GOVERNANCE ROUND-UP

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Delaware Enacts Sweeping Changes to Treatment of Conflicted Transactions and Books-and-Records Demands

On March 25, 2025, Delaware Governor Matt Meyer signed into law S.B. 21, which amends the Delaware General Corporation Law to provide greater clarity as to the treatment of transactions involving conflicted directors or controlling stockholders and to constrain the scope of materials available pursuant to stockholder books-and-records demands. The adoption of S.B. 21 comes against the backdrop of several high-profile corporate departures from Delaware and chatter about possible future departures. The Office of the Governor touted the bill as "aimed at ensuring the state remains the premier home for U.S. and global businesses." These new rules will apply in cases filed after February 17, 2025. For a summary of the amendments to the DGCL implemented by S.B. 21, see our *Debevoise Update—Delaware Enacts Sweeping Changes to Treatment of Conflicted Transactions*.

SEC Focus on Disclosure of Executive and Director Perquisites

As companies consider new or enhanced perquisites for executive officers and directors—including executive security arrangements following the death of the UnitedHealthcare CEO Brian Thompson—they should remain mindful of SEC disclosure rules. Recent orders against Express, Inc. offer a reminder that executive and director perquisites should be appropriately disclosed in proxy statements and that companies should regularly assess their internal controls to ensure they have clear procedures for approving, tracking and valuing perquisites.

Under Item 402 of Regulation S-K, the aggregate incremental cost to the company of providing a perquisite or personal benefit must be reported in the "All Other Compensation" column of the Summary Compensation table.

In December 2024, the SEC settled charges with Express for failing to disclose executive compensation the company paid to its former CEO. The SEC found that from 2019 to

2021, Express failed to disclose over $900,000 of perquisites provided to its CEO, including use of the company chartered aircraft for the CEO's personal purposes.

According to the SEC's order, Express had a process to identify, track, and calculate perquisites, but the process incorrectly applied a standard that accepted any business purpose as sufficient to determine that certain items were not perquisites requiring disclosure. The SEC found that Express incorrectly viewed the CEO's business expenses to include expenses associated with the CEO's personal flights, including transportation, meals, and hotel. Express paid these expenses but did not disclose them as perquisites.

The SEC found Express violated reporting and disclosure obligations under the Exchange Act but declined to impose a civil penalty based, in part, on the company's self-reporting, cooperation with the SEC's investigation, and remedial efforts.

It should be noted that the SEC views executive security arrangements as disclosable perquisites, even if the company considers them to be necessary business expenses. Some organizations are advocating for the SEC to reevaluate its treatment of security arrangements. For one such example, see the Society for Corporate Governance's letter to SEC Acting Chair Uyeda, submitted via email on January 30, 2025 (available here).

NACD Calls for Improved Board Oversight of Technology

In a recent report of the National Association of Corporate Directors Blue Ribbon Commission, the NACD called on boards "to govern technologies with more definition, a more strategic focus, and more proactive engagement."

For companies where new forms of technology—such as AI, augmented and virtual reality, low- and no-code software development, quantum computing, and biomimetics—has become (or is likely to become in the near future) a mission-critical regulatory compliance risk, directors should regularly assess whether board oversight frameworks for technology are adequate.

Board oversight over technology can reside with the full board, an existing committee (*e.g.*, audit or governance), or a newly formed committee dedicated to technology. The appropriate framework will differ for each company and should align with the company's strategic needs and relationship to technology. A technology-focused committee can be particularly valuable during major technological transformations or periods of significant disruption. Some companies have adopted these committees in

response to technological shifts affecting their business models, signaling to investors and employees a commitment to technology transformation.

However, even if a board creates a technology committee, technology oversight should remain a full-board agenda item to ensure directors fulfill their fiduciary role with respect to oversight of strategy, risk, compliance, and long-term value creation.

The NACD's report is available here.

SEC Issues New Guidance Affecting Shareholder Proposals and Engagement

- **New Guidance on Schedule 13G Eligibility**. On February 11, 2025, the Staff of the SEC's Division of Corporation Finance issued a new Compliance and Disclosure Interpretation regarding the eligibility of shareholders to file beneficial ownership reports on Schedule 13G. The C&DI addresses the circumstances in which a shareholder's engagement with an issuer's management on a particular topic would cause the shareholder to be deemed to hold the subject securities with the "purpose or effect of changing or influencing control of the issuer"—thereby losing its eligibility to report on Schedule 13G.

  The new C&DI indicates that disqualifying conduct may be found in the form of exerting actual pressure on an issuer, including in the form of conditioning support of issuer-nominated directors on the adoption of the shareholder's recommendations. As a result, institutional shareholders that currently file on Schedule 13G and whose voting policies state that they will withhold support for incumbent directors at companies with policies inconsistent with their own may now be reluctant to engage with management if doing so would require them to file on Schedule 13D.

  For more information on the C&DI, see our *Debevoise Debrief—SEC Provides New Guidance on Schedule 13G Eligibility*.

- **Reversal of Limitations on Issuers' Ability to Exclude Shareholder Proposals**. On February 12, 2025, the Staff issued SLB 14M, which rescinds SLB 14L and reinstates earlier guidance on the exclusion of shareholder proposals under Rule 14a-8 of the Exchange Act. Under former SEC Chair Gary Gensler, the SEC had narrowed the substantive bases on which a Rule 14a-8 proposal

could be excluded from a proxy statement and expanded companies' ability to exclude shareholder proposals under Rule 14a-8(i)(5)—the "economic relevance" exclusion—and Rule 14a-8(i)(7)—the "ordinary business" exclusion. SLB 14M reverses these changes.

While SLB 14M is undoubtedly useful for issuers seeking to exclude shareholder proposals under the economic relevance and ordinary business exclusions, SLB 14M does not guarantee exclusion, as witnessed by the handful of issuers whose no-action requests on these grounds have been denied by the SEC—even after issuance of SLB 14M.

For a detailed discussion of SLB 14M, see our *Debevoise Update—SEC Staff Reverses Certain Limitations on Issuers' Ability to Exclude Shareholder Proposals*. A link to the SEC's responses to No-Action Letters under Rule 14a-8 is available here.

- **New Guidance on PX14A6G Filings for Shareholder Letters**. On January 27, 2025, the Staff released two updated and three new C&DIs relating to the use of PX14A6G filings pursuant to Exchange Act Rule 14a-6(g). Form PX14A6G is a notice of exempt proxy solicitation filed with the SEC. The form acts as a cover page for soliciting materials (*e.g.*, letters sent to shareholders) used by a shareholder who wants to communicate or recommend a particular issue to other shareholders (for example, electing board members), owns more than $5 million of a company's securities, and who is not seeking to act as a proxy (or furnishing or requesting a form of revocation, abstention, consent, or authorization).

  For a summary of the new guidance, see our *Debevoise Debrief—SEC Releases Guidance on PX14A6G Filings for Shareholder Letters*.

Proxy Advisors and Institutional Shareholders Revise Voting Guidelines on Board Diversity

Several proxy advisors and institutional shareholders revised their voting guidelines for the 2025 proxy season to scale back their expectations regarding board diversity.

- **ISS.** On February 11, 2025, Institutional Shareholder Services announced that it "will no longer consider the gender and racial and/or ethnic diversity of a

company's board when making vote recommendations with respect to the election or re-election of directors at U.S. companies."

- **Glass Lewis.** Glass Lewis continues to apply its existing policies for the 2025 proxy season. However, Glass Lewis announced in March that it will now provide a "*For Your Attention*" flag on any proxy report with a negative diversity-related director recommendation, "pointing clients to a supporting rationale they can leverage if their preference is to vote differently from the recommendation."

- **BlackRock.** BlackRock's voting guidelines state that it may vote against members of the nominating committee of an S&P 500 company whose board "does not have a mix of professional and personal characteristics that is comparable to market norms." In describing "market norms," BlackRock noted that 98% of S&P companies have a "diverse board," which it defines as one in which at least 30% of the members are from diverse backgrounds.

- **Vanguard.** Vanguard's proxy voting policy states that boards should be "fit for purpose by reflecting sufficient diversity of skills, experience, perspective, and personal characteristics (such as gender, age, race, and ethnicity) resulting in cognitive diversity." Vanguard funds may vote against a nominating committee chair if a company's board composition or related disclosure is inconsistent with relevant market-specific governance frameworks or market norms.

- **State Street**. State Street's guidelines do not include explicit language indicating that State Street may still take negative voting action against market outliers. Instead, the policy provides that nominating committees are best placed to determine the most effective board composition, while still encouraging companies to maintain "sufficient levels" of diverse experiences and perspectives in the boardroom.

For analysis on how registrants are revising their board diversity disclosures in response to these and other developments, see "*Choppy Waters: Navigating Board Diversity Amid Changing DEI Sentiment*," published in Agenda on March 28, 2025.

SEC Votes to End Defense of Climate Disclosure Rules

On March 27, 2025, the SEC voted to end its defense of *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, which would have required registrants to disclose climate-related information in registration statements and annual reports.

The rule was adopted in March 2024 and faced legal challenges that were consolidated in the Eighth Circuit. Following the vote, the Staff sent a letter to the Court stating that the SEC withdraws its defense of the rules and that SEC counsel "is no longer authorized to advance the arguments" in the brief the SEC had filed.

The SEC's statement is available here.

NYSE Releases Annual Listed Company Compliance Guidance Memo

On January 30, 2025, NYSE Regulation released its annual Listed Company Compliance Guidance Memorandum for issuers listed on the New York Stock Exchange.

There are two noteworthy developments in this edition. First, the SEC approved a rule amendment to Section 802.01C of the Listed Company Manual, which states that if a company fails to meet the $1.00 Price Criteria (which requires NYSE-listed companies to maintain an average closing price of at least $1.00 over any consecutive 30-tading day period) and has (i) effected a reverse stock split during the prior one-year period or (ii) effected one or more reverse stock splits during the prior two-year period with a cumulative ratio of 200 shares or more to one, then the company will not be eligible for any compliance period and the NYSE will immediately commence suspension and delisting procedures. Second, a listed company may not effectuate a reverse stock split if the effectuation of such reverse stock split results in the company's security falling below the continued listing requirements of Section 802.01A of the Listed Company Manual, which require minimum numbers of stockholders or publicly held shares.

The NYSE's proposal echoes Nasdaq's 2024 proposal, which also tightened the rules on the use of reverse stock splits. In its rationale for the proposal, NYSE stated that "some companies, typically those in financial distress or experiencing a prolonged operational downturn, engage in a pattern of repeated reverse stock splits," which pattern, the NYSE

believes, "is often indicative of deep financial or operational distress within such companies, rendering them inappropriate for trading on the Exchange for investor protection reasons."

For more information, see the 2025 NYSE guidance memorandum (available here).

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