resources

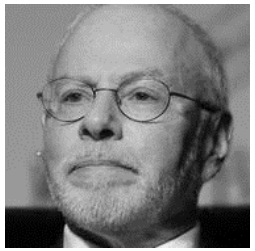
Bill Ackman

Target, Herbalife, jcp, Allergan, Valeant, ADP, Mondelēz International



Barry Rosenstein

Marathon, QEP, ConAgra Foods, Civeo, Whole Foods, Qualcomm, Oil States, Apache



Paul Singer

Hess, Novell, Citrix, Juniper Networks, bhpbilliton, Arcomic

Daniel Loeb

Sony, Nestlé, Yahoo!, Sotheby's, Murphy Oil Corporation

Nelson Peltz

Pentair, GE, Wendy's, P&G, DuPont, Sysco, Kraft, Pepsi

Jeff Smith

macy's, Luby's, Aol., Darden Restaurants

Jeff Ubben

Rolls-Royce, Baker Hughes, Dresser-Rand, Microsoft, American Express

Keith Meister

Yum!, Williams, Crown Castle

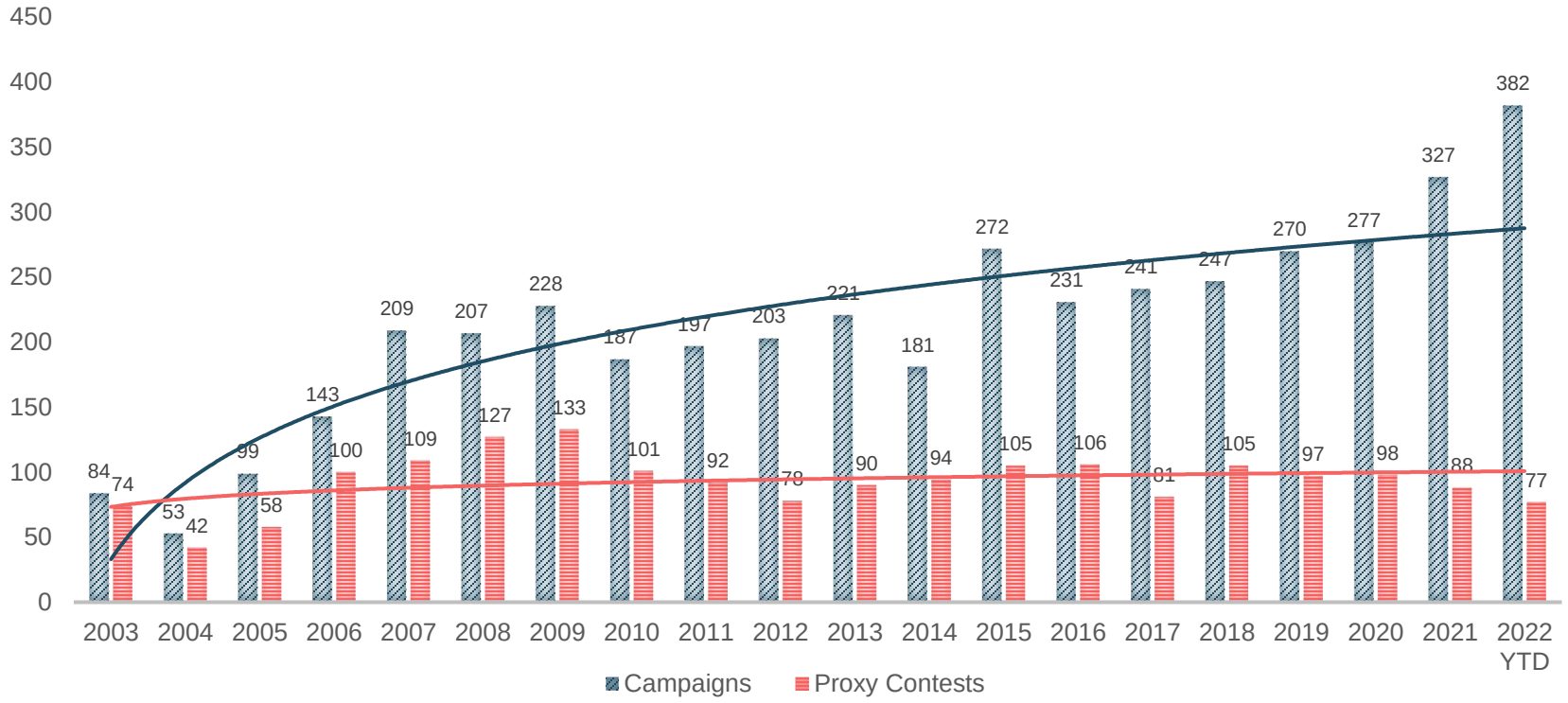
Introduction to Shareholder Activism: Well-Known Activists

- Ancora Advisors LLC
- Barington Companies Investors LLC
- Basswood Capital Management LLC
- Biglari Capital LLC
- Bulldog Investors LLC
- Cannell Capital LLC
- Carlson Capital LP
- Cevian Capital AB
- City of London Investment Management Co. Ltd.
- Clinton Group, Inc.
- Clover Partners LP
- Corvex Management LP
- Crystal Amber Advisers (UK) LLP
- Elliott Management Corp.
- Engaged Capital LLC
- Engine Capital Management LP
- Fondren Management LP
- FrontFour Capital Group LLC
- GAMCO Asset Management, Inc.
- Greenlight Capital, Inc.
- Highland Capital Management LP
- Icahn Associates Holding LLC
- JANA Partners LLC
- Karpus Management, Inc.
- Land & Buildings Investment Management LLC
- Legion Partners Asset Management LLC
- Mangrove Partners
- Marcato Capital Management LP
- Northern Right Capital Management LP
- Oasis Management (Hong Kong) LLC
- Osmium Partners LLC
- Pershing Square Capital Management LP
- PL Capital Advisors LLC
- Privet Fund Management LLC
- Raging Capital Management LLC
- Red Mountain Capital Partners LLC
- Sandell Asset Management Corp.
- Sarissa Capital Management LP
- Southeastern Asset Management, Inc.
- Starboard Value LP
- Steel Partners LLC
- Stilwell Value LLC
- TCI Fund Management Ltd.
- Third Point LLC
- Trian Fund Management LP
- ValueAct Capital Management LP
- Veteri Place Corp.
- VIEX Capital Advisors, LLC
- Voce Capital Management LLC
- Wynnefield Capital, Inc.

Introduction to Shareholder Activism: Campaign Themes

M&A	• Sale of company or other strategic transaction • Spin-off or sale of divisions or assets • Activism against M&A transactions
Balance Sheet	• Share buyback program • Special dividend
Operational	• Change in management • Eliminate business lines or products • Pursue new business strategies • Pursue cost-cutting measures
Corporate Governance	• Change board composition • Separate chairman/CEO roles • Shareholder rights/takeover defenses • Reform executive and/or director compensation • Related party transactions

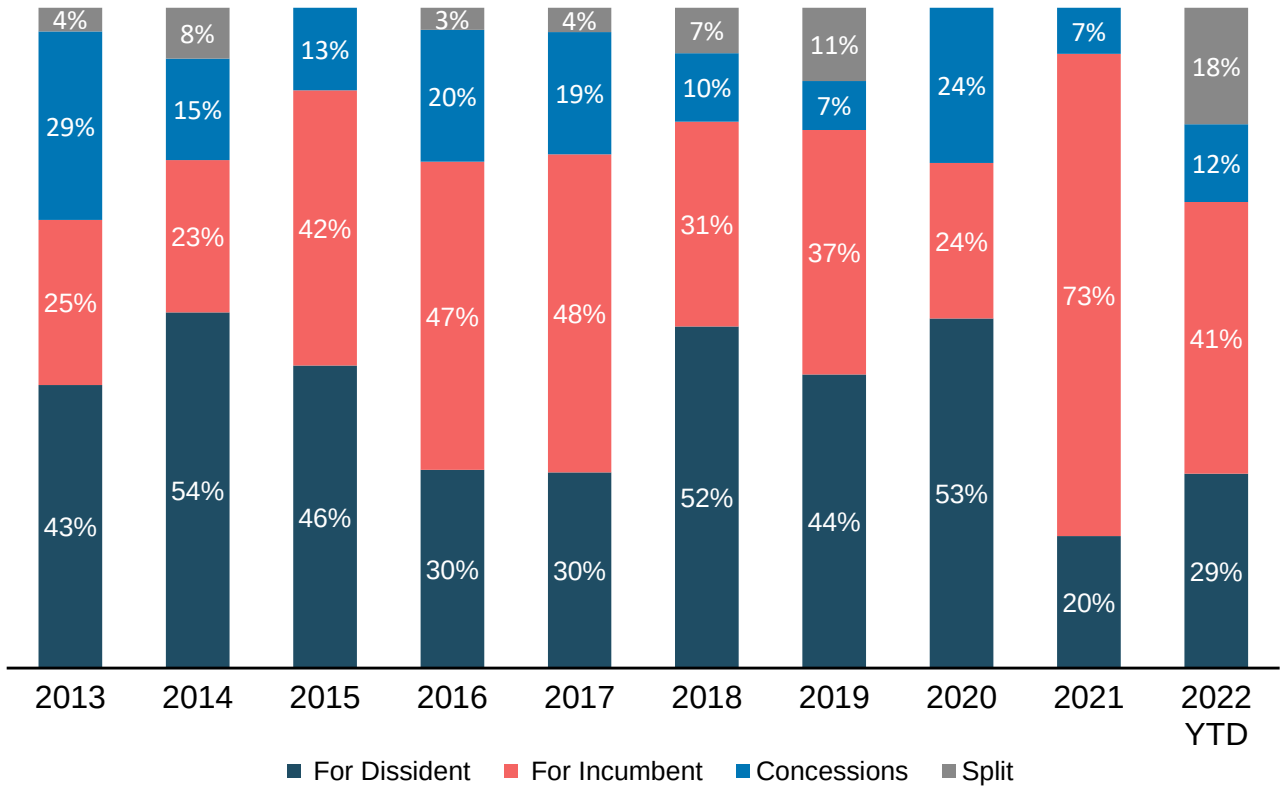
The Current Activism Landscape: The Tide of Shareholder Activism Keeps Rising



(*"The Tide Of Shareholder Activism Keeps Rising" Source: FactSet as of November 1, 2022, based upon meeting date and proxy contests only.)*

The Current Activism Landscape: ISS Recommendations 2013 – 2022 YTD

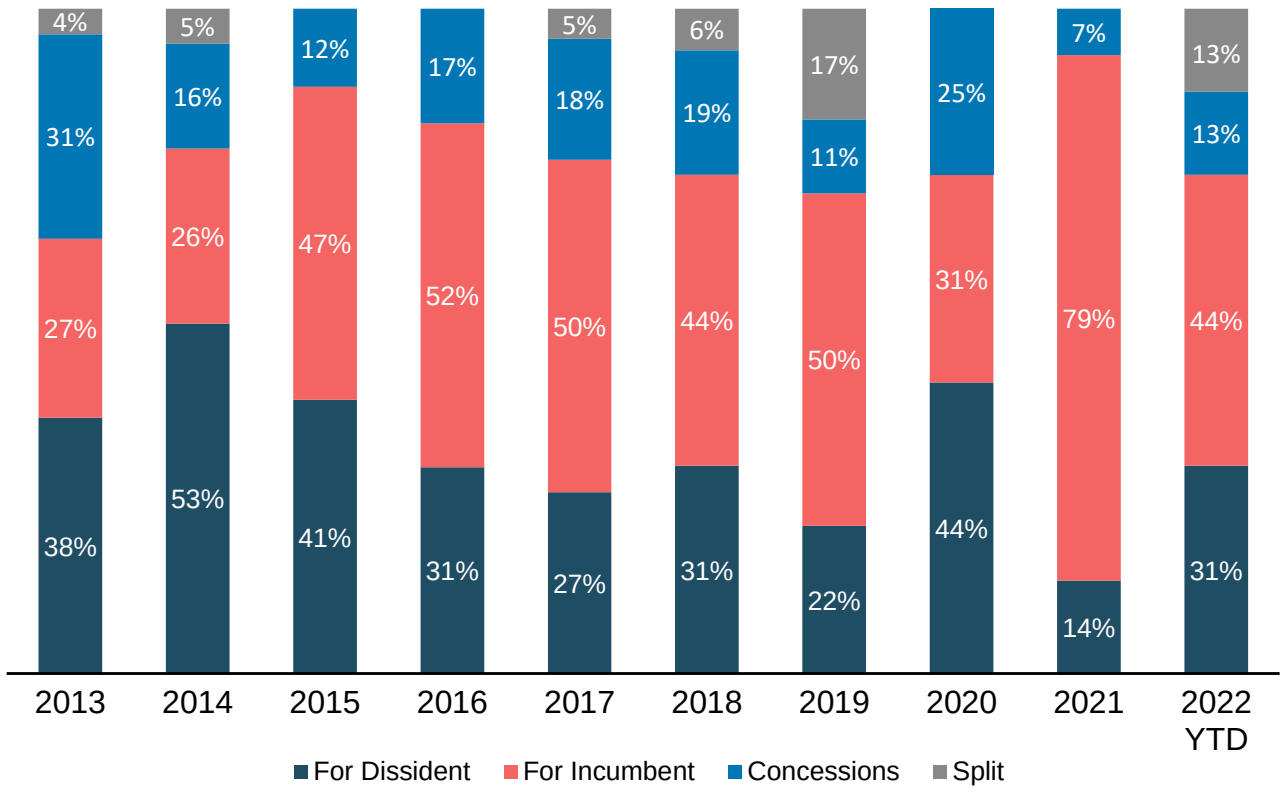
ISS Has Recently Become More Activist-Friendly



(Source: FactSet as of November 1, 2022, based upon meeting date and proxy contests only.)

The Current Activism Landscape: Glass Lewis Recommendations 2013 – 2022 YTD

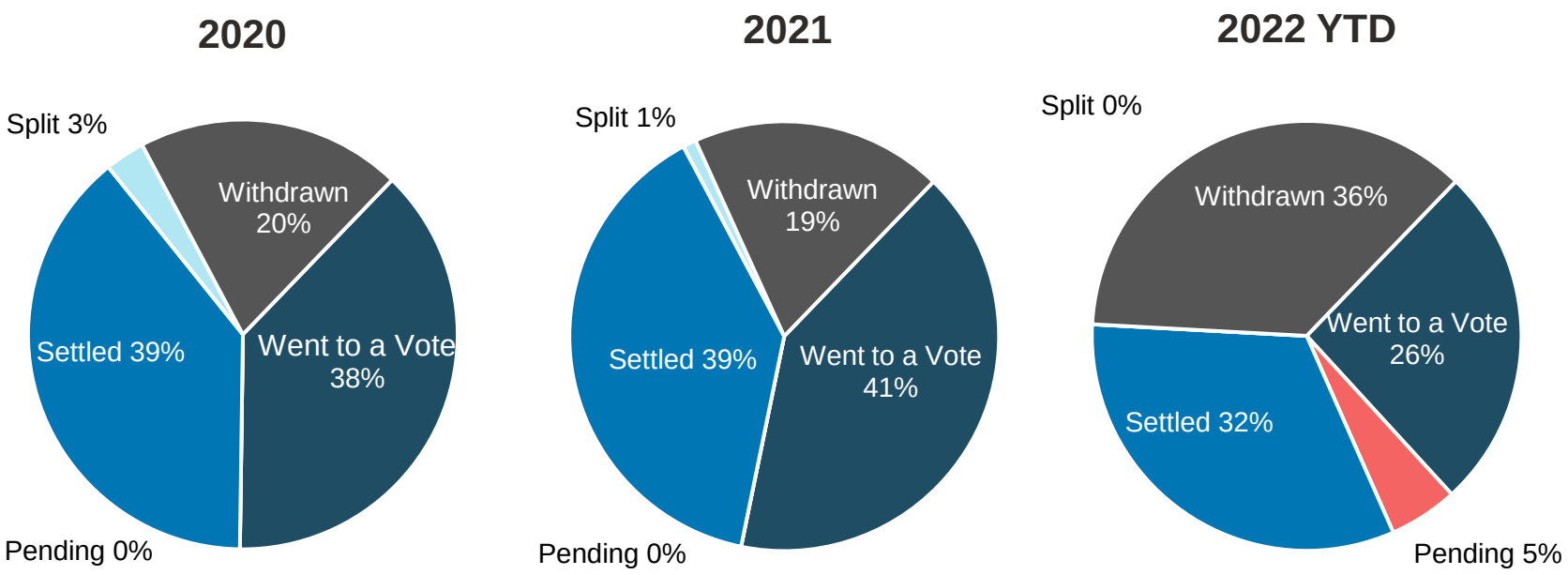
Glass Lewis Has Been More Board-Friendly



(*Source: FactSet as of November 1, 2022, based upon meeting date and proxy contests only.*)

The Current Activism Landscape: Proxy Contest Resolutions

Many Proxy Fights Don’t Go the Distance



(*Source: FactSet as of November 1, 2022, based upon meeting date and proxy contests only.)*

Campaign Stages: Lifecycle of an Activist Campaign

As the campaign stages progress, the level of hostility increases between the company and the activist.

Stakebuilding
- Accumulate Strike
  - Derivatives
  - Acting in concert ("wolf pack")
- Disclose Stake
  - Hart-Scott-Rodino notification
  - Form 13F filings
  - Schedule 13D/G filings

Engagement
- Private Engagement
  - Private letters
  - Meetings with executives and board members
  - Contact individual directors
- Public Engagement
  - "White Papers"
  - Public letters
  - Press releases
  - Public statements
  - Questions on investor calls

Proxy Contest
- Proxy Contest
  - Short slate vs. full slate
  - Annual meeting vs. special meeting vs. consent solicitation
  - Rule 14a-8 shareholder proposals
- Withhold the Vote
  - Majority voting
  - Plurality voting with resignation policy

Litigation
- Lawsuit
  - Compel shareholder meeting
  - Access books and records
  - Dismantle legal defenses
  - Reverse board decisions
- Regulatory
  - SEC poison pen letters
  - Other regulatory complaints

Takeover Bid
- Activist as Bidder
  - Stalking horse bid
  - Joint bid with strategic bidder
- Activist as Facilitator
  - Activist encourages friendly third-party bids
  - Activist supports unsolicited or hostile bid

Mock Proxy Fight: Typical Timeline

120 to 90 Days
- Notice of nomination of opposing director slate
- Demand for shareholder list

75 to 60 Days
- File preliminary proxy statement (10 day SEC review period; multiple rounds if possible)

45 to 40 Days
- File definitive proxy statement
- Mail 1st fight letter

38 to 32 Days
- Press release
- Mail 2nd fight letter

31 to 24 Days
- Press release
- Mail 3rd fight letter

21 to 14 Days
- ISS/Glass Lewis meetings
- Press release
- Mail 4th fight letter

14 to 7 Days
- ISS and Glass Lewis reports
- Issue press releases in response

10 to 7 Days
- Press release
- Mail 5th fight letter

5 to 2 Days
- Press Release
- Final fight letter

Day 0
- Annual shareholder meeting

Campaign
- Meetings with major shareholders
- Telephone campaign
- Media interviews

Advance Preparation: Response Team

Law Firm

- Co-leads the defense, advises on strategy, develops legal defenses, briefs the board on fiduciary duties, ensures compliance with the federal securities laws and state corporate law, reviews all communications, drafts all proxy materials, and handles any litigation

Proxy Solicitor

- Identifies the shareholders, develops vote models, sets up investor meetings, organizes meetings with proxy advisory firms, runs the proxy solicitation process, and tracks the flow of proxies and votes

Public Relations Firm

- Drafts press releases, “fight” letters, fight deck and other campaign communications, and works with the media

Investment Bank / Boutique Advisory Firm

- Leads the defense and assists with the target’s response to the activist’s data and the development of the campaign platform, strategy and tactics

Polling Question

Does your company have a written activism response plan that also identifies the team members?

A. Yes
B. No
C. N/A

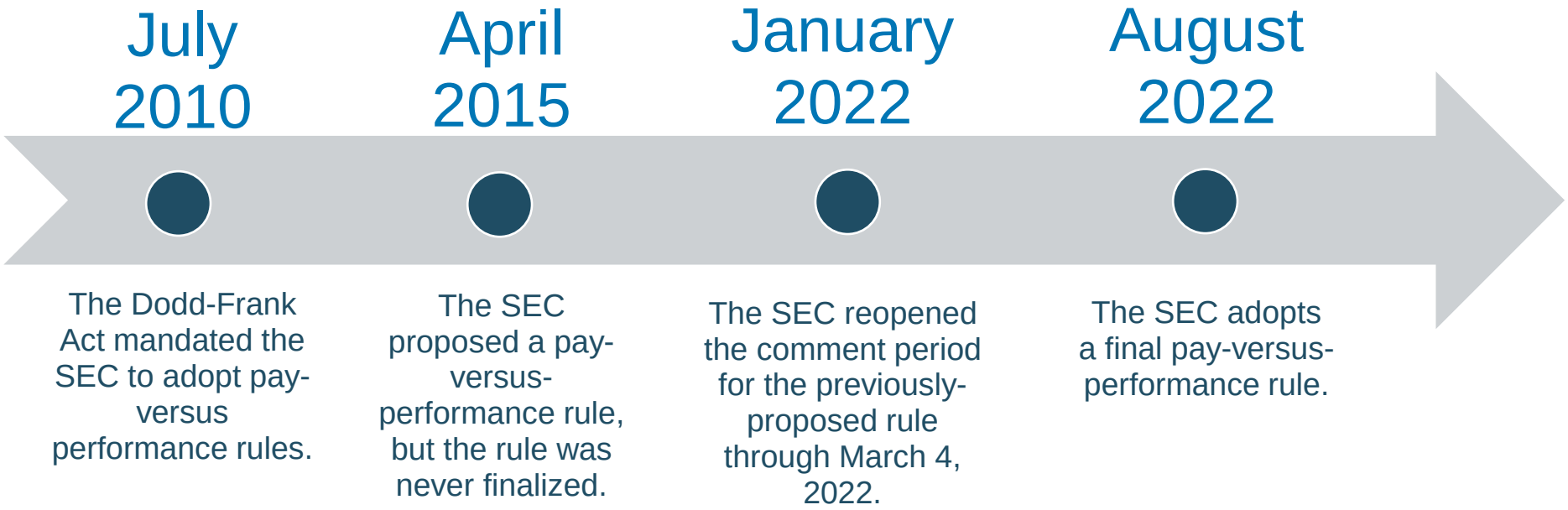
Advance Preparation: Immediate Action Items

- **Financial Self-Evaluation**: With the assistance of outside advisors, evaluate the strategy and performance of the company like an activist
- **Corporate Governance Analysis**: Analyze the company's corporate governance from an activist campaign standpoint (Board composition & practices, compensation, shareholder rights, related party transactions, etc.)
- **Structural Defenses**: Ask special proxy fight counsel to review the company's charter and bylaws to assess legal strengths and weaknesses; prepare an up-to-date, fully drafted and negotiated "shelf" poison pill to enable the Board to react quickly in the event an activist attacks
- **Stock Surveillance**: Retain a stock watch service to monitor trading in the company's stock to receive advance notice in the event an activist builds a stake
- **Investor Relations**: Screen meeting/call requests for activists; conduct perception surveys; prepare "off the shelf" press releases and statements
- **Boot Camp**: Walk Board and management team through a "mock proxy fight" to familiarize them with the risk and issues related to activism

Compensation Disclosure Updates

Pay Versus Performance

Pay Versus Performance — Background



- Generally, companies have shifted more towards granting performance-based awards.
  - This could be attributed to the ongoing prevalence of say-on-pay votes (which started in 2011) and preferences from proxy-advisory firms, such as ISS/Glass Lewis.
- Since the original rule proposal in 2015, financial-performance measures in performance-based awards are increasing in both quantity and variety.
  - In addition to total shareholder return (TSR), companies are using other performance measures to evaluate company performance with respect to performance-based awards.

Pay Versus Performance — Final Rule

- The final rule on Pay Versus Performance will be effective for 2023 proxy statements.
  - The final rule applies to ***proxy statements and information statements*** (not 10-Ks) that are required to include Item 402 disclosures with respect to fiscal years ending on or after December 16, 2022.
  - A calendar-year company is required to comply with the Rule's new disclosure requirements in its proxy or information statements filed in 2023.
- Under the final rule, companies are required to disclose in their proxy or information statements the relationship between (a) executive compensation "actually paid" and (b) the company's financial performance (beyond just TSR). These additional disclosures include both a pay-versus-performance table and an accompanying explanation (in either graphic or narrative form, or a combination of both).
- There are three primary components to the disclosure requirements:
  1. pay-versus-performance table;
  2. additional disclosure of the relationships between the pay-versus-performance table and compensation paid to named executive officers; and
  3. list of the company's most important financial performance measures.
- The final rule applies to all reporting companies other than emerging growth companies, foreign private issuers, and registered investment companies. Smaller reporting companies ("SRCs") are permitted to comply with certain reduced disclosure requirements.

Pay Versus Performance — Table

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

Pay Versus Performance — Compensation "Actually Paid" Table

- Compensation "actually paid" is defined as the total amount of compensation reported in the Summary Compensation Table (the "SCT"), with adjustments made to the amounts reported for the following two categories:
  1. pension values; and
  2. equity awards.
- To determine compensation "actually paid," the total amount of compensation reported in the SCT for the CEO and other NEOs is adjusted:
  - for pension values, (a) deduct the total aggregate change, if any, in the actuarial present value of all defined benefit and actuarial pension plans, and (b) add the aggregate service cost for the applicable year and the "prior service cost" under such plans, each calculated in accordance with GAAP; and
  - for equity awards, revalue such equity awards to reflect year-end, or year-over-year, changes in fair value.

Pay Versus Performance — Performance Measures Table

- **TSR**
  - Companies must disclose their cumulative TSR for each fiscal year calculated based on the value of a fixed investment of $100 (which is the same calculation used to prepare the "Performance Graph" that companies (other than SRCs) are required to include in their Form 10-K pursuant to Item 201(e) of Reg. S-K).
  - Companies must also disclose the cumulative TSR of the company's peer group (which should be the same peer group used for purposes of Item 201(e) of Reg. S-K or the peer group used in the Compensation Discussion & Analysis ("CD&A") section of the applicable proxy or information statement) for each fiscal year calculated based on the value of a fixed investment of $100.
    - Note that SRCs are <u>not</u> required to present cumulative TSR for the SRC's peer group.
- **Net Income**
  - Companies are required to disclose the company's net income, calculated in accordance with GAAP, for each fiscal year.
- **Company-Selected Measure (if applicable)**
  - Companies must select a financial performance measure that is not otherwise represented in the Table that the company has determined represents the "most important financial measure" used by the company to link executive compensation "actually paid" to company performance for the last completed fiscal year.
  - If a company either does not use any financial performance measures to link pay and performance, or if the company only uses measures that it has already disclosed (*e.g.*, TSR and net income), then the company is not required to disclose a Company-Selected Measure for this purpose.
    - Note that SRCs are <u>not</u> required to provide the Company-Selected Measure.

Pay Versus Performance — Additional Disclosure

- Companies must include additional disclosure that clearly describes the relationship between:
  - executive compensation “actually paid” to the CEO and the other NEOs; and
  - the company’s (i) cumulative TSR; (ii) net income; and (iii) the Company-Selected Measure (if applicable).
- If, in addition to the Company-Selected Measure, a company includes other voluntary performance measures in the Table, then the additional disclosure must also describe the relationship between executive compensation “actually paid” to the CEO and the other NEOs with the additional performance.
- Additional disclosure can be a narrative description, graphic description, or a combination of both.

Pay Versus Performance — Tabular List

- Companies must include an unranked list of three to seven of a company's "most important" financial performance measures used by the company to link compensation "actually paid" to company performance for the most recently completed fiscal year.
- The tabular list must include the Company-Selected Measure, if applicable.
- Companies are permitted to include non-financial performance measures if they are among the company's most important performance measures, but only if the company discloses at least three financial measures (or fewer if the company uses fewer) and would still be subject to a maximum of seven performance measures.
- Companies that do not use any financial performance measures to link compensation "actually paid" to company performance would not be required to present a tabular list.

Pay Versus Performance — Transition Rules

- For the first proxy or information statement in which the pay versus performance disclosure is provided (2023), companies are required to provide the disclosure only for the last *three* completed fiscal years (or, if fewer, the number of such fiscal years in which the company was a reporting company under the Exchange Act).
- In the second proxy or information statement in which the pay-versus-performance disclosure is provided (2024), companies will add another year and hence will be required to provide the disclosure for the last *four* completed fiscal years.
- Finally, in the third proxy or information statement in which the pay-versus-performance disclosure is provided (2025), companies will add the final year and hence will be required to provide the disclosure for the last *five* completed fiscal years.
- Note that SRCs are permitted to provide disclosure in the Table for the last two completed fiscal years (instead of three) in the first proxy or information statement in which the Table is disclosed and a maximum of the last three completed fiscal years (instead of five) in subsequent proxy or information statements.

Pay Versus Performance — What to do now?

	Next Steps
☐	Be prepared for more complicated and robust compensation disclosures
☐	Start thinking about financial measures in relation to NEO compensation
☐	Start thinking about your three to seven most important performance measures
☐	Start gathering data now

Pay Versus Performance — Information Required to Prepare Disclosures in 2023

1. SCT totals for the CEO and other NEOs for 2020, 2021 and 2022.
2. Compensation “actually paid” adjustments for the CEO and other NEOs – (a) information on changes in fair value of equity awards from 2019 through year-end 2022; and (b) if applicable, information on changes in service cost and prior service cost for pension benefits for 2020, 2021 and 2022.
3. TSR – (a) calculated for the company; and (b) calculated for the company’s peer group, in each case, for 2020, 2021 and 2022.
4. Net income – calculated for the company for 2020, 2021 and 2022.
5. Company-Selected Measure – if applicable, the most important financial measure used to link compensation actually paid to company performance, determined and presented in accordance with GAAP for 2020, 2021 and 2022.
6. Narrative or graphical disclosure of: (a) the relationship between compensation actually paid to company performance; and (b) the relationship between the company’s TSR and the peer group’s TSR.
7. Tabular list of three to seven of the company’s most important financial performance measures used to link compensation “actually paid” to company performance (if applicable), plus (*optional*) non-financial performance measures (if applicable).

Pay Versus Performance — Example of Adjustments Required for "Actually Paid" Equity Awards

Applicable Facts:

- A company is recalculating SCT amounts "actually paid" to its CEO for the 2022 calendar year
- CEO's "Total Compensation" for the 2022 year was $5,000
- CEO received one restricted stock award during the 2022 year ("RS")
  - 100 RS granted 6/1/2022, vesting 6/1/2024
  - SCT reflected $2,000 ($20 x 100) as the grant date value for the 2022 RS award
- The CEO holds three separate restricted stock awards (100 shares each) that were all outstanding on 12/31/2021, all time-based vesting
  - 100 RS granted 6/1/2020, vesting 6/1/2022
  - 100 RS granted 6/1/2021, vesting 6/1/2023
  - 100 RS granted 10/1/2021, vesting 10/1/2023
- The company doesn't pay dividends/distributions on its stock that are not already reflected within the fair value of the stock
- FMV of company's stock on applicable dates:

12/31/2021	6/1/2022	12/31/2022
$10	**$20**	**$15**

Pay Versus Performance – Example of Adjustments Required for "Actually Paid" Equity Awards

Adjustment Rules and Calculations Applicable to CEO

Deduct all amounts reported in the Summary Compensation Table for the 2022 covered year with respect to the grant of all equity awards: −$2,000

Add, or subtract, the following:

a. The year-end fair value of any equity awards granted in the covered fiscal year that are outstanding and unvested as of the end of the covered fiscal year
   - + $1,500 ($15 x 100)
     - Note: This would be $500 less than what would have been reported on the grant date for this award in the real SCT
b. The amount of change as of the end of the covered fiscal year (from the end of the prior fiscal year) in fair value of any awards granted in prior years that are outstanding and unvested as of the end of the covered fiscal year
   - + $1,000 ($5 x 200)
c. For awards that are granted and vest in the same covered fiscal year, the fair value as of the vesting date
   - $0
     - Note: The 2022 award won't vest until 2024
d. For awards granted in prior years that vest in the covered fiscal year, the amount equal to the change as of the vesting date (from the end of the prior fiscal year) in fair value;
   - + $1,000 ($10 x 100)
e. For awards granted in prior years that are determined to fail to meet the applicable vesting conditions during the covered fiscal year, a deduction for the amount equal to the fair value at the end of the prior fiscal year;
   - $0
f. The dollar value of any dividends or other earnings paid on stock or option awards in the covered fiscal year prior to the vesting date that are not otherwise reflected in the fair value of such award or included in any other component of total compensation for the covered fiscal year
   - $0 – N/A

New "Actually Paid" Number for the CEO for 2022: $6,500 ($5,000 - $2,000 + $1,500 + $1,000 + $1,000)

Clawbacks

Clawbacks — Legislative Background

July 2010

The Dodd-Frank Act mandated the SEC to adopt rules requiring stock exchanges to order public companies to implement a clawback policy.

July 2015

The SEC proposed a clawback rule, but the rule was never finalized.

October 2021

The SEC reopened the comment period for the previously-proposed rule through November 2021

June 2022

The SEC again reopened the comment period for the previously-proposed rule through July 2022.

October 2022

The SEC adopted a more onerous rule than previously proposed.

- The final rule applies to nearly all listed companies, including emerging growth companies, foreign private issuers, smaller reporting companies and controlled companies, with very limited exceptions. The final rule will be effective 60 days following publication in the Federal Register.
- Within 90 days following publication, the national securities exchanges must file proposed listing standards compelling companies to develop and implement clawback policies that will be effective within one year following publication.
- Companies must adopt compliant clawback policies no later than 60 days following the date that the applicable listing standards become effective, and compliance with the new public disclosure requirements will be required in the first annual report, proxy statement, or information statement required to be filed following the effective date of the final listing standards.

Clawbacks — Compensation Recovery Rules

- The final rule requires a company to recoup incentive compensation erroneously received by current and former executives during the three-year period preceding the date that the company is required to prepare an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement under the securities laws.
- Under the final rule, the term “received” generally means that the applicable financial reporting measure connected to incentive compensation has been satisfied and such incentive compensation has been earned, even if such incentive compensation has not yet actually been paid.
- **The recoverable amount (on a pre-tax basis) is the difference between the incentive-based compensation received by the executives and the amount that would have been received based on the required restatement.**

Clawbacks — Restatements (including restatements)

- Unlike the proposed 2015 version of the clawback rule, which was limited to “Big R” restatements, the final rule applies to both “Big R” and “little r” restatements.
  - “Big R” restatements restate historical financial statements to correct errors that were material to those previously issued financial statements.
  - “Little r” restatements restate prior period information in the current period comparative financial statements.
    - Issuers utilize “little r” restatements for errors that are not material to previously issued financial statements, but would result in a material misstatement if the errors were left uncorrected in the current report or if the error correction were recognized in the current period.
  - SEC economists estimate that “little r” restatements are approximately three times more common than “Big R” restatements.
  - Because the final rule includes “little r” restatements, it might require a company to either:
    - conduct a clawback analysis, even if the applicable error did not lead to erroneously paid compensation to its executive officers; or
    - claw back a *de minimis* amount of compensation from its executives.

Clawbacks — Restatement Exceptions

- The following changes to a company's financial statements *will not* trigger application of the company's clawback policy under the final rule:
  - Retrospective application of a change in accounting principle;
  - Retrospective revision to reportable segment information due to a change in the structure of an issuer's internal organization;
  - Retrospective reclassification due to a discontinued operation;
  - Retrospective application of a change in reporting entity, such as from a reorganization of entities under common control;
  - Retrospective adjustment to provisional amounts in connection with a prior business combination (IFRS filers only); and
  - Retrospective revision for stock splits, reverse stock splits, stock dividends or other changes in capital structure.

Clawbacks — Executive Officers

- Executive officers covered by the final rule consist of both former and current employees who served as president, principal financial officer, principal accounting officer, vice-president in charge of a principal; business unit, division or function or any officer or person who perform or performed policy-making functions during the three years preceding the accounting restatement.
- The definition of executive officers under the final rule is consistent with the definition of “officer” for purposes of Section 16 of the Exchange Act.
- Note that, under the final rule, it does not matter whether the executive officer was involved with the events leading to the restatement or is deemed to be at fault.

Clawbacks — Incentive-based Compensation

- Incentive-based compensation includes any compensation that is granted, earned or vested wholly or in part on a financial reporting measure, which means not only accounting-based metrics, but also market-driven metrics.
- Market-driven metrics include both TSR and stock price, which both reflect factors beyond the company's reported financial information.
- Calculating a recoverable amount that is tied to a market-driven metric, such as TSR or stock price, would be difficult, as it would not be based solely on information in an accounting restatement. In such case, the final rule requires that a company (i) base the recoverable amount on a reasonable estimate of the accounting restatement's effect on the applicable measure; and (ii) provide documentation to the applicable national securities exchange regarding the methodology employed to determine such reasonable estimate.
  - As a reminder, the amount to be clawed back is equal to the difference between the amount of incentive-based compensation received by current or former executives and the amount that would have been received after giving effect to the restatement.

Clawbacks — Additional Disclosure Requirements

- All covered companies must now file their clawback policies as a tagged exhibit to their annual reports, regardless of whether the company has ever been required to apply its clawback policy to recoup incentive compensation.
- Forms 10-K, 20-F, and 40-F will include new check boxes for a company to indicate whether:
  - (i) the included financial statements reflect the correction of an error to previously issued financial statements; and
  - (ii) any such error corrections are restatements that required a clawback analysis of incentive-based compensation received by any executive officers during the three-year recovery period pursuant to the clawback.
- If a company has applied its clawback policy, then the company must disclose:
  - (i) the date on which the company was required to prepare an accounting restatement;
  - (ii) the amount of erroneously awarded compensation based on its accounting restatement;
  - (iii) an analysis of the calculation that determined the erroneously awarded compensation;
  - (iv) the estimates used to determine the amount of erroneously awarded compensation linked to either stock price or TSR, and an explanation of the methodology used for such estimates;
  - (v) amounts still owed; and
  - (vi) if amounts erroneously awarded have not yet been recovered, this fact and the reason(s) for it.
- Clawed back compensation will also trigger additional disclosures within a company's SCT for the relevant period(s).

Clawbacks — What to do now?

	Next Steps
☐	For companies without an existing clawback policy, start thinking about a policy that is compliant with the final rule
☐	For companies with an existing clawback policy, start evaluating such policies as compared to the final rule
☐	Start evaluating pre-existing documentation governing incentive-based compensation to ensure that the clawback of such incentive-based compensation is permitted in accordance with the final rule

Governance Action Items

Charter Updates—Officer Exculpation

- **Officer Exculpation.** DGCL Section 102(b)(7) now allows protections for officers for breaches of the duty of care but not the duty of loyalty, as directors already have.
- **Proxy Advisors**:
  - It is not yet clear where ISS, Glass Lewis, and institutional investors will come out on this, but some companies have already filed proxy statements this season proposing amendments to their charters.
- Action Items:
  1. Board must adopt and recommend an amendment to the certificate of incorporation;
  2. The amended certificate of incorporation must be submitted to a stockholder vote; and
  3. The Company must file a preliminary proxy statement.

Bylaws Updates

- **Stockholder List.** DGCL Section 219 has been revised so that Delaware corporations are no longer required to make the stockholder list available during the stockholder meeting for inspection (but it still must be available during the 10-day period preceding the meeting date); and
- **Notice of Meetings.** DGCL Section 222 (requirement to give notice to stockholders) has been revised:
  - To clarify that notice of meetings must given in accordance with Section 232 (notice by mail, courier, email, or with stockholder consent via some other electronic means); and
  - To provide that unless the bylaws require otherwise, when a meeting is adjourned, including due to technical failure, notice need not be given if the time, date, and place of the meeting (and means of remote communication, if applicable) are announced at the meeting, displayed during the time scheduled for the meeting on the website used for the virtual meeting, or set forth in the notice of meeting.
- Action Items:
  - Amend bylaws to remove language requiring company to make stockholder list available during stockholder meetings for inspection; and
  - Ensure that bylaws do not conflict with Section 222 and consider amending provisions regarding adjournments to incorporate the concept of a virtual meeting being adjourned under the expanded circumstances provided under DGCL Section 222(c).

Bylaws Updates

- **Universal Proxy Rule**
  - Rule 14a-19 provides for, among other things, a "universal proxy card" which lists the names of all duly-nominated director candidates for election, regardless of whether the candidates were nominated by management or shareholders.
- Action Items:
  - Ensure that the bylaws are not inconsistent with the universal proxy rule (*e.g.*, bylaws should no longer state that the sole method by which a stockholder can include a nominee in the Company's proxy materials is via proxy access provisions); and
  - Update the nominating and advance notice procedure provisions within the bylaws for universal proxy rule-specific updates, including:
    - requiring the activist to provide the information required under Rule 14a-19 if they intend to solicit proxies for director nominees;
    - providing that proxies solicited by activists will be disregarded if they do not comply with Rule 14a-19; and
    - ensuring that the advance notice provision deadlines supersede the activist notice deadlines within Rule 14a-19 if they are earlier than the 14a-19 deadlines.

Bylaws Updates

- **Resignation Procedures for Directors and Officers**
  - Consider adding a clear resignation procedure requiring written notice to a specific individual.
  - Protocol should avoid uncertainty as to when oral statements constitute a notice of resignation that triggers a Form 8-K disclosure obligation.
- **Exclusive Forum Provisions**
  - Exclusive forum provisions require litigation to be brought in a specific forum.
    - Multi-forum litigation, or litigation of nearly identical fiduciary claims in multiple jurisdictions, is costly and time consuming.
  - Consider adopting an exclusive forum bylaw provision that addresses claims brought under (1) state law (such as disputes related to corporate internal affairs); (2) the Securities Act; and (3) the Exchange Act (less clarity around enforceability of this one).
  - ISS and Glass Lewis may recommend unfavorable votes if a company adopts these provisions, particularly if the company does so without putting the issue to a shareholder vote.

Updating Corporate Policies

- **Insider Trading Policies**
  - Proposed Rule 10b5-1 would impose, among other things, (i) a minimum 120-day cooling-off period, (ii) certification from directors and officers of no MNPI and good faith, (iii) quarterly disclosure of trading arrangements, and (iv) annual disclosure of insider trading policies and procedures.
  - Consider reviewing and revising insider trading policies in light of potential public disclosure requirements and “shadow trading” enforcement.
- **Audit Committee Charter**
  - Consider adding language to audit committee charters to clarify that only the audit committee can trigger 8-K disclosures under Items 2.06 and 4.02
    - Items 2.06 and 4.02 provide that an 8-K is triggered by, in addition to the board or a committee, “the officer or officers of the registrant authorized to take such action if board action is not required. . . .”
    - Most companies take the view that the authority with regards to these items is with the audit committee.
    - Limits likelihood that the SEC could determine an 8-K was triggered by an officer without the audit committee’s participation.
    - Not required to be included by Nasdaq/NYSE or SEC rules and many charters are silent on this issue.

Important Reminders

- **Share Counting**
  - Form S-8 registers a finite number of shares, so it is important to track share usage.
    - Easier to track stock incentive plans, which have a finite pool of securities.
    - For 401(k) plans, there is generally not a finite pool, making it more difficult to track the usage.
    - Staff has declined to give much guidance in the area of share counting; company practices vary.
  - Form S-3s filed by non-WKSI issuers must specify the number of securities that are registered.
    - Companies must implement internal controls to track transactions in real time.
    - Barclays agreed to a $361 million settlement to resolve SEC charges relating to its over-issuance of securities due to a failure of internal controls.
- **Shelf Registration Statements on Form S-3 and the Three-Year Sunset**
  - Rule 415(a)(5)'s three-year expiration rule applies to:
    - WKSI automatic shelf registration statements
    - registration statements on S-3 or F-3 that offer securities on a delayed or continuous basis
    - registration statements for continuous offerings (e.g., a DRIP/DSPP that is open to new investors and traditional best efforts offerings); and
    - registration statements for offerings of mortgage-related securities under Rule 415(a)(1)(vii).
  - Three-year expiration rule does not apply to secondary offerings unless they are registered on a WKSI shelf (S-3ASR).

Potential D&O Questionnaire Changes

- Consider including the following in your 2023 D&O questionnaires:
  - Self-identification with respect to diversity characteristics;
  - Information to comply with sanctions applied to Russian individuals and entities, in addition to those already requested under the Iran Threat Reduction Act (some companies deal with sanction matters in a separate questionnaire); and
  - Disclosure of officer experience and expertise in areas that pending rulemaking may require such as climate change and cybersecurity.

Checklist

	Possible Governance Action Items
☐	Officer Exculpation Charter Amendment
☐	Bylaw Updates • DGCL • Rule 14a-19
☐	Exclusive Forum Provision
☐	Insider Trading Policy
☐	Audit Committee Charter
☐	Share Counting
☐	S-3 Sunset Tracking
☐	D&O Questionnaires

MD&A

Why? How? What? Who? When?

Why MD&A?

- **MD&A is required**
  - To provide material information relevant to an assessment of the financial condition and results of operations of the registrant including an evaluation of the amounts and certainty of cash flows from operations and from outside sources
  - To focus 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
  - To enhance a reader's understanding of the registrant's financial condition, cash flows and other changes in financial condition and results of operations
  - To better allow investors to view the registrant from management's perspective
- **MD&A is about communication, not just compliance**
  - Don't ask "Do I have to disclose this?"
  - Ask "Would investors want or need to know this?"
  - Avoid boilerplate, general statements, or immaterial things

MD&A overview is the first and most important section professional investors usually read

Rules and Interpretive Releases

- Reg. S-K, Item 303
- **Key MD&A Guidance**
  - 1989 Interpretive Release
  - 2003 Interpretive Release
  - 2022 Commission Statement
- **Numerous Other Releases and Guidance**
  - Off-Balance Sheet Rules (01/03)
  - Liquidity and Capital Resources (09/10)
  - Non-GAAP Financial Measures
  - Modernizing MD&A and Financial Disclosures (11/20)
  - KPIs and Metrics (02/20)
  - Reference Rate Reform (12/21)
  - Sample “Dear CFO” Letters from the SEC Division of Corporation Finance

Why did results change? Why will they be different in the future?

- **MD&A is about "why"**
  - The financial statements tell what happened, but MD&A explains why it happened.
  - Use MD&A to explain:
    - actions the company has taken that have affected or are expected to affect its financial condition and results of operations
    - Reasons for changes in results
    - Quantification of the reasons for changes
- **MD&A is also forward-looking**
  - Much of MD&A is historical (*e.g.*, part of overview, comparison of historical results, liquidity position at period-end).
  - MD&A also includes:
    - Known trends that are reasonable likely to have a material effect in the future
    - Updating of prior disclosures, when appropriate (changes in trends, guidance)
    - Outlook on liquidity for the next 12 months and beyond

How do you explain “why” in MD&A?

- **Plain language**
  - Clear writing with little or no jargon
- **Management perspective**
  - Big picture, top-down analysis
- **Most important things first**
  - Refresh and revisit this each time
- **Explanation and quantification**
  - Identify why something changes
  - Quantify the amount and direction of the change for each significant reason, or explain relative significance and difficulty of quantification
- **Tables and charts**
  - Easier for a reader to obtain and assess information quickly
  - A single table that compares all relevant periods is better than separate tables for each period
  - Table provides what changed, narration explains why
- **Don’t duplicate notes to financial statements; cross reference and add “why”**

What is in MD&A?

- **Overview**
  - Brief overview (paragraph or bullets)
  - Key developments and reasons
  - Don’t repeat business overview from registration statement or 10-K (except when customary in IPO registration statements)
- **Period-to-period comparison and discussion**
  - Clear description and quantification of unusual or infrequent events or significant economic changes
  - Not just what changed, but why it changed
- **Liquidity and capital resources**
  - Clear discussion of cash positions, liquidity resources, and the drivers of cash flows
  - Trends and uncertainties about meeting known or reasonably likely cash requirements
- **Forward-looking disclosure (as appropriate in any of these sections)**
- **Critical accounting estimates**

Polling Question

Does your company present operational information or non-GAAP financial measures in its earnings release that it does not also present in its SEC periodic reports?

A. Yes

B. No

What may be challenging in MD&A?

- **Operating statistics and non-GAAP financial measures**
  - Useful if they provide insight—explain why you use them
  - Remember GAAP-first and reconciliation of Non-GAAP financial measures (and Reg. S-K Item 10(e))
  - If you include these in earnings releases but not in MD&A, you're either including unimportant information in the earnings release or omitting important information from the periodic report. Either way, be ready to explain to the SEC why you have different disclosures
- **Liquidity and capital resources**
  - Snapshot of liquidity plus forward-looking discussion (needs increased rigor in cash-management and forecasting)
  - Availability of adequate amounts of cash for requirements and plans in the short-term (the next 12 months from period end) and the long-term (beyond the next 12 months), including:
    - known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in liquidity increasing or decreasing materially; course of action taken or proposed to be taken to remedy material liquidity deficiencies, if any; identity and description of internal and external sources of liquidity; briefly discuss any material unused sources of liquid assets
    - material cash requirements, including commitments for capital expenditures, and source of funds; known material trends, favorable or unfavorable, in the capital resources, including reasonably likely material changes in the mix and relative cost of such resources and any changes among equity, debt, and any off-balance sheet financing arrangements

What may be challenging in MD&A? – Cont'd

- **Critical Accounting Policies and Estimates**
  - Don't explain GAAP
  - Explain judgments, uncertainty, and volatility, as well as the likelihood of materially different reporting results if different assumptions or conditions prevail
  - Don't repeat disclosure from notes to financial statements
    - The notes describe policies; MD&A explains judgments and sensitivity and gives insight into possible changes
    - Provide early warning disclosures of possible future charges and credits
- **Uncertainty is not a reason to remain silent**
  - If something is hard to estimate, explain why

What will likely draw SEC comments?

- MD&A draws scrutiny from the SEC staff, and the issuance of comment letters regarding MD&A continues to trend upward.
- The SEC staff's comments on MD&A have largely focused on the requirements of Item 303 of Reg. S-K and related disclosure, emphasizing the following:
  - Results of operations, such as the description and quantification of factors, events, and economic changes (*e.g.,* the COVID-19 pandemic) between periods
  - Performance Indicators and Operating Metrics, such as how the metrics used by management to assess the performance of the company are calculated and period-over-period comparisons
  - Critical accounting policies and estimates, such as judgments made in applying significant accounting policies, sensitivity to change, and the likelihood of materially different reported results if different assumptions or conditions were to occur
  - Liquidity and capital resources, such as drivers of cash flow and the trends related to meeting known or reasonably likely future cash requirements
  - Known trends and uncertainties, including discussion of how such trends and uncertainties (*e.g.* COVID-19) are expected to affect future results in the near- and long-term.
  - Location of Non-GAAP Discussion and Reconciliation, specifically presenting comparable GAAP measures with equal or greater prominence to related Non-GAAP financial measures, such as ensuring that the GAAP measures precede the non-GAAP financial measures in reconciliations.

Who contributes to MD&A?

- **Those who draft it**
  - Usually best to be company personnel with access to the relevant information
- **Disclosure committee**
  - Consider issues checklists to help identify potential disclosures
- **Investor relations / public relations**—promote consistency throughout all public disclosures
- **Other internal sources**
  - CEO/CFO, who will certify that they read it and that the financial statements and other financial information included in the report—***this includes MD&A*** — fairly present in all material respects the financial condition, results of operations and cash flows
  - Key personnel who know the business—finance, legal, sales, planning, etc.
  - Board minutes, including management presentations
- **Peer companies**
    - What are they discussing that you didn't? What happened to you that they don't discuss?
- **Board of Directors or Audit Committee**
- **External legal and audit**

Polling Question

Does the company have a formally-constituted disclosure committee that reviews its public disclosures, including SEC filings?

A. Yes

B. No

Disclosure Controls and Procedures

- Companies are expected to develop disclosure controls and procedures that ensure information is gathered and communicated on a timely basis. ***This requires coordination with senior management and the Board.***
  - Senior management
  - Audit committee
  - Disclosure committee
  - CEO / CFO certification (and sub-certification) processes
  - Evaluation of other public disclosures

Polling Question

Do you start with a “clean slate” in drafting MD&A each time? (Answer “no” if the bulk of your MD&A drafting starts with prior period disclosure.)

A. Yes

B. No

Who gathers and drafts the MD&A?

- **Gathering the information:**
  - Senior management input is key.
  - Bottom-up processes that ask individual business units to identify trends and uncertainties affecting their business may be effective.
- **The drafting process:**
  - Preparation of the MD&A (particularly “overview” and “liquidity and capital resources”) should emphasize taking a clean-slate approach rather than simply rolling forward the MD&A from prior periods.
  - While input from key personnel is critical, having too many people involved in drafting may weaken the disclosure.
- **Who should take the lead?**
  - Top-level management involvement is expected to identify key disclosure themes.
  - Finance department (Controller, head of financial reporting, CFO)
- **Who should <u>NOT</u> take the lead?**
  - Auditors
  - Outside securities counsel

Typical Review Process

- Finance department
- CFO
- Legal Counsel
- Disclosure Committee
- Auditors
- Audit Committee
- Full board of directors and CEO

When?

- **Start early**
  - Allow time for thoughtful preparation
  - Allow time for management, board, and outside adviser review
- **Consider timing of MD&A drafting versus:**
  - Earnings release
  - Conference call
- **Consider reducing delay between earnings release and filing of periodic report**
  - Make the fuller content of the periodic report available to shape preparation of the earnings release and conference call so that all three identify the same significant developments and reasons
  - Reduce likelihood of intervening developments (*e.g.*, litigation that alters financial statement notes or reserves)
  - Reduce likelihood of unexpected changes (*e.g.*, during finalization of auditor review)

Recent Events to Consider in MD&A

Summary: Recent Events to Consider in MD&A

- The COVID-19 pandemic
- Geopolitical tensions
- Supply chain issues
- Labor shortages
- Rising inflation
- Market volatility
- Interest rate hikes
- Reference rate reform
- Cybersecurity
- Climate change disclosure
- Key performance indicators and metrics

Recent Events to Consider in MD&A

- **COVID-19**
  - In 2020, the SEC issued guidance encouraging companies to provide disclosure regarding the effect of COVID-19 on the business's operations, liquidity, and capital resources. Companies must also disclose any other material effects of COVID-19 on their business, such as employee work arrangements, business continuity plans, and demand for products and services.
  - Relevant SEC Guidance:
    - CF Disclosure Guidance: Topic No. 9 – Coronavirus (COVID-19)
    - CF Disclosure Guidance Topic No. 9A Coronavirus (COVID-19) — Disclosure Considerations Regarding Operations, Liquidity, and Capital Resources
- **Geopolitical Tensions**
  - The ongoing war in Ukraine has created worldwide economic repercussions, including supply chain disruptions, uncertainty regarding the cost and availability of energy resources, the effect of sanctions and the divestment or cessation of operations in Russia and Belarus, which is reflected in MD&A and risk factors.
    - Sample Letter to Companies Regarding Disclosures Pertaining to Russia's Invasion of Ukraine and Related Supply Chain Issues
- **Supply Chain Issues**
  - COVID-19, the war in Ukraine and other economic circumstances have contributed to wide-spread supply chain disruptions, which figure prominently in many issuers' disclosures of known trends and uncertainties in the MD&A.

Recent Events to Consider in MD&A – Cont'd

- **Labor Shortages**
  - Labor shortages arising from the conditions of the COVID-19 pandemic have contributed to uncertainty in attracting and retaining talent, which has resulted in disclosure in MD&A and risk factors.
- **Rising inflation**
  - While the SEC revised Item 303 to remove a specific requirement to address inflation in favor of a more principles-based approach, Item 303 still requires companies to discuss the affect of inflation or changing prices if they are part of a known trend or uncertainty that had, or is reasonably likely to have, a material effect on net sales, revenue, or income from continuing operations.
  - Item 303 also requires that, where the financial statements reveal material changes from period to period in one or more line items, companies must describe the underlying reasons for these material changes in quantitative and qualitative terms, which could result in a discussion of inflation and changing prices.
- **Market volatility**
  - Periods of extreme market volatility over the past two years have required attention in the liquidity and capital resources portion of MD&A regarding access to capital for some companies.
- **Interest rate hikes**
  - If recent increases in interest rates have increased interest on existing credit facilities, changed cash receipt or cash payment positions, or effected liquidity materially, consider providing discussion of such events.

Recent Events to Consider in MD&A – Cont'd

- **Reference Rate Reform**
  - Some companies may need to address LIBOR transition risk identification and mitigation efforts if material, with qualitative and quantitative disclosure encouraged by the SEC staff.
    - SEC Staff Statement on LIBOR Transition—Key Considerations for Market Participants
- **Cybersecurity**
  - The SEC announced in June 2021 that it would focus on cybersecurity disclosures made by public companies as part of its regulatory agenda and continued focus on cybersecurity and data privacy. In 2021 the SEC Enforcement Division's Cyber Unit brought a series of enforcement actions against companies for inadequate cybersecurity controls and disclosures. A cybersecurity risk disclosure rule was proposed on March 9, 2022.
  - MD&A should address cybersecurity if costs or other consequences associated with known incidents or the risk of potential incidents represent a material event, trend, or uncertainty that is reasonably likely to have a material effect on the registrant's results of operations, liquidity, or financial condition or would cause reported financial information not to be necessarily indicative of future operating results or financial condition.
    - Release No. 33-10459, Commission Statement and Guidance on Public Company Cybersecurity Disclosure
    - CF Disclosure Guidance: Topic No. 2 – Cybersecurity
    - Proposed Rule, *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure*, SEC Release No. 33-11038

Recent Events to Consider in MD&A – Cont'd

- **Climate Change Disclosure**
  - In September 2021, the SEC's Division of Corporation Finance issued a sample comment letter regarding climate change disclosures to illustrate the types of comments it had begun issuing to companies.
  - In March 2022, the SEC proposed new rules to enhance and standardize disclosures that registrants make about climate-related risks, their climate-related targets and goals, their greenhouse gas (GHG) emissions, and how the board of directors and management oversee climate-related risks. (Release No. 33-11042; 34-94478)
    - If adopted, the proposed rules would create new sections of Reg. S-K and Regulation S-X. These new regulatory requirements would add sweeping new climate disclosure obligations for all U.S. public companies.
    - With a few exceptions, the SEC's typical materiality threshold is notably absent from the proposed rules, and the SEC is proposing to require all registrants to make these disclosures on the grounds that they are "decision useful" to investors.

Recent Events to Consider in MD&A – Cont'd

- **Climate Change Disclosure**
  - Proposed Item 1501 Governance – would require disclosures on oversight of climate risks by management and the board of directors
  - Proposed Item 1502 Strategy – would require disclosure of climate-related risks reasonably likely to have a material effects on the business or consolidated financial statements
    - Specifically calls for disclosure of both physical and transition risks
  - Proposed Item 1503 Risk Management – would require all companies to disclose the identification and management of climate-related risks, including disclosing the processes surrounding identifying risks and the management and integration of climate risks into the company's overall risk management system
  - Proposed Item 1504 & 1505 GHG Emission – would require all issuers to disclose certain GHG emissions on the premise that they are quantifiable and comparable across all industries and that investors have stated that emissions disclosures are useful in conducting transition risk analysis
    - Disclose the Scope 1 and Scope 2 GHG emissions
  - "Disclose it if you have it" requirements

Key Performance Indicators and Metrics

- **Management's Discussion and Analysis Key Performance Indicators ("KPI") and Metrics (Release No 33-10751)**
  - In 2020, the SEC released guidance asking companies to disclose any material information that may be necessary to understand the metrics disclosed in MD&A that are used by the companies' management and are necessary for investors to understand the companies' performance.
  - Staff focused on the "how" and "why" to convey what KPIs reveal about historical earnings and anticipated effect on future earnings
    - How is the metric defined and/or calculated?
    - Why is the metric useful to management? How does the metric relate to management's evaluation of the company's performance?
    - What useful, practical information does the metric provide to an investor?
    - How has the definition or prominence of an individual KPI changed compared to past periods? Why and what does that change reveal about the company's outlook and performance?

V&E Client Alerts

V&E Client Alerts

- SEC Makes Early Holiday Moves with Universal Proxy Adoption
- Third Time's a Charm! SEC Finally Approves New Rule Requiring Mining, Gas, and Oil Firms to Disclose Government Payments
- SEC Adopts Final "Pay Versus Performance" Rules
- SEC Issues Long-Awaited Rule on Clawback of Executive Compensation
- Proposed SEC Climate Disclosures: An Overview of the Proposed Rule and What Companies Need to Do Now
- SEC Releases Proposed Rules on Enhanced Cybersecurity Disclosures
- SEC's Proposed SPAC Rules: A Closer Look at the Proposed Rules
- Not as Safe as You Thought: Rule 10b5-1 Trading Plans are not Immune to Insider Trading Claims
- Don't Forget the G: After Years of "Environmental" and "Social" Regulations and Enforcement, the SEC's Recent Priorities Demonstrate a Focus on "Governance"
- Peak ESG? Think Again.

THANK YOU

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