Governance & Securities Alert

From the Public Company Advisory Group of Weil, Gotshal & Manges LLP

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Looking Ahead to the 2025 Proxy Season: Key Corporate Governance, Disclosure, Engagement, and Annual Meeting Topics

In this Alert, we provide an overview of key corporate governance, disclosure, and engagement issues that public companies should prioritize as they prepare for their 2025 annual meetings. We offer guidance to companies in navigating the myriad corporate governance developments and other demands on boards of directors and management teams. For a discussion of disclosure developments for annual reports see our *Need to Know for 2025: Top 10-Tips for the Form 10-K* here (the "10-K Alert").

1. HOT TOPICS IN BOARD RISK OVERSIGHT

Stakeholders expect companies to anticipate, manage and communicate about risks in today's dynamic risk environment. With the increase in the number and complexity of risks that boards oversee and claims against directors by plaintiffs alleging oversight failures, boards should determine how best to allocate risk oversight across the full board and its committees. While core risks relating to company strategy and business continue to be the primary areas of board focus, the following "hot topics" in risk oversight also warrant board attention.

Artificial Intelligence (AI). Rapid advancements in generative AI are reshaping the corporate landscape as companies increasingly integrate AI into their operations. In order to effectively oversee complex AI-related risks and new legal and regulatory mandates, boards must first understand how AI is used within their companies and how it may impact strategy going forward. In 2024, an increasing number of boards expressly addressed AI oversight in their governance documents, including delegation of such oversight to the audit (or another) committee. Boards should determine the appropriate structure for oversight of AI, identify directors with AI expertise and/or create an AI governance framework. If applicable, companies should be prepared to disclose this framework in their proxy statements in 2025.

Cybersecurity. Cybersecurity risk oversight and disclosure continues to be a top priority for companies across all industries. Our 10-K Alert (here) discusses considerations relating to the SEC's disclosure rules adopted in July 2023. In 2024, companies first provided information in their Form 10-Ks under Item 1C, which requires disclosure of cybersecurity risk management and strategy, including with respect to processes for identifying, assessing, and managing cybersecurity threats and whether risks from cybersecurity threats have materially affected the company, and cybersecurity governance, including with respect to oversight by the board and management. (Although not required by the SEC rules, companies continue to highlight directors' cybersecurity and information security expertise in director biographical disclosure and skills matrices in the proxy statement). The SEC is critically focused on companies following their cybersecurity incident response plans and other cybersecurity-related policies, and assesses adherence to such plans as a consideration in determining whether disclosure and accounting controls were sufficient.

Diversity, Equity and Inclusion (DEI). Although many companies continue to provide human capital disclosures and/or affirm DEI commitments aligned with strategy in their Form 10-Ks, proxy statements and/or ESG or sustainability reports, others are scaling back or rebranding or renaming their efforts in light of potential litigation, shareholder proposals and social media campaigns. These trends may be attributed to heightened scrutiny of DEI programs more generally after the June 2023 landmark U.S. Supreme Court decision *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, which held that college admissions programs that expressly factor race into an admissions decision are unconstitutional. Boards remain challenged to help their companies navigate the risks of this environment while continuing to advance a positive company culture, workforce happiness and productivity.

ESG Disclosure and Greenwashing. It is imperative for company disclosures about sustainability targets and ESG commitments and programs to be accurate, particularly with the rise of "greenwashing" claims by regulators and plaintiffs. As we discussed here, at this time, we expect the SEC's climate-related rules adopted in March 2024 to be invalidated by the Eighth Circuit or rescinded or not enforced by the new administration. Nevertheless, companies must prepare for forthcoming regulations requiring climate-related disclosures that will apply to many U.S. companies doing business in California and/or the European Union that meet certain thresholds. Board committees with responsibility for overseeing sustainability-related matters should review the company's ESG programs and commitments and related disclosures to ensure continued alignment with corporate strategy. In 2024, the SEC and state regulators brought several greenwashing-focused enforcement actions based on alleged misleading disclosures, as well as claims of deceptive or false advertising and public nuisance. Greenwashing claims may arise from or refer to, among other things, company disclosures and the use of terms like "carbon neutral," "net zero," "recycled," "recyclable," "biodegradable," "ethical," "sustainable," "clean," or "organic." See the discussion of the Keurig Dr. Pepper Inc. enforcement action below as well as the recent dismissal by the New York Supreme Court of the public nuisance lawsuit against PepsiCo brought by the New York Attorney General relating to plastic pollution, discussed here.

Selected SEC Enforcement Actions: Regulatory Compliance in the Spotlight

Although the SEC's enforcement focus is expected to shift with the upcoming change in administration, several recent enforcement actions that related to key compliance and disclosure processes underscore the need for companies to implement effective disclosure controls and processes.

- **Cyber:** The SEC remains focused on cybersecurity disclosures following material cyber-related incidents. The SEC recently announced settlements with Unisys, Avaya, Check Point and Mimecast, where the SEC found that such companies made materially false and misleading disclosure minimizing the impact of the SolarWinds cyber incident. SolarWinds was the subject of fraud charges brought by the SEC in 2023 following a material breach.
- **Sustainability:** In 2024, the SEC staff continued to focus on greenwashing and the inaccuracy of sustainability disclosures underscoring the need for companies to maintain controls around disclosures in all public documents, but especially in reports filed with the SEC. For example, the SEC's September 2024 settlement with Keurig Dr Pepper Inc. relating to its inaccurate statements about the recyclability of its K-Cup pods in its 2019 and 2020 annual reports on Form 10-K, which we discussed in a prior Alert here, reflects an example of the SEC taking a broad view of materiality where the SEC has previously expressed a policy interest.
- **Director Independence:** Executives and directors should take care to fully disclose in the D&O questionnaire (updated as needed) information about personal or business relationships among themselves so that the board can take into account all relationships in making independence assessments. See the SEC's recent settlement with a former director of Church & Dwight Co., finding that the company violated proxy disclosure rules as a result of the director's failure to disclose a close friendship with a company executive, which caused the company to erroneously identify the director as independent.
- **Insider Reports:** The most recent SEC enforcement sweep of Schedule 13D and 13G, Form 4 and Form 13F filings in September 2024 serves as a reminder to companies to invest the necessary time and resources to make sure ownership reports are filed on time. See the recently settled charges against 23 entities and individuals for failure to timely report information about their holdings and transactions in public company stock, including charges against several private equity firms and large corporate filers regarding holdings of 13F securities.
- **Whistleblowers:** The SEC announced several enforcement actions alleging that company policies or agreements prohibited employees, contractors and/or customers from whistleblowing. See the SEC's recent announcement of settlements with seven companies for using employment, separation, and other agreements that potentially impeded individuals from reporting potential misconduct, in violation of the Dodd-Frank whistleblower protection rules.

What to Do Now:

- **Focus on execution and alignment of strategic initiatives.** Boards should remain focused on oversight of risks related to strategic priorities and communications with investors and other key stakeholders about strategy and risk through public disclosures and engagement.
- **Evaluate board risk oversight structure, including committee charters and company policies.** Regularly assess the most important risks to the company and whether the full board or a committee should have responsibility for oversight of each risk – e.g., cybersecurity oversight by the full board or the audit committee, or a separate information security or technology committee. Once determined, confirm that board committee charters clearly define risk oversight responsibilities, which should be allocated sufficient time in board and board committee meeting agendas.
- **Review disclosure controls; consider appropriate disclosure enhancements.** Consider whether the company's disclosure review process is effective and includes the right personnel to identify and escalate issues for consideration as well as make decisions around disclosure (for example, through a disclosure committee). This review should take

into account new regulatory requirements, particularly where subject matter experts may not currently be involved in the disclosure decision-making process, such as cybersecurity (see discussion of disclosure requirements around material cybersecurity incidents under Item 1.05 of Form 8-K in our prior Alert here). Review and consider company policies and processes for assessing, identifying, managing and disclosing important risks, including AI safety and threats associated with third-party service providers, cybersecurity threats and ESG-related risks.

- **Review targets and goals; substantiate disclosures.** Companies should continue to provide meaningful, accurate and clear disclosures, including regarding company sustainability efforts and goals, and review them on an ongoing basis in light of company performance and changes to assumptions and measurement techniques. Companies should review commitments regularly and update as needed. In light of greenwashing scrutiny from regulators and plaintiffs, companies should also ensure that all sustainability claims, including with respect to climate-related and DEI initiatives, can be substantiated and include appropriate disclaimers.
- **Stay up to date with evolving regulatory requirements; be aware of state-level AI and climate requirements.** Boards should be informed of new legal requirements and regulations and implement the proper controls to capture climate reporting data (discussed above), as well as AI-related developments. For example, several U.S. states, including Colorado and Utah, have enacted AI legislation with disclosure obligations for certain companies doing business in those states. Additionally, the EU AI Act, as discussed in our prior Alert here, became effective August 1, 2024, and will impose obligations starting in 2025.

2. BOARD COMPOSITION

With expectations of directors continuing to expand, board accountability for company performance and risk oversight continues to challenge directors. As a result, board composition remains under significant scrutiny as investors question whether boards have the appropriate composition, skills, leadership and diversity to oversee the company’s business and strategy while navigating today’s risk environment and the various issues facing the company.

Board Skills and Backgrounds. The demand for adaptable directors with up to date expertise relevant to company needs has increased as companies seek to remain resilient in today’s technology-driven landscape. As challenges stemming from cyber security threats, natural disasters, the growth of generative AI, regulatory unpredictability, geopolitical tensions and the energy transition grow in complexity, investors continue to look for leadership with industry-specific expertise capable of addressing key and emerging risks and technologies. Boards are also focused on recruiting directors with prior board and CEO experience, reflecting the continued importance of governance and leadership track record to enhance credibility with shareholders. Successful boards continue to evolve and strive for membership that reflects a “fit for purpose” mix of experience, skillset and personal characteristics, including directors with skillsets that match emerging needs.

Board Refreshment and Assessments. Annual director turnover has remained persistently low, at around 7% or 8% for S&P 500 companies over the past five years (per the SSBI), while according to PwC’s Annual Corporate Directors’ Survey 2024, almost half of directors surveyed believe someone on their board should be replaced. Despite the importance placed by investors and other stakeholders on board refreshment, only 9% of S&P 500 boards have adopted term limits for non-executive directors; moreover, at the 67% of S&P 500 companies that have age limits, the mandatory retirement age for board members has continued to rise, with 75 being the retirement age of 56% of S&P 500 boards with a retirement age (SSBI). As a result, boards are drawing on a different array of tools to encourage board refreshment, including adding directors with different skills and conducting deeper dives into the board’s skills and functioning through the board self-assessment process.

Director Commitments. As external risks and shifting market conditions demand greater care and attention from public company directors, boards should expect criticisms directed towards directors who serve on several public company boards and who may be considered "overboarded" by institutional investors and/or proxy advisory firms. The vast majority of S&P 500 boards have adopted policies limiting the number of public company directorships (84% in 2024, per the 2024 U.S. Spencer Stuart Board Index, available here (SSBI)), which in many cases reflect institutional investor and proxy advisory firm policies, including those noted in the table below.

Selected Institutional Investor and Proxy Advisor Policies on Director Time Commitments

The following table provides an overview of the policies on board service of selected institutional investors and proxy advisors, including the applicable limits set by those policies and the impact on director elections.

	Max # of Public Company Boards for CEOs, NEOs and Executive Directors (as applicable)	Max # of Public Company Boards for Non-Executive Directors	Impact on Vote or Recommendation
Vanguard	2 for a NEO (including the board where he or she is an NEO)	4	Will generally vote against the individual director, except at the boards where he or she is board chair or LID; for an NEO, only at the boards where he or she is not an NEO when the max # of boards is exceeded
BlackRock	2 for a CEO or executive chair (including the board where he or she is the CEO)	4	May vote against committee members or individual directors, as applicable when the max # of boards is exceeded
State Street	Starting in 2024, at S&P 500 no longer uses numerical limits to identify overcommitted directors For non-S&P 500 companies: • 2 for a NEO • 3 for non-executive board chair or LID • 4 for director nominees	4	For S&P 500, may vote against NomGov chair if no disclosure of company policy on director time commitments For other companies, may vote against individual director when the max # of boards is exceeded
ISS	3 for a CEO (including the board where he or she is the CEO)	5	May recommend against the individual director; for a CEO, only at the boards where he or she is not CEO when the max # of boards is exceeded
Glass Lewis	2 for an executive officer (including the board where he or she is an executive officer); 3 for an executive chair (including the board where he or she is an executive chair)	5	May recommend against the individual director; for an executive officer, only at the boards where he or she is not an EO when the max # of boards is exceeded

What to Do Now:

- **Evaluate board and committee composition; assess skills and vulnerabilities; consider refreshment.** The board should frequently evaluate its leadership structure, competencies, independence, diversity, tenure and effectiveness to determine whether the composition of the board and its committees aligns with the company's long-term strategic objectives and key and emerging risks facing the company. Stagnant boards may resist change, be less likely to identify emerging trends and opportunities for innovation, and be less effective in the long term. Boards must remain vigilant and identify gaps in expertise in order to ensure that new members add value and enhance board efficacy. Although Nasdaq's diversity rules have been invalidated by the Fifth Circuit, as we discuss in our prior Alert here, board diversity remains important for investors and boards.
- **Review director time commitment and overboarding policies; disclose reasons for continued service of directors who may be considered overboarded**. The board should assess whether directors have sufficient capacity to take on the significant tasks relating to public company directorship. Companies should review their overboarding policies against key institutional investor policies and publicly disclose company policies. For directors who may be considered overboarded under institutional investor and/or proxy advisory firm policies, disclosure addressing the contributions of, and rationale for retaining, a particular director may serve to mitigate criticism and the potential impact on director elections.
- **Review D&O Questionnaires for director independence and interlocks.** In light of recent regulatory enforcement relating to director independence, companies should provide clear guidance to directors and executives emphasizing how social interactions and personal relationships might impair director independence. Similarly, companies should also be vigilant about avoiding interlocks in violation of antitrust laws resulting from simultaneous service as an officer or director at competing companies. D&O questionnaires can provide a foundation for evaluating director independence and expertise, and can help companies prevent misstatements or omissions in related disclosures and avoid impermissible interlocks.

3. HUMAN CAPITAL AND EXECUTIVE COMPENSATION MATTERS

Executive Succession Planning. Nominating and corporate governance committees continue to identify management succession planning as a top priority according to Spencer Stuart's annual survey of nominating and corporate governance committee chairs, reflecting that selecting the CEO is one of the board's most important responsibilities. Heightened activity in CEO turnover during 2024 underscores the need for robust succession planning for CEO positions and the entire C-suite. In an effective long-term succession planning process, the board thoughtfully considers and develops the desired profile for future company leaders based on a clear understanding of the company's strategy and challenges. Clear engagement about the company's succession planning process should bolster stakeholder confidence that the right leaders are in place and are further being developed to ensure stable executive leadership in the long-term.

Workplace Environment, Culture and Talent. Oversight of human capital management ("HCM") issues – such as talent development, company culture, DEI metrics and targets, labor, pay equity, recruitment, retention, sexual harassment, discrimination and training – continues to be critical as companies focus on the development of an effective workforce. As companies try to balance business priorities with DEI and anti-DEI pressures, they are challenged to promote a workplace that fosters the development and effective performance of their human capital.

New Disclosure of Timing of Stock Option Grants. For companies that grant stock options or stock appreciation rights (SARs), new Item 402(x) of Regulation S-K requires companies to disclose their policies and practices regarding the timing of stock option grants, SARs, and similar instruments in relation to the disclosure of material nonpublic information (MNPI). This includes explaining how the board determines the timing of awards (e.g., whether they follow a predetermined schedule), and how, if at all, the board or compensation committee considers MNPI when granting awards. Companies must also disclose whether the timing of the disclosure of MNPI was intended to affect executive compensation. Further, if during the last completed fiscal year, the company awarded options to named executive officers in the period beginning four business days before the filing of a Form 10-Q, Form 10-K, or Form 8-K disclosing MNPI and ending one business day after the filing or furnishing of such report, the company must include specific tabular disclosure for each award, including the grant date, number of securities underlying such award, exercise price, grant date fair value and the percentage change between the closing market price of the securities underlying such award between the trading day immediately prior to the disclosure of the MNPI and the trading day beginning immediately following the disclosure of the MNPI. This disclosure may be included in the proxy statement and incorporated by reference into the Form 10-K.

Pay for Performance Equity Award Considerations. In 2025, ISS will place a greater focus on performance-based equity disclosure and design components, particularly for companies that exhibit a quantitative pay-for-performance misalignment. ISS has noted that a growing number of investors have become skeptical of performance conditioned equity awards (see prior Alert here), which result in complex, non-rigorous performance goals and above target payouts. ISS has been reevaluating its pay-for-performance principle, whether a predominance of performance-based compensation remains preferable to discretionary or time-based equity pay, and what the most appropriate approach is going forward. For 2025, we expect greater focus by investors and proxy advisory firms on performance-vesting equity disclosure and design components, as discussed in our prior Alert here, and for existing qualitative considerations around performance equity programs to be subject to greater scrutiny by ISS, especially for companies that exhibit a quantitative pay-for-performance misalignment.

Clawback Policies Beyond Listing Rules. Companies listed on the NYSE or Nasdaq are required to have a policy that provides for the recovery, in the event of an accounting restatement, of incentive-based compensation received by current or former executive officers where such compensation is based on the erroneously reported financial information. Even prior to the adoption of the listing rules, many companies had adopted clawback policies that were triggered by certain specified misconduct events. Proxy advisory firms and investors are continuing to encourage companies to adopt clawback policies that are broader than those required by NYSE and Nasdaq listing rules, including to expand triggering events to include misconduct. For example, Glass Lewis expects policies to provide companies with the power to recoup "variable incentive payments (whether time-based or performance-based) when there is evidence of problematic decisions or actions, such as material misconduct, a material reputational failure, material risk management failure, or a material operational failure…" (see our prior Alert here). Pursuant to a new ISS U.S. Compensation Policies FAQ, for a clawback policy to be considered "robust" in ISS's executive compensation analysis, it must explicitly cover all time-vesting equity awards – not just awards tied to financial performance as required under NYSE and Nasdaq rules. The absence of policies that align with ISS and Glass Lewis Policies, as applicable, could negatively impact the proxy advisory firms' assessment of a company's compensation disclosure. BlackRock (policy available here) also expects clawback policies to allow a company to recover compensation from executives whose behavior caused material financial harm to shareholders, material reputational risk to the company or resulted in a criminal investigation, regardless of whether there was a corresponding accounting restatement.

New Clawback Disclosure under Item 402(w) of Regulation S-K; May be Triggered by Interim Period Financial Restatements. Item 402(w) of Regulation S-K requires proxy disclosure concerning a company's action to recover erroneously awarded incentive-based compensation in proxy and information statements in which Item 402 compensation disclosure is required. We discuss the specific requirements of the rule in our prior Alert here. Companies should take note that the SEC Staff confirmed through informal guidance that while the 10-K checkbox does not need to be checked as a result of material corrections to interim financial statements where annual periods are not affected by the errors, companies must still provide the disclosures required by Item 402(w). This suggests the possibility that a correction of interim financials could be an accounting restatement that could require a clawback if, for example, incentive-based compensation is based on interim period financial results.

New Clawback Disclosure under Item 402(w) of Regulation S-K. Item 402(w) of Regulation S-K requires proxy disclosure concerning a listed company's action to recover erroneously awarded incentive-based compensation in proxy and information statements in which Item 402 compensation disclosure is required.

- *SEC Staff Comments* – Even When No Amount to Recover. Whenever there is a "big R" or a "little r" restatement, a listed company is required to analyze whether those restatements would result in any recovery of incentive-based compensation. While the extent of that recovery analysis may vary depending on facts and circumstances, the second checkbox of Form 10-K must still be checked for big R and little r restatements because the analysis still needs to be performed (see our prior Alert here). In instances in which there is no amount to recover after applying the clawback policy, the rules (Item 402(w)(2)) still require a brief explanation of why the application of the recovery policy resulted in that particular conclusion. A "brief explanation" is more than just disclosing the conclusions. The "why" is also required to be disclosed. The SEC staff already has seen disclosures that failed to provide that kind of brief explanation and merely jumped straight to a conclusion that no recovery is necessary.

- *Disclosure May be Triggered by Interim Period Financial Restatements*. Companies should take note that the SEC Staff confirmed through informal guidance that while the Form 10-K checkbox does not need to be checked as a result of material corrections to interim financial statements where annual periods are not affected by the errors, companies must still provide the disclosures required by Item 402(w). This suggests the possibility that a correction of interim financials could be an accounting restatement that could require a clawback if, for example, incentive-based compensation is based on interim period financial results.

What to Do Now:

- **Proactively plan for executive succession.** Companies should proactively identify and develop potential leaders to ensure seamless transitions in both emergency and long-term succession plans. Companies should consider which qualifications and experiences should be prioritized to identify and develop the right people to take on senior executive leadership roles – whether internally or externally.
- **Evaluate HCM disclosures and commitments.** Companies should consider taking an inventory of internally and externally disclosed HCM-related metrics, statements and reports, including DEI policies, commitments and public statements, paying close attention to any general short, medium and long-term targets or goals the companies previously set for HCM-related efforts and progress against targets and goals. Companies should also make sure that any such HCM-related disclosures are consistent and supportable with quantifiable data where available.
- **Conduct holistic review of existing clawback provisions and consider adopting clawback policy beyond listing requirements, as appropriate.** Companies should review and evaluate their ability to recover compensation pursuant to their existing recoupment policies and/or any applicable award or employment agreements, including the type of compensation subject to recoupment and the triggering events, and provide fulsome disclosure. To the extent such provisions are limited to the listing rule requirements, companies should also consider whether it is appropriate to expand policies to include misconduct and/or time-based equity awards beyond listing rule requirements.
- **Review compensation peer group**. Companies should review their compensation peer group annually to confirm that current peers still fit from an industry, size and business model perspective and whether others may be appropriate to add based on changes to their businesses or the market.
- **Mind the "perks."** Company perquisites remain a focus for the SEC as companies continue to miss disclosures. Most recently, the SEC settled with Express over failure to disclose over $1 million in perks, including certain expenses associated with the CEO's authorized use of chartered aircraft for personal purposes, over the course of three years' proxy statement filings. The SEC found controls failures, but did not impose damages due the company's self-reporting, cooperation and remediation.
- **Plan for new stock option timing and clawback disclosure under new Items 402(x) and 402(w) of Regulation S-K; must be tagged in Inline XBRL.** Companies that grant options, SARs or similar awards should also evaluate and be mindful of the board and compensation committee calendar to ensure that anticipated grant dates are not close in time to the expected release of MNPI (e.g., Form 8-K filing under Item 2.02 / earnings release, Form 10-Q, Form 10-K) if the desire is to avoid the required tabular disclosure. For companies that had restatements in the last year, be mindful of required clawback obligations and disclosure.
- **PVP year 3 requires five years of disclosure (for non-SRCs); review SEC comment letters, CDIs and peer disclosure.** Companies should review SEC comment letters and the CDIs to assess whether their PVP disclosure could be adjusted to better meet SEC requirements. Companies should also compare their PVP disclosures and

metrics with those of their peers, which may also shape investor expectations for PVP among the peer group. Companies may also want to consider whether the peer group used for purposes for this disclosure should be updated.

4. SHAREHOLDER ENGAGEMENT TOPICS: INVESTORS GET CREATIVE

It is essential for companies to engage with shareholders year-round on strategy, risk, executive compensation, corporate governance and ESG issues, particularly now following the adoption of universal proxy cards. Engagement meetings with investors afford directors an opportunity to build relationships with investors by allowing investors to express their concerns and hear how management intends to address their concerns. In 2024, investors became even more creative with the mechanisms to bring matters to a company's attention through new channels such as social media campaigns, in addition to traditional avenues such as shareholder proposals and proxy fights. Companies must reassess their engagement and preparedness playbook, which now includes monitoring and addressing, as appropriate, social media activity, to ensure both that engagement efforts yield the greatest returns and the company is not caught flatfooted by an activist campaign.

Spotlight on Key Shareholder Engagement Topics

We expect that companies will continue to face pressure from investors on the following hot topics:

- **Director Qualifications:** Investors analyze director qualifications to assess their ability to oversee the important issues facing the company. The implementation of the universal proxy card has served to spotlight the skills and qualifications of each individual director, by allowing dissidents to target specific directors who they believe lack particular skills or experience. Companies should "think like an activist" and proactively assess any individual director weaknesses a dissident may seek to exploit. Regular engagement with key institutional investors along with clear and effective proxy statement disclosure are paramount to educate investors about each director's contributions well in advance of a challenge.
- **Strategy and Operations:** In 2024, activist investors continued a shift seen over the last several years toward prioritizing operational and strategic improvements. Recent activist campaigns have also led to the CEO being replaced in record numbers largely due to concerns about effective company operations and execution of strategic priorities, which at some companies has been in connection with a major problem. Companies should be prepared to communicate in a thoughtful and meaningful way about their strategy and operations.
- **Risk Oversight, AI Specifically:** Investors want boards to disclose the company's processes for identifying, monitoring, and managing risks, and are engaging with companies to understand how risk oversight processes evolve in response to changes in corporate strategy and/or shifts in the business and related risk environment. As discussed above, as use of AI spreads across sectors, we expect the range and breadth of demands on companies and boards to articulate the company's AI strategy and oversight to expand.
- **Executive Compensation and Say-on-Pay:** The say-on-pay advisory vote on executive compensation continues to be the centerpiece of shareholder engagement at many companies. According to ISS, instances of low (less than 70%) say-on-pay support and failed say-on-pay votes have decreased to 5.1% and 1%, respectively, in 2024. Shareholder activists often campaign on dissatisfaction with executive compensation as a rallying cry to effect management and board changes. Companies should continue to be prepared to engage on executive compensation, and be responsive to investor feedback on this topic, particularly those companies who have seen a decline in shareholder support for say-on-pay.
- **DEI:** During 2024 and into 2025, some of the most well-known global consumer brand companies publicly announced that they would revisit their DEI initiatives in response to pressure from various constituencies, including shareholder proponents such as the National Center for Public Policy Research (NCPPR), plaintiffs, as well as targeted social media campaigns by investors and other activists (see DEI discussion above).

Proxy Statement as an Engagement Tool. Companies should continue to keep in mind the importance of the proxy statement as a key part of their overall engagement efforts. When preparing a proxy statement, companies must keep in mind the diverse audience of stockholders (institutional, individual/retail and/or activist), proxy advisors, board members, company executives, employees, labor unions, analysts, journalists, regulators and many others. These groups utilize the disclosures in proxy statements in a variety of ways, including to inform voting decisions, review for compliance, and to educate about the company. Disclosure in the proxy statement can serve as a way for the company to highlight strategic governance initiatives and topics of importance and to connect with stakeholders on their topics of interest. Companies should ensure that the proxy statement is easy to navigate, using summaries, charts and linked headings as appropriate, keeping in mind that many proxy statement users may focus on specific sections of the document (perhaps assisted by AI tools).

Union Activism Gets Creative. In 2024, unions used various methods in the proxy process to amplify their messages. Unions advanced shareholder proposals submitted under Rule 14a-8 focused on labor, human capital management matters, "just transition" (i.e., framework for transition to a fair and inclusive sustainable economy) and other ESG topics. Additionally, the Strategic Organizing Center (SOC), a coalition of North American labor unions, launched the first ESG-focused proxy fight since the adoption of the universal proxy rules at Starbucks. SOC nominated three directors with labor issues experience, which ultimately were withdrawn after Starbucks agreed to begin discussions on a foundational framework to achieve collective bargaining agreements, including a fair process for organizing and the resolution of outstanding labor-related litigation. A group of unions also took a creative approach to getting their proposals on the company's ballot and bypassing the Rule 14a-8 shareholder proposal process. The AFL-CIO and United Mine Workers of America launched a proxy solicitation at Warrior Met Coal sending their own proxy materials to the company's shareholders pursuant to the provisions of the company's advance notice bylaws. The unions' proxy included five of their own proposals plus the company's full director slate (i.e., without a contested slate of directors nominated by the unions). While shareholder proponents have always been able to submit proposals relating to business matters under advance notice bylaw provisions, the adoption of the universal proxy rules enable these proponents to include the company's full director slate in their proxy materials without first obtaining the consent of the company's nominees. This approach effectively compelled Warrior Met Coal to include the five shareholder proposals in its proxy materials so that the company could use its proxy card to solicit votes against the proposals as well as achieve a quorum for the meeting.

Shareholder Proposal Expectations for 2025. In 2024, environmental and social proposals dominated shareholder proposals, with only three environmental proposals and one social proposal receiving majority support according to ISS Governance Analytics. Support for DEI proposals decreased with proposals calling for companies to conduct third-party racial or civil rights equity audits receiving significantly less support than in recent years. In 2024, several AI-related shareholder proposals at media and retail companies requested additional disclosure on AI use and clarity on AI-related oversight at the board and management level, and we expect an uptick in these kinds of proposals in 2025. We also expect more targeted proposals focused on material issues and risks as well as proposals focused on companies that have missed previously disclosed climate or other ESG-related targets. During the 2024 proxy season, more companies experienced success in obtaining no action relief from the SEC Staff to exclude shareholder proposals. While we expect the trend in no action relief to continue, the SEC Staff under the new administration may take a different approach to the Rule 14a-8 shareholder proposal process (see also the discussion above on using universal proxy to submit shareholder proposals).

Litigation Tactic for Excluding Shareholder Proposal: ExxonMobil Changes Course in 2024. In 2024, ExxonMobil skipped the no action letter process by going directly to court to obtain a declaratory judgment to exclude a proposal from proponents Arjuna Capital and Follow This requesting that the company accelerate the pace of greenhouse gas emissions (GHG) reductions and disclose new plans, targets and timetables for these reductions. Exxon argued that the activists submitted multiple shareholder proposals over the years to "interfere with ExxonMobil's business and to promote their own interests over those of ExxonMobil's shareholders." The case ultimately was settled, and the proponent agreed to refrain from submitting any future proposals to Exxon shareholders related to GHG emissions or climate change. The settlement may encourage other companies to use the threat of litigation as a way to increase leverage with shareholder proponents.

Advance Notice Bylaw Scrutiny. A company's advance notice bylaws set forth requirements for shareholders to nominate directors or submit business for consideration at the company's annual or special meetings. Information requirements for director nominees and nominating shareholders under advance notice bylaw provisions frequently have been in focus and recently have been challenged in Delaware courts. The decision of the Delaware Supreme Court in *Kellner v. AIM ImmunoTech, Inc*. ultimately confirmed the facial validity of most of the requirements imposed by the AIM Immunotech advance notice provisions other than those that "couldn't operate lawfully under any set of circumstances." Accordingly, *Kellner* stands for the proposition that advance notice bylaws are presumed to be valid and confirmed that adopting advance notice bylaws is advisable for Delaware corporations provided the provisions are decipherable, fall within the limits of the law and, if adopted in the face of a potential or actual proxy contest, can satisfy enhanced scrutiny. Plaintiffs have however challenged advanced notice provisions requiring significantly detailed information from dissident nominees, including certain provisions that would require dissident nominees to provide, in connection with their nomination, an irrevocable resignation letter subject to acceptance by the board in the event that, at some later date, the board determines that the nominee made untrue statements in connection with their advance notice submission to the company. Delaware courts have yet to weigh in on the facial validity of irrevocable letters of resignation.

Impact of Changing Voting Dynamics. In the 2024 proxy season, according to Broadridge 2024 Proxy Season Review, retail investors owned 31.7% of shares and institutional investors owned 68.3% of shares, yet retail stockholders voted only 29.8% of the shares they owned, while institutional investors voted 80% of the shares they owned. Recently, large asset managers such as BlackRock, Vanguard, and State Street introduced mechanisms of pass-through voting to their retail customers, allowing individual investors to select from a menu of voting options in casting votes at portfolio companies held in a mutual fund. Vanguard announced the expansion of its voting choice program in late 2024, expanding pass-through voting optionality to funds representing over $200 billion in assets under management. Although only a small number of retail investors have opted to participate in pass-through voting pilot programs so far, we expect asset managers to continue rolling out pass-through voting programs.

What to Do Now

- **Prepare for engagement on "hot topics"; review investor policies.** Companies must be prepared and able to clearly articulate their priorities and areas of focus including director qualifications, executive compensation, risk oversight, AI, cyber and ESG issues. Investor policies on particular topics can help companies identify where issues may arise and provide responsive information where appropriate in the proxy statement and/or engagement meetings (for example, reasons for a director's service on multiple boards, as discussed above). Engagement meetings with shareholders should follow an agenda that reflects input from the company and the investor and be compliant with Regulation FD.
- **Enhance individual director and full board profiles.** Given the recent success of activists using universal proxy cards to obtain at least one board seat, companies should continue to review director backgrounds and enhance director profiles in their proxy statements to highlight each director's distinctive skills, elaborate on how the director acquired such skills and why they are important for the company. Although the SEC declined to require disclosure of director cyber expertise, investors are expecting boards to have technology and/or cyber expertise, and companies continue to highlight such experience in director bios and skills matrices. In 2025, we expect to continue to see more disclosure on cyber and technology expertise, as well as AI-related skills and expertise.
- **Retool playbook; prepare for creativity.** Companies must frequently reassess their preparedness playbook, which should include monitoring of social media activity.
- **Regularly consider shareholder base.** Amid the rise of new activist investors seeking to influence management and/or governance of companies, it is essential to review the company's shareholder base regularly with the company's proxy solicitor or other providers of "market intelligence." This active monitoring will help the company to avoid surprises, as well as generally understand shareholder sentiment and anticipate voting behaviors.

- **Review advance notice bylaws on a "clear day."** Given the heightened levels of activism and the increased scrutiny of advance notice bylaws, it is critically important for companies to review their advance notice bylaws periodically to ensure that the terms are reasonable, unambiguous and narrowly tailored. Ideally, revisions should be adopted on a "clear day" in the absence of activist approach to reduce the risk of a court applying an "enhanced scrutiny" standard of review.
- **Encourage voting through investor communication strategies.** Companies should review communication strategies designed to target and influence potential voters and investors particularly in anticipation of more retail shareholder participation by means of pass-through voting.

5. PROXY SEASON NUTS & BOLTS AND REMINDERS

Included below is a potpourri of housekeeping considerations and other basic reminders and "to dos" for upcoming 2025 annual meetings.

- **Update D&O questionnaires; review responses closely and ask questions.** Consider updates to address skills, certifications, experience and diversity, particularly as it relates to hot-button topics such as AI, cyber and climate, as well as disclosures relating to related person transactions, receipt of perquisites, and the adoption, modifications or termination of Rule 10b5-1 plans (and non-Rule 10b5-1 arrangements). Also, consider broadening questions relating to director independence from members of management and review responses carefully**.**
- **Confirm compensation disclosures required in connection with filer status change**. If you are no longer an emerging growth company or smaller reporting company under SEC rules, among other things, additional compensation disclosures will be required. Review and consider the requirements and plan ahead.
- **Consider adopting officer exculpation.** According to public filings, over 450 Delaware public companies have proposed for shareholder approval amendments to their certificates of incorporation to adopt exculpation, of which nearly 90% were approved. Delaware companies that have not yet adopted officer exculpation provisions in their certificates of incorporation may decide to do so in 2025. If so, a preliminary proxy statement will be required and proxy statement review, filing and printing scheduling should be adjusted accordingly.
- **Review ISS and Glass Lewis policies; identify proposals that may receive negative vote recommendations.** Understand how ISS and Glass Lewis voting policies may apply given the company's governance profile and identify potential negative recommendations, including the possible impact on director elections (summarized here and here) and other proposals at the annual meeting. A few important reminders based on 2024 results include:
    - Confirm that the board has an overboarding policy, and review its terms with regard to ISS and Glass Lewis limits (as well as relevant investor policies, as discussed above).
    - Confirm that oversight of ESG matters is specifically assigned to the board in the corporate governance guidelines or to one or more board committees in their charters and appropriately disclosed, pursuant to the Glass Lewis policy.
    - Expect a negative recommendation from Glass Lewis if the board is less than 30% gender diverse with very few exceptions (and they do not round up!)
- **Review and confirm voting standards**. Review and confirm accuracy of voting standards included in proxy materials to ensure consistency with the company's organizational documents and applicable state/country law and stock exchange requirements. A close review could avoid disclosure claims from shareholder plaintiffs, SEC comments or potential SEC enforcement. Pay especially close attention to the treatment of abstentions and broker non-votes, and situations where default standards under state law apply where the charter and/or bylaws are silent. Similarly, be mindful of compliance with applicable NYSE and Nasdaq shareholder approval rules to ensure that shareholders appropriately approve company actions.

- **Remember insider trading policy and procedure disclosure (including for company buybacks; file policies and procedures with Form 10-K; consider review ahead of disclosure).** In light of new disclosure requirements regarding insider trading policies and procedures applicable to directors, officers, employees and the company under Item 408(b) of Regulation S-K and the requirement to file them as Exhibit 19 to Form 10-K, companies should review their policies and procedures and consider adopting a stand alone policy regarding company buybacks. Companies should also consider taking a fresh look at their insider trading policies to evaluate: appropriate blackout periods; pre-clearance processes and procedures; coverage of gifts as transactions in company securities; and whether to address trading in another company’s securities in light of the SEC’s acceptance of the shadow trading theory (liability for trading in securities of a company economically linked to the registrant).
- **Remember options and clawback disclosures required by Item 402(x) and 402(w)**. As discussed above, new disclosure is required. Review the requirements and confirm that the required disclosure is included

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Please reach out to your regular contact at Weil, Gotshal & Manges LLP with any questions.

Contributors

Kaitlin Descovich	View Bio	kaitlin.descovich@weil.com	+1 202 682 7154
Lyuba Goltser	View Bio	lyuba.goltser@weil.com	+1 212 310 8048
Rebecca Grapsas	View Bio	rebecca.grapsas@weil.com	+1 212 310 8668
Steven Bentsianov	View Bio	steven.bentsianov@weil.com	+1 212 310 8928
Howard B. Dicker	View Bio	howard.dicker@weil.com	+1 212 310 8858
Adé K. Heyliger	View Bio	ade.heyliger@weil.com	+1 202 682 7095
Rachel Alpert	View Bio	rachel.alpert@weil.com	+1 212 310 8061
Julie Rong	View Bio	julie.rong@weil.com	+1 212 310 8201
Eleni Samara	View Bio	eleni.samara@weil.com	+1 212 310 8617
Allie Williams*	View Bio	allie.williams@weil.com	+1 212 310 8183
Amanda Zoda	View Bio	amanda.zoda@weil.com	+1 212 310 8669

*Not Yet Admitted in New York