During 2021, the U.S. Securities and Exchange Commission (SEC) adopted rule changes and provided public companies with useful guidance on various topics. In December, Institutional Shareholder Services (ISS) released its final policy updates, along with an executive summary of its global policy updates. In November, Glass Lewis released two documents: 2022 U.S. Proxy Voting Policy Guidelines and 2022 Policy Guidelines on ESG Initiatives, which apply across all jurisdictions.

In anticipation of the upcoming reporting season, in this update we highlight some of the most significant rule changes, guidance, institutional investor areas of focus, and trends for public companies to consider in preparing annual report and proxy statement disclosures in 2022:

- Form 10-K Disclosures
- E&S Disclosures in Proxy Statements

- Board Diversity
- Executive Compensation
- Changes in the SEC Staff's Shareholder Proposal No-Action Letter Process
- Universal Proxy
- Multi-Class Share Structures
- Proxy Voting Advice Rules

Form 10-K Disclosures

Climate Change Disclosures

One area of focus for both the SEC and many investors is climate change disclosure. Companies need to be mindful of what their shareholders seek in this area—and adjust their disclosure controls and procedures accordingly if they intend to provide more detailed disclosure about climate change in their SEC filings, including Form 10-K. As companies consider climate change-related disclosures in 2022, including for purposes of SEC filings, consider the following developments:

- In November, the International Financial Reporting Standards (IFRS) Foundation made a huge consolidation announcement—the formation of a new "International Sustainability Standards Board" (ISSB), which includes the combination of the Climate Disclosure Standards Board (CDSB) and the Value Reporting Foundation (which itself is the product of a recent merger of the SASB and the Integrated Reporting Framework) into the new ISSB by June 2022. The Global Reporting Initiative (GRI) is not part of this consolidation and is still a separate reporting framework. This consolidation should help reduce the climate reporting workload for companies that were reporting under multiple frameworks.
- In September, the SEC's Division of Corporation Finance (Corp Fin) posted a sample comment letter that contained nine sample comments relating to climate change disclosures. We summarized the sample comment letter and provided practice pointers in a September blog post. As companies draft their climate change-related disclosures, they should keep in mind the SEC's sample comments, including that the SEC reviews sustainability and corporate social responsibility reports, and will ask what consideration a company has given to including the same type of disclosures in SEC filings as has been provided in these separate reports.
- The SEC will likely propose new rules regarding climate change related disclosures in the coming months, which—when adopted following the required comment period and other procedures—would update its interpretive guidance from 2010. Over the course of 2021, the SEC chair and commissioners have delivered numerous speeches on what that proposed rulemaking might look like. The rule proposal also will be informed by the input received in response to the SEC's request for comment from March 2021.

MD&A Amendments Now Effective

In 2021, many companies voluntarily complied with updated rules for Management's Discussion & Analysis of Financial Condition and Results of Operations (MD&A) and related financial disclosures adopted by the SEC in November 2020. We summarized the amendments in a prior update. Highlights of the amendments include:

- Eliminating the requirement to provide five years of selected financial data.
- Streamlining the requirement to provide summarized tabular disclosure of two years of quarterly operating data to require disclosure only when there have been one or more retrospective changes that are material,

individually or in the aggregate, together with an explanation of the reasons for the changes.
- Modernizing, simplifying, and enhancing MD&A disclosure requirements, including replacing the item requiring disclosure of off-balance sheet arrangements with an instruction to discuss such obligations in the broader context of MD&A, and eliminating the tabular disclosure of contractual obligations.

As always, companies should consider whether there are any material events and uncertainties known to management that are reasonably likely to have a material impact on future operations. The SEC's rule changes emphasize this long-standing requirement.

Companies are required to comply with the amended rules starting with their fiscal year ending on or after August 9, 2021. As a result, for calendar year-end companies, the new rules apply to annual reports for the fiscal year ending December 31, 2021, and to other periodic reports going forward.

Human Capital Management Disclosures

Last year, many companies had little time to prepare Form 10-K disclosures regarding human capital management in response to SEC rules adopted in late 2020. The SEC did not define "human capital" or specify a particular framework for disclosure. This year, we anticipate seeing evolution in human capital management disclosures as companies have had more time to consider potential disclosures and engage with internal and external stakeholders. As companies prepare updated disclosures, they should consider the following:

- Include metrics that management uses, or reports on to the board, regarding human capital management. For companies that did not have metrics that were prepared for disclosure controls and backed up for purposes of disclosure in an SEC filing in 2021, consider whether the work has been done to prepare for disclosure this year. When providing human capital management metrics, consider the SEC's 2020 interpretive release on key performance indicators and metrics.
- Companies that engaged with investors during 2021 on human capital topics of interest should incorporate their input into the updated disclosures.
- Review disclosures by company peers and consider whether those peers cover any topics or metrics the company has not addressed.
- Recognize that, while the SEC rules do not currently require specific metrics other than the number of employees, human capital management disclosures are on the SEC's Regulatory Flexibility Agenda, with a rule proposal expected in the near future.

E&S Disclosures in Proxy Statements

Environmental and social (E&S) issues continue to dominate many institutional investor, proxy advisor, and other proxy season participants' agendas. We have reported on some of these policies in blog posts on 2022 voting policies for ISS, Glass Lewis, and BlackRock. Many companies prepare investor-facing sustainability; environmental, social, and governance (ESG); or corporate responsibility reports, but do not publish these reports until after the annual shareholder meeting due to the timing for when much of the information reported is ready for release. In light of these circumstances, companies should consider focusing on the following E&S disclosures in the proxy statement:

- The role of the board in overseeing E&S matters, including allocation of specific E&S risks or review of the annual sustainability report to a particular committee.

- Discussion of how, where, and how often the company reports to investors on E&S matters. Many investors and proxy advisors are looking for information on whether the company provides reporting aligned with accepted frameworks, such as Task Force on Climate-Related Financial Disclosures (TCFD) and Sustainability Accounting Standards Board (SASB).
- Ensure that any references to sustainability or corporate responsibility websites are inactive URLs and not hyperlinks to avoid unintentionally incorporating all materials on such websites into the proxy statement.
- E&S priorities for the company identified by management and the board, including areas for which the company has set goals or targets for improvement.
- For companies that have set greenhouse gas (GHG) emission reduction targets, consider reporting in the proxy statement that the company has set these targets, even if the targets themselves are not reported.
- Highlight achievements of progress toward targets and goals, and external recognition of the company's E&S efforts.

Board Diversity

Increasing gender and underrepresented minority representation on boards of directors continues to be a major focus for investors, regulators, proxy advisors, and state legislatures. Below are highlights of significant updates for 2022, and see our proxy season update from last year for discussion of the California and Washington state statutes.

Nasdaq Requirements

In August 2021, the SEC approved new Nasdaq rules relating to board diversity. The two principal requirements of the new Nasdaq rules are that companies must (1) disclose the diversity characteristics of its board of directors and (2) have (or explain why the company does not have) at least two members who identify as diverse.

- **Board Diversity Matrix.** The new Rule 5606(a) requires that Nasdaq-listed companies disclose, in the form of a standardized matrix set forth in the rule or a substantially similar format (Nasdaq has provided additional guidance and examples), how the members of the board of directors voluntarily self-identified regarding gender, predefined race and ethnicity categories, and LGBTQ+ status. While the rule only requires that the disclosure be made on an aggregated basis, it does not preclude companies from providing more detailed diversity disclosures—such as on an individual basis—in addition to the required matrix.

  All Nasdaq-listed companies will be required to comply with the diversity matrix disclosure requirements by August 8, 2022, or, if later, by the date during calendar year 2022 on which the company files its proxy statement for its 2022 annual meeting of shareholders, or its annual report on Form 10-K or 20-F, if the company does not file a proxy statement. A company may provide the diversity matrix disclosure in such SEC filing, or on its website concurrently with such filing (and for website disclosure, must also submit a URL link to the disclosure through the Nasdaq Listing Center within one business day after such posting). If a company files a proxy statement for its 2022 annual meeting of shareholders without including the diversity matrix, the company has until August 8, 2022, to disclose the matrix on its website or in an amended annual report.
- **Diverse Directors.** The new Rule 5606(f) requires that Nasdaq-listed companies have at least two diverse board members, or explain the company's reason for not meeting the objective. For U.S. companies, at least one diverse director must identify as female and one diverse director must identify as an

underrepresented minority (defined by Nasdaq as an individual who self-identifies in one or more of the following groups: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or two or more races or ethnicities) or as LGBTQ+. The diversity requirement is subject to a phase-in period, with all Nasdaq-listed companies expected to have at least one diverse director by August 7, 2023. Larger companies listed on Nasdaq Global Select Market or Nasdaq Global Market tiers will need to have a second diverse director by August 6, 2025, while smaller companies listed on the Nasdaq Capital Market tier have until August 6, 2026. Nasdaq has issued FAQs and provided other guidance regarding these requirements.

Proxy Advisory Firms and Institutional Investors

Proxy advisory firms and institutional investors have updated their policies on board diversity for the 2022 proxy season. Updated guidance from ISS, Glass Lewis, and BlackRock is highlighted below. Other large institutional investors will likely provide updated voting policies in the coming weeks and months.

- As announced last year, ISS's proxy voting guidelines for 2022 include a policy to generally recommend votes against the chair of the nominating committee for companies in the Russell 3000 and S&P 1500 indices where the board has no apparent racially or ethnically diverse members, subject to certain exceptions. ISS also announced that its gender diversity voting policy to generally recommend votes against the chair of the nominating committee at companies with no women on the board will be expanded to apply to most listed U.S. companies for meetings on or after February 1, 2023.
- As announced last year, Glass Lewis' 2022 policy guidelines provide that it will now generally recommend voting against the nominating committee chair for Russell 3000 companies if a board has fewer than two "gender-diverse directors" or against the entire nominating committee if the board has no gender-diverse directors. The update here is the shift from a policy regarding female directors to one regarding gender-diverse directors (female or identifying with a gender other than male or female). Glass Lewis has noted that a company may avoid a "vote against" recommendation if its disclosure offers a persuasive rationale that explains, or a plan to address, the lack of diversity. Starting in 2023, Glass Lewis will move from a numerical approach to a percentage-based approach, where it will generally recommend voting against the nominating committee chair for boards without 30% gender-diverse representation for Russell 3000 companies.
- BlackRock's recently updated 2022 proxy voting guidelines remain consistent with its prior approach to engagement on board diversity. New for 2022, BlackRock has added an aspirational goal of at least one director who identifies as a member of an underrepresented group to its existing targets for companies of 30% diversity of membership and at least two directors who identify as female. BlackRock defines "underrepresented group" as including (but not limited to) individuals identifying as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, or Native Hawaiian or Pacific Islander; individuals who identify as LGBTQ+; individuals who identify as underrepresented based on national, Indigenous, religious, or cultural identify; individuals with disabilities; and veterans.

D&O Questionnaire Updates

Companies planning to disclose director diversity information should consider making updates to their annual director and officer questionnaires (D&O Questionnaires).

- Nasdaq-listed companies should include questions that track the information required to be disclosed in the board diversity matrix. The questions should clearly provide directors with an option not to disclose such information, and explicitly solicit their consent to publicly disclose such information in the company's SEC filings, corporate website, or other locations in which the company expects to provide this disclosure.

- Other companies might also consider adding similar questions to their D&O Questionnaires if they decide to voluntarily disclose director demographic information.
- If a company decides to go beyond the aggregated disclosure provided for in the Nasdaq rule, the D&O Questionnaire should be clear about how the disclosure will be framed, and whether demographic information will be provided on a director-by-director basis.

Executive Compensation

Proxy Advisory Firm Updates

- In December, ISS posted 11 updated FAQs for pandemic-related pay adjustments. We provided key takeaways in a blog post. Overall, ISS is largely reinstating its prepandemic guidelines on pay practices, although some variance from recommended practices may be viewed as reasonable for companies that continue to incur severe negative impacts over the long term.
- ISS also announced that it will transition its three-year burn rate calculation for its Equity Plan Scorecard from a volatility-based approach to a value-adjusted approach beginning in the 2023 proxy season.
- In its 2022 voting policy guidelines, Glass Lewis confirmed that it does not have a policy about whether E&S should be used for either a company's short- or long-term incentive program. If E&S metrics are used, Glass Lewis expects robust disclosure on the metrics selected, the rigor of performance targets, and the determination of corresponding payout opportunities.
- Glass Lewis clarified that it will consider adjustments to GAAP financial results in its assessment of an incentive's effectiveness at tying pay to performance. Glass Lewis expects clear disclosure regarding long-term incentive awards in order to assess the basis for any adjustments to metrics or results.
- Glass Lewis also clarified its guidance regarding front-loaded incentive awards, noting that it will examine both the amount of the award on an annualized basis and the impact of overall size of awards on dilution of shareholder wealth.

Continued SEC Focus on Perquisites

As we reported last year, the SEC's Division of Enforcement has been focused on perquisite disclosures. That focus has continued, with additional SEC enforcement action settlements related to companies' failure to disclose personal and travel expenses as perquisites. Consistent with our recommendations last year, we suggest that companies review internal procedures for capturing potential personal benefits, as well as questions regarding perquisites and other potential personal benefits in their annual D&O Questionnaires, and consider whether such procedures and questions are working well in eliciting disclosure of benefits that could be considered perquisites. Companies may want to consider providing additional training for directors, officers, and staff involved with implementing such internal procedures, and including in their annual D&O Questionnaires an explanation of the SEC's two-step analysis for determining whether an item is a perquisite.

SEC Comments on Non-GAAP Financial Measures and Regulation G Compliance

As we noted in a November blog post, non-GAAP financial measures that require compliance with Regulation G can be easily overlooked in the context of SEC disclosure addressing executive compensation and company performance outside of the limited context for which such compliance is not required (discussion of incentive compensation goals and achievement in a company's compensation discussion and analysis (CD&A) disclosure). The SEC Corp Fin staff (Staff) continues to comment on this, and to require companies to file amended

disclosures that include the required Regulation G compliance. Companies should evaluate their disclosure procedures to ensure that all disclosure of non-GAAP financial measures included SEC filings complies with Regulation G.

Changes to the SEC Staff's Shareholder Proposal No-Action Letter Process

In late 2021, the SEC Staff published new guidance that may result in more ESG-related shareholder proposals appearing in company proxy statements and clarified some of the procedural rules governing the shareholder proposal submission process.

Substantive Grounds for Exclusion

On November 3, 2021, the SEC Staff published Staff Legal Bulletin 14L, which rescinds three recent Staff legal bulletins (SLB 14I, SLB 14J and SLB 14K) and provides new guidance on how the Staff will evaluate future no-action requests seeking the exclusion of shareholder proposals on the basis of the "ordinary business" exception in Rule 14a-8(7), the micromanagement argument for purposes of the ordinary business exception, and the "economic relevance" exception in Rule 14a-8(i)(5).

- **Social Policy.** SLB 14L reverses the company-specific approach to evaluating the significance of a social policy issue for purposes of the ordinary business exception. The Staff will focus instead on the "broad[er] societal impact" of the issue rather than the significance of the policy to the company. Because the Staff is no longer taking a company-specific approach, it no longer expects a board analysis, including the "delta" component showing the differences between the company's existing actions and the proposal's request, to support future no-action requests. As an example, the new guidance notes that proposals "squarely raising human capital management issues with a broad societal impact" would not be excludable solely because the proponent did not demonstrate that the human capital management issue was significant to the company.
- **Micromanagement.** SLB 14L reverses the Staff's approach to micromanagement arguments under the ordinary business exclusion. Noting that "the rescinded guidance may have been taken to mean that any limit on company or board discretion constitutes micromanagement," the new guidance provides that going forward, the Staff will take a "measured approach" to evaluating micromanagement arguments, and that specifically the Staff will not concur in the exclusion of proposals that suggest targets or timelines to address climate change, so long as the proposals afford discretion to management as to how to achieve such goals.
- **Economic Relevance.** SLB 14L reverses the Staff's approach to the economic relevance exception, which permits the exclusion of proposals relating to less than 5% of a company's total assets, net earnings, and gross sales not otherwise significantly related to the company's business. Under the new guidance, the Staff will no longer concur in the exclusion of a proposal based on analysis by the company's board of directors demonstrating that a proposal raising social concerns was insignificant to the company. Instead, exclusion will be disallowed where a proposal raises issues of broad social or ethical concern related to the company's business.

Procedural Guidance

SLB 14L and subsequent Staff announcements also provide guidance on procedural requirements for the shareholder proposal process.

- **Email Submissions and Communications.** SLB 14L suggests that to prove delivery of an email for purposes of Rule 14a-8, the sender should seek a reply email from the recipient in which the recipient acknowledges receipt of the email. The Staff also encourages both companies and proponents to acknowledge receipt of emails when requested. Companies can also provide an email address for submission of proposals in their proxy statements, and may find it beneficial to do so in order to avoid mislaid proposals. Email read receipts, if received by the sender, may also help to establish that emails were received. Email delivery confirmations and company server logs may not be sufficient to prove receipt of emails as they only serve to prove that emails were sent, not received.
- **Proof of Ownership.** SLB 14L provides that even where a company has previously sent a shareholder a deficiency notice, it should notify the shareholder of any specified defects in a subsequently provided proof of ownership and afford the shareholder an opportunity to remedy the defect. The Staff accordingly may expect companies to send more than one notice of deficiency, depending on the circumstances. SLB 14L also provides a suggested, but not exclusive, new format that a shareholder may use to demonstrate the required level of stock ownership, in light of the changes to ownership threshold requirements first applicable in the 2022 proxy season.
- **Use of Graphics and Images.** SLB 14L republishes and updates guidance on the use of graphics and images in shareholder proposals originally included in the rescinded SLBs, confirming that any words used in graphics would be included in determining whether the proposal exceeds 500 words, and giving examples of when exclusion of the graphics would be appropriate under Rule 14a-8(i)(3) as vague or misleading. SLB 14L also notes that companies should not diminish the appearance of a shareholder's graphic, but need not give greater prominence to the proponent graphics than to their own, and may reprint graphics in the same colors used by the company for its own graphics.
- **Redaction of Personal Information.** In December 2021, the Staff made an announcement advising companies and shareholder proponents to redact all personally identifiable and other sensitive information from Rule 14a-8 submissions and related materials prior to submitting them to the SEC. This includes information such as brokerage account numbers, physical addresses, email addresses, and telephone numbers of individual shareholders. The Staff also clarified that in submitting no-action requests, companies need to include only the *relevant* correspondence with the proponent. For example, the proponent's proof-of-ownership documents are not relevant unless the company is contesting a proponent's eligibility to submit a proposal.
- **Staff Responses to No-Action Requests.** Also in December 2021, the Staff made an announcement that it will return to its prior practice of responding to all shareholder proposal no-action requests with a written letter, similar to those issued in prior years. The Staff had discontinued this practice in 2019, when it began responding with a written letter only in limited instances, and communicating the vast majority of responses via notations to a chart maintained on Corp Fin's website.

Universal Proxy

In November 2021, the SEC adopted rules that enable the use of a universal proxy card in public solicitations involving the election of directors, summarized in this SEC fact sheet. The new rules do not become effective until August 31, 2022. In the case of contested elections, the rules will require that all nominees for director appear on the same proxy card, giving shareholders the ability to "mix and match" their votes for nominees from each of the company's and a dissident shareholder's slate. Under the current rules, in a contested election, shareholders receive different proxy cards where they can vote either entirely for the company's slate on the company's proxy card or entirely for the dissident's slate on the dissident's proxy card, which may be rounded

out by company nominees under the current "short slate" rules if the dissident is proposing nominees for fewer than all seats to be elected.

It is hard to know now whether the universal proxy rules will increase the frequency of proxy contests or the likelihood of success of dissident nominees. Notably, the new rules include certain procedural requirements, detailed below. While these procedures will create hurdles for a dissident seeking to use the universal proxy rules—including the expense of soliciting votes from a significant portion of company stockholders—there is no enforcement mechanism to cause the activist to comply. We anticipate that a company could properly exclude votes for a dissident's nominees if the dissident failed to comply with these requirements, but we may see disputes over such issues once these rules go into effect.

- **Dissident Notice to Company.** No later than 60 calendar days prior to the anniversary of the previous year's annual meeting, the dissident must provide the company the names of all nominees for which the dissident intends to solicit proxies. The notice date may provide no real benefit for public companies since most advance notice bylaws require notice of 90 calendar days or more before the anniversary of the previous year's annual meeting for director nominations. Companies will be required to disclose this deadline for the following year's meeting in each annual meeting proxy statement, similar to the existing disclosure requirements for Rule 14a-8 deadlines and advance notice bylaw provision deadlines.
- **Company Notice to Dissident.** If a company received notice from a dissident, the company must provide the dissident with the names of the company's nominees no later than 50 calendar days prior to the anniversary of the previous year's annual meeting.
- **Solicitation Threshold.** The dissident is required to solicit the holders of shares representing at least 67% of the voting power of the shares entitled to vote at the meeting.
- **Proxy Statements.** A dissident will be required to file a proxy statement at least 25 calendar days before the shareholder meeting or five calendar days after the company files its proxy statement, whichever is later. While the dissident and company will not be required to include information regarding the other side's nominees, they will need to direct shareholders to the information in the opposing side's proxy statement.
- **Proxy Cards.** The rules establish presentation and formatting requirements for universal proxy cards. Each party's nominees will need to be presented in a clear, neutral manner.

The disclosure requirement regarding the deadline for notice of a solicitation of proxies pursuant to the universal proxy rules will become effective on January 31, 2022. Companies should include the notice deadline for their 2023 meetings in this year's proxy statement.

Multi-Class Share Structures

Both ISS and Glass Lewis have announced voting policy changes with respect to companies with multi-class capital structures with unequal voting rights. Both proxy advisory firms have existing policies with regard to voting against certain directors at recent initial public offering (IPO) companies that have multi-class share structures with unequal voting rights. The key update for both firms' voting policies is that they will start recommending against directors at all companies with these capital structures, and not only companies that have recently gone public.

- ISS's policy change will be effective for the 2023 proxy season. It will begin recommending votes against directors at all U.S. companies with multi-class structures with unequal voting rights. Companies can

avoid the adverse voting recommendations if reasonable sunset provisions are implemented (ISS considers a sunset period of no more than seven years to be reasonable). The adverse voting recommendation may apply to directors individually, committee members, or the entire board.
- Glass Lewis' policy change will be effective beginning in 2022. It will issue adverse voting recommendations for the chair of the nominating and governance committee at all companies with multi-class structures with unequal voting rights, unless such structures are subject to a reasonable sunset (a sunset period of no more than seven years).

Proxy Voting Advice Rule Changes

As we reported last year, the SEC adopted amendments to its proxy solicitation rules in 2020, codifying its longstanding view that proxy voting advice generally constitutes a solicitation within the meaning of the federal proxy rules. These amendments also added disclosure and procedural conditions proxy advisers must satisfy to rely on exemptions from the information and filing requirements of the proxy solicitation rules. The amendments generally were to be effective for the 2022 proxy season, but faced criticism and legal challenge from proxy advisers.

In June 2021, Corp Fin announced that it was reconsidering the rule amendments, and would not recommend enforcement action under the rules adopted in 2020 if new final rules had not been adopted by the original compliance date. In November 2021, the SEC proposed additional rule amendments, eliminating the disclosure and procedural conditions that proxy advisers were to be required to satisfy to rely on exemptions from the proxy solicitation rules. The SEC noted that the rule amendments were proposed due to concerns that these conditions would impose increased compliance costs on proxy voting advice businesses and impair the independence and timeliness of their proxy voting advice.

In November 2020, ISS notified S&P 500 companies that for annual meetings held on or after January 1, 2021, it will no longer provide them with draft versions of its proxy voting reports before sending them to its investor clients. Instead, ISS advised that any errors companies bring to its attention will be provided to its clients by supplemental "Alerts." At this point, ISS has not rescinded this change in practice.

Authors

Allison C. Handy

Partner
AHandy@perkinscoie.com 206.359.3295

J. Sue Morgan

Of Counsel
JMorgan@perkinscoie.com 206.359.8447

Danielle Benderly

Partner
DBenderly@perkinscoie.com 503.727.2011

Christopher Wassman

Counsel
CWassman@perkinscoie.com 206.359.3807

Explore more in

Corporate Governance | Public Companies | Sustainability & Corporate Responsibility

Related insights

Update

Proposed DOJ FARA Rules Would Increase Uncertainty for Global Companies Amid Heightened Enforcement

Update

Wrapping Paper Series: Issues and Trends Facing the Retail Industry During the Holiday Season