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WHAT NOMINATING/GOVERNANCE COMMITTEES SHOULD KNOW ABOUT RECENT SEC RULEMAKING

The SEC has made significant changes affecting public company governance in recent years. Nominating/governance committees in particular need to be mindful of these changes. This article provides an overview of the SEC's rules and suggests how committees and their counselors can navigate these changes.

By David R. Fredrickson *

During the tenure of Chair Gary Gensler, the U.S. Securities and Exchange Commission has engaged in significant rulemaking affecting public company governance. This article examines that regulatory record as it relates to public company directors, with a particular emphasis on lessons for nominating/governance committee members. That record has sparked controversy and provoked court challenges — all the dust has yet to settle. Some bullets have been dodged for nominating/governance committees, but challenges still lie ahead.

Upon being sworn in as the 33rd Chair of the SEC on April 17, 2021, few expected Chair Gensler to pursue a regulatory agenda so focused on corporate governance. He had most recently focused on the interplay of technology and markets, and showed interest in the role of private funds and their advisers, the effect of artificial intelligence on investment advice, and the regulation of digital assets. Agency rulemaking agendas, however, are seldom driven solely by the current chair's interests. Regulatory projects begun under prior Chair Jay Clayton and Acting Chair Alison Lee, as well as some long overdue Dodd-Frank rulemakings, have played an important role in the SEC's rulemaking agenda during Chair Gensler's tenure to date.

These SEC rulemakings sometimes bump up against state corporate law. In the traditional recitation of black letter corporate law, shareholders elect directors who hire and oversee management who run the day-to-day operations. Directors owe duties to the corporation and its shareholders, and their decisions are generally given wide latitude by courts. In contrast, the federal securities laws generally rely on disclosure requirements. The SEC has long required information about directors and director nominees, including details about their names and ages, positions held, terms of office, and any arrangements or understandings regarding their selection as directors. Companies also must disclose their business experience, other directorships, and involvement in certain legal proceedings, along with particularized disclosure about the activities, membership, and independence of key board committees, including the nominating committee. Finally, the SEC requires information about board meetings, whether the chief executive officer is also the

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chair of the board, and "the extent of the board's role in risk oversight of the registrant."[1]

The SEC's universal proxy rule may appear to be the most consequential of the SEC's corporate governance agenda, and it is indeed a significant change. Nominating/governance committees should consider how the SEC's new regulatory terrain affects their processes to identify, evaluate, and steer nominees through this terrain, as well as whether the board's governance processes are prepared for effective oversight of new challenges and obligations.

EARLY HARBINGERS AND SETTING THE TONE

Early in his tenure, Chair Gensler set an ambitious agenda, much of it touching on corporate governance.[2] Among other matters, the SEC's Spring 2021 agenda included rules related to corporate board diversity, human capital management, and shareholder proposals. In addition, he indicated that the SEC would complete long-delayed executive compensation-related rulemaking required by the Dodd-Frank Act of 2010.[3] Chair Gensler also signaled that he intended to revisit corporate governance initiatives of his predecessor, Jay Clayton.

First, Chair Gensler directed the staff to revisit Clayton-era rulemaking on proxy voting advisory businesses.[4] These firms help large institutional investors manage their proxy voting in company elections, often by recommending how to vote. The role of proxy advisory firms in corporate governance has been controversial for some time — public companies often complained that the advisory firms had undisclosed conflicts of interest, used their voting recommendations to earn fees on other services, and failed to correct factual errors in their voting recommendations even when brought to their attention.[5] The Clayton-era changes sought to address these issues.[6] At the time of his announcement, Chair Gensler did not indicate what his concerns were or how he might want to address them.

Second, the Chair endorsed the reversal of a Clayton-era policy relating to the SEC staff's administration of the shareholder proposal process. During the Clayton administration, the staff issued three Staff Legal Bulletins to explain how it would apply the "ordinary business" exception, probably the most contentious basis for excluding a proposal.[7] Under Exchange Act Rule14a-8(i)(7), a company may exclude a proposal if it "deals with a matter relating to the company's ordinary business operations." The Clayton-era staff bulletins welcomed input from company directors as to whether the subject matter of the proposal "transcended" the company's ordinary business and therefore not qualify for exclusion from the company's proxy statement. On November 3, 2021, the staff rescinded the Clayton-era bulletins and issued a superseding bulletin rejecting any input from the board or value to its judgment. Chair Gensler praised the new staff bulletin as "consistent with the Commission's original intention"[8] in adopting the "ordinary business" exception.[9]

[1] Regulation S-K, Items 401 and 407.

[2] Every six months, federal agencies publish their regulatory agendas. The agendas are not binding, but they often reflect the changing priorities of a new administration. One of Chair Gensler's earliest votes was to approve the Spring 2021 Agenda on May 11, 2021. Rel. No. 33-10942 (2021).

[3] Reg Flex Spring 2021 Agenda.

[4] Gensler, *Statement on the application of the proxy rules to proxy voting advice* (June 1, 2021). All speeches and statements cited in this article are *available at* https://www.sec.gov/news/speeches-statements.

[5] *Amendments to Exemptions From the Proxy Rules for Proxy Voting Advice,* Rel. No. 34-87457 (2019) (discussion in footnotes 22, 24, 70, 94 & 98).

[6] *Exemptions From the Proxy Rules for Proxy Voting Advice*, Rel. No. 34-89372 (2020).

[7] Staff Legal Bulletin 14I (2017); Staff Legal Bulletin 14J (2018); Staff Legal Bulletin 14K (2019).

[8] Staff Legal Bulletin 14L (2021).

[9] Gensler, *Statement regarding Shareholder Proposals: Staff Legal Bulletin No. 14L* (Nov. 3, 2021).

Although Chair Gensler had an early opportunity to weigh in on board diversity, the SEC struck a decidedly neutral tone in considering whether to approve an exchange listing standard (not the SEC's own rule).[10] Nasdaq proposed to require companies listed on its exchange to have at least two diverse board members, or explain why it did not.[11] In its application for SEC approval, Nasdaq cited a number of studies that it said demonstrated that diverse boards had a positive impact on firm value. On a divided vote, the SEC approved the listing standard.[12] The SEC's order, however, did not adopt Nasdaq's rationale for the new standard. Indeed, the Commission noted that the empirical evidence of any positive effect of a diverse board was equivocal. In a separate statement, Chair Gensler praised the optionality of the standard, saying that it would "ensur[e] that [Nasdaq listed] companies have the flexibility to make [board composition] decisions that best serve their shareholders."[13] Given the rulemaking project on the Commission's own regulatory agenda, the cautious tone set in the Nasdaq board diversity approval order was curious and gave little indication of how the SEC would address other corporate governance initiatives ahead.

Over the next 2½ years, the chair brought over 10 rules that touch on corporate governance to a final vote. The rules evidence three, not always harmonized, themes: (1) promoting shareholder suffrage; (2) deferring to the board on its composition and assignment of roles; and (3) demonstrating heightened suspicion of compensation decisions and opportunities for self-dealing.

PROMOTING SHAREHOLDER SUFFRAGE

The SEC has long been a champion of shareholder suffrage, arising largely from its authority over the proxy process under Exchange Act Section 14(a). Between 2021 and 2023, the SEC finalized two rules directly related to proxy voting, involving a universal proxy card and the role of proxy advisory firms. Although both rulemaking projects were initiated long before the Gensler administration, Chair Gensler praised them as major accomplishments for shareholder engagement, especially in director elections. The SEC adopted two other rules that, although not primarily focused on shareholder suffrage, sought to empower and encourage shareholder engagement.

Most notably, the SEC changed the mechanics of proxy voting in director elections. The Commission's proxy rules had long prevented shareholders from nominating candidates for director and having those nominees on the same proxy card when voting on the company-nominated director candidates. Under Chair Gensler, the SEC adopted so-called "universal proxy" card rules[14] which the Chair characterized as a way "to give shareholders more say about who directs the company they own."[15] In his view, the changes would "strengthen the accountability of directors and company management to the shareholders they represent."

Evidence to date is that a universal proxy card has been used in only a handful of elections. By allowing as few as one shareholder-nominated director nominees to be included alongside company nominees, it allows dissident shareholders to target individual company nominees. The goal of a shareholder nominee may no longer be to change the direction of the company (as traditional proxy contests often were) but to identify a nominee the sponsoring shareholder believes will better accomplish the company's goals. Put simply, the universal proxy card can isolate and expose potentially weak company nominees. Pro-actively, nominating/governance committees can take the opportunity to more carefully vet and more forcefully explain why its nominees are best positioned to work together to accomplish the company's goals.

As discussed above, during Chair Clayton's administration, the SEC had adopted rules and interpretations to address how proxy advisory firms make recommendations.[16] It required these firms to adopt a policy that they would provide their

[10] In its Spring 2021 regulatory agenda, the SEC included a proposal related to board diversity, but gave few details other than it would "enhance registrant disclosures."

[11] Rel. No. 34-90574 (2020).

[12] Rel. No. 34-92600 (2021). The approval order is subject to court challenge. *Alliance for Fair Board Recruitment v. SEC*, No. 21-60626 (5th Cir. 2023); currently on rehearing en banc.

[13] Gensler, *Statement on the Commission's Approval of Nasdaq's Proposal for Disclosure about Board Diversity and Proposal for Board Recruiting* (Aug. 6, 2021).

[14] *Universal Proxy*, Rel. 34-93596 (2021).

[15] Office Hours with Gary Gensler: *Universal Proxy Cards in Contested Director Elections* (Nov. 17, 2021).

[16] *Exemption From the Proxy Rules for Proxy Voting Advice*, Rel. No. 34-89372 (2020).

recommendations to the subject company, as well as a policy of informing their clients of any relevant information disclosed by the subject company. Under Chair Gensler and after the staff's reevaluation of those rules, the SEC left in the place the agency's authority over proxy advisory firms[17] and the required conflict disclosure. However, the Commission eliminated the requirement for proxy advisory firms to adopt policies requiring them to share their recommendations with companies and company information with their clients.[18] In supporting the change, Chair Gensler said the changes would protect "independent and timely" advice.[19] This statement seems to adopt a criticism of the Clayton-era rules — that they could give subject companies undue influence over the firms' recommendations, or at the very least, could delay clients' access to those recommendations.

The SEC also addressed shareholder suffrage obliquely as part of two other rulemakings — modernizing its beneficial ownership rules and providing greater transparency into investment company and adviser proxy votes.[20] The main thrust of the beneficial ownership release was to shorten the time within which holders of more than 5% of a registrant's securities need to publicly report that ownership. An issue raised in the proposing release was how to define a "group" that had to report as a "person" under Exchange Act Section 13(d). Rather than adopt a definition of "group," however, the SEC in the adopting release provided examples of behavior that would *not* trigger obligations as a group. One example was:

> "when shareholders jointly make recommendations to an issuer regarding the structure and composition of the issuer's board of directors where (1) no discussion of individual directors or board expansion occurs and (2) no commitments are made, or agreements or understandings are reached, among the shareholders regarding the potential withholding of their votes to approve, or voting against, management's director candidates if the issuer does not take steps to implement the shareholders' recommended actions."

So long as the discussion "does not involve an attempt to convince the board to take specific actions through a change in the existing board membership or bind the board to take action," the SEC does not believe the shareholders are acting as a group for Section 13(d) purposes. The example is clearly designed to support and encourage such shareholder engagement.

Separately, mutual funds have for many years been required to disclose how they voted their proxies, but critics claim that the disclosures were hard to compare and analyze. During Chair Gensler's tenure, the SEC adopted rules providing greater transparency about how registered funds and advisers report their proxy votes, and particularly how institutional investment managers report how they voted on executive compensation matters.[21] The Commission noted how funds and advisers "can influence the outcome of a wide variety of matters that companies submit to shareholder vote, including governance, corporate actions, and shareholder proposals." To provide greater transparency and consistency in reporting — allowing fund investors and adviser clients to more closely monitor — the SEC required funds to report votes in certain categories, including "Director Elections" and "Corporate Governance." Presumably, the greater transparency allows fund investors and adviser clients to alter their investment strategy if they disagree with a voting pattern. Or, it could also inform activist shareholder campaigns.

DEFERENCE TO BOARD COMPOSITION AND ASSIGNMENT OF ROLES

In three major rulemaking initiatives — cybersecurity incidents, climate-related risks, and special purpose acquisition companies ("SPACs") — the SEC proposed bold new requirements for boards. The adopting releases scaled back those requirements significantly.

[17] The interpretation is subject to court challenge. *Institutional Shareholder Services, Inc. v. SEC*, Civil No. 19-cv-3275 (APM) (D.DC 2024), currently being appealed to the D.C. Circuit.

[18] *Proxy Voting Advice*, Rel. 34-95266 (2022). The SEC also deleted the antifraud example. These changes to the rule are subject to court challenge. *Chamber of Commerce v. SEC*, No. 3:22-cv-00561 (M.D. TN 2023), currently being appealed to the 6th Circuit.

[19] Gensler, *Statement on the Adoption of Amendments to the Rules Governing Proxy Voting Advice* (July 13, 2022).

[20] *Modernization of Beneficial Ownership Reporting*, Rel. No. 33-11253 (2023); *Enhanced Reporting of Proxy Votes By Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investors*, Rel. No. 33-11131 (2022).

[21] The executive compensation reporting implements Section 951 of the Dodd-Frank Act, codified at Exchange Act Section 14A(d).

And, as of this writing, only cybersecurity-incident-reporting requirements are in effect. This scaling back (and court challenges) represent the most significant "bullet dodged" of the Gensler-era corporate governance rulemakings.

The cybersecurity rule requires public companies to disclose material cybersecurity incidents on a current basis and the processes for managing cybersecurity risks on an annual basis.[22] The climate rule requires disclosure of climate risk assessment, management, and mitigation strategies. Larger companies have to disclose their greenhouse gas emissions and financial statement impacts.[23] Both rules specifically require companies to disclose any board oversight role over the respective risks and "the processes by which the board. . .is informed about such risks."

As mentioned above, SEC rules already require registrants to disclose board oversight of risk. The SEC does not explain why these two particular risks need to be specifically addressed. In the cyber-incident release, the SEC asserts that the issue-specific and general risk oversight disclosure requirements "serve distinct purposes" — the former, it says, focuses on the specific risk, whereas the latter focuses on the leadership structure and administration of risk oversight. The SEC noted in the climate release that the two risk disclosure requirements were "similar," but does not explain how they are meant to be different, conceding that preparers could simply cross-reference the same disclosure in different places.

It is important to note that SEC rules do not require board oversight of risk, and do not suggest how a board should oversee the risks facing the company. Even less clear is what, if anything, should be disclosed differently about the board's oversight of cyber-incident and climate-related risk than how it discloses risk oversight generally. If the board does in fact oversee cyber-incident (and climate-related risk, once the stay is lifted and if the rule survives the legal challenges), however, it should definitely say so, as well as describe any special processes it uses to stay informed about the particular risk.

In the proposing releases for each rule, the SEC had proposed to require disclosure of whether any board members had expertise in the respective fields.[24] The provisions were seemingly modeled on the Sarbanes-Oxley requirement that companies disclose whether the audit committee has a financial expert, and if not explain why not.[25] Nevertheless, the SEC did not adopt such a requirement in either release. In the cyber-incident release, the Commission said that "directors with broad-based skills in risk management and strategy often effectively oversee management's efforts without specific subject matter expertise." The SEC struck a slightly different tone in the climate rule, emphasizing that the rule was "not intended to shift governance behaviors, including board composition or board practices" nor designed to "incorporate, reflect, or favor any governance structure or process." The SEC pressed further, that it did not adopt expertise disclosure or other more prescriptive elements because such disclosure "could have unintended effects on the registrant's governance structure and processes by focusing on one area of risk at the expense of others." Indeed, the SEC asserted that it "remains agnostic about whether and/or how registrants govern climate-related risks. Registrants remain free to elect whether and how to establish or retain the procedures and practices that they determine best fit their business."

The treatment of boards in the SPAC rulemaking was quite different from cyber and climate, but, after proposing different measures, shares a similar deference to the board's ability to structure itself. The SEC had proposed a number of measures "to address concerns regarding potential conflicts of interest and misaligned incentives" in SPAC transactions.[26] In the end, the SEC largely deferred to state corporate law requirements in SPAC transactions.

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[22] *Cybersecurity Risk Management, Strategy, Governance and Incident Disclosure*, Rel. No. 33-11216 (2023).

[23] *The Enhancement and Standardization of Climate-Related Disclosure for Investors*, Rel. No. 33-11275 (2024). The SEC stayed the effectiveness of the rule after it was challenged in court. Rel. No. 33-11280 (2024). The various petitions challenging the rule were consolidated in the 8th Circuit.

[24] *Cybersecurity Risk Management, Strategy, Governance and Incident Disclosure*, Rel. No. 33-11038 (2022); *The Enhancement and Standardization of Climate-Related Disclosure for Investors*, Rel. No. 33-11042 (2022).

[25] Sarbanes-Oxley Act of 2002, Section 407; codified in Regulation S-K, Item 401(h).

[26] *Special Purpose Acquisition Companies, Shell Companies and Projections*, Rel. 33-11048 (2022). SPACs are a method of raising capital in a public, registered offering, after which the sponsor seeks a private merger partner. The private company thereafter becomes public and receives an infusion of capital without engaging in a typical (and much more regulated and liability-laden) initial public offering.

The SEC proposed to require the SPAC to state whether [it] "believes that the de-SPAC transaction and any related financing transaction are fair or unfair to unaffiliated security holders."[27] Many commenters objected to this provision, in large part, because they thought it intruded on state corporate law. In the end, the Commission deferred to state corporate law to achieve the "same goal": "assessing the SPAC's decision to proceed with a particular de-SPAC transaction." A company need only disclose the board's opinion of the de-SPAC transaction "[i]f the law of the jurisdiction in which the [SPAC] is organized requires its board of directors (or similar governing body) to determine whether the de-SPAC transaction is advisable and in the best interests of the" SPAC. Further, the SEC conceded that directors have fiduciary duties to all shareholders, not just unaffiliated shareholders.[28]

The SEC also proposed to require disclosure of the information the board reviewed as part of the de-SPAC transaction.[29] Commenters warned that a requirement to disclose these materials would create an incentive to provide fewer materials to the board. The SEC adopted the requirement anyway, acknowledging that the "final rule could impact the information provided to the SPAC's board of directors." Indeed, the SEC noted that "[d]irectors are generally subject to fiduciary duties by continuing to inform themselves of the potential merits of a de-SPAC transaction with the assistance of outside parties despite the potential public nature, added cost, or risk of liability associated with the filing of any report, opinion, or appraisal." In effect, the SEC relied on state corporate law duties to mitigate the effects of its own rule.

[27] *Special Purpose Acquisition Companies, Shell Companies and Projections*, Rel. 33-11265 (2024).

[28] The SEC considered, but abandoned, another prescriptive board requirement. Because the SPAC raised capital — which it could invest — before it identified a merger target, this structure raises a question of whether the SPAC was primarily engaged, at least for some period of time, in the business of holding and investing in securities, triggering a possible requirement to register under the ICA. To address the issue, the Commission proposed an exception from ICA registration, based in part on the board of directors adopting an "appropriate resolution" evidencing that "the company is primarily engaged in the business of seeking to complete a single de-SPAC transaction." The SEC did not adopt the ICA exception.

[29] The business combination of the SPAC with the private company is often referred to as a "de-SPAC transaction."

HEIGHTENED SUSPICION OF COMPENSATION DECISIONS AND OPPORTUNITIES FOR SELF-DEALING

One of the board's critical functions is to oversee management — rewarding behavior that benefits the company while preserving the company's assets from waste and self-dealing. In adopting a number of provisions, the SEC evidenced deep skepticism that current safeguards were up to the task. Although these provisions most directly affect the compensation (and, to some extent, audit) committee, the nominating/governance committee needs to be mindful of their implications.

From the beginning, the federal securities laws have required disclosure about executive compensation[30] and sought to prevent misuse of corporate information.[31] The risk that senior officers would use their position to enrich themselves to the detriment of shareholders has been a key "agency" problem from the beginning of the modern corporation. Congress has bolstered these protections, especially after the accounting scandals of the early 2000s, in part by requiring listed companies to have audit committees that oversaw the company's relationship with the auditor. Congress later directed that compensation committees be comprised of independent directors in the Dodd-Frank Act of 2010. That act also mandated certain metrics be disclosed about executive compensation and directed that non-binding shareholder votes be held about that compensation.[32]

The SEC completed a rulemaking requiring exchange-listed companies to recover incentive-based compensation from executive officers in the event of an accounting restatement due to material non-compliance with financial reporting requirements.[33] The SEC had first proposed to implement the rule in 2015, but faced significant criticism from commenters. One issue in the comment letters was the extent to which the board could exercise discretion on whether and how much compensation to recover. Another concern was defining a suitable "trigger" for when a company must begin the

[30] Securities Act, Schedule A, Item 14; Exchange Act Section 12(b)(1)(D).

[31] Exchange Act Section 16(b).

[32] Dodd-Frank Act, Sections 951, 953, 955 & 956.

[33] Dodd-Frank Section 954. The SEC also completed Dodd Frank Section 953(a) "pay for performance" rulemaking. Rel. No. 34-95607 (2022).

required three-year "look-back" for the compensation to "clawback."

On the board discretion in the recovery issue, the SEC relied on the statutory language that the issuer "will recover" incentive-based compensation to largely curtail any discretion the board might exercise in the amount of recovery it sought. The only basis for not seeking recovery is when it would be "impracticable:" when the costs of recovery are expected to exceed the amount recovered or when recovery efforts would violate foreign law. To "mitigate potential conflicts of interest," the independent directors on the compensation committee (or independent directors responsible for executive compensation), must make the determination of "impracticability" and disclose why they determined that recovery was impracticable.[34] The committee's determination is not committed to their judgment, though; the SEC pointedly noted that the determination would be subject to review by the exchange.

To determine the "trigger date," the SEC emphasized that the test it chose "appropriately limits board discretion," "minimizing incentives for issuers to delay their restatement conclusions." The obligation to recover begins either when the company decides that a restatement is required or "reasonably should have concluded" that a restatement was required.[35] The SEC acknowledged that this "reasonably should have concluded" test could lead to second-guessing, and potential litigation. The SEC concluded that the risk was "acceptable in light of the benefit of deterring issuers from manipulating the timing of their conclusions to avoid or delay a recovery obligation."[36] Rejecting commenters' observation that board members are already subject to state corporate fiduciary duties (as well as other SEC disclosure rules, and the risk of private litigation), the SEC was concerned that boards may "manipulate the recovery date." This "reasonably should have concluded" standard, the SEC warned, was also subject to review by the exchange.

[34] The SEC provided some greater leeway on the manner of recovery, "subject to certain reasonable restrictions."

[35] Or when a court or other authoritative body directs the company to restate.

[36] In the cyber-incident disclosure release, the SEC took a different approach. A reporting trigger is when the board determines that an incident is material. Form 8-K, Item 1.05(a). Although that determination cannot "unreasonably be delayed," the SEC did not adopt a "reasonably should have concluded" alternative trigger.

The SEC also amended Exchange Act Rule 10b5-1[37] largely out of concern that officers and directors were taking advantage of the rule. The SEC had adopted Rule 10b5-1 almost 25 years ago as part of an effort to resolve whether proof of "use" or mere "possession" of material non-public information was sufficient for insider trading liability.[38] Choosing "possession," the SEC found it necessary to adopt an affirmative defense that would allow company insiders to trade company securities, as long as they adopted a plan to trade before coming into possession of material nonpublic information. In the 2022 proposing release to amend the rule, the SEC expressed concern that the defense "has allowed traders to take advantage of the liability protections provided by the rule to opportunistically trade securities on the basis of material nonpublic information,"[39] citing academic studies that corporate insiders trading pursuant to a 10b5-1 plan "consistently outperform" those not trading pursuant to such plans.

Among the amendments adopted to address these concerns was a new requirement to disclose "whether the board or compensation committee takes material nonpublic information into account when determining the time and terms" of options grants, and if so, how it does.[40] The Commission conceded that investors could already access information about the timing of option grants and earnings announcements, but asserted that the information "would not reveal the extent to which a board considered the effects of such timing."[41] It is

[37] For similar reasons, the SEC amended the share repurchase disclosure rules. *See* footnote 41, below.

[38] *Selective Disclosure and Insider Trading*, Rel. No. 33-7881 (2000).

[39] *Insider Trading Arrangements and Related Disclosures*, Rel. No. 33-11013 (2022).

[40] Regulation S-K, Item 402(x)(1).

[41] *Insider Trading Arrangements and Related Disclosures*, Rel. No. 33-11138 (2022). The share repurchase rulemaking shared a similar pattern. The SEC had long required quarterly summaries of share repurchases. The Gensler-era rules would have required the company to disclose much greater detail about its share repurchases, whether it had adopted or terminated its own Rule 10b5-1 trading arrangement, as well as "any policies and procedures relating to purchases and sales of the issuer's securities by its officers and directors during a repurchase program, including any restrictions on such transactions." Citing "some research [that] has shown that repurchases can serve as a form of real earnings management" and noting that executives could be incentivized "to undertake repurchases in an attempt to maximize their compensation," the SEC proposed and adopted significantly more detailed

difficult to see how this new disclosure meaningfully supports or supplements state corporate law duties against waste and self-dealing. Rather, it seems likely to result in highly lawyered boilerplate or serve as a liability trap for the unwary.

CONCLUSION AND TAKE-AWAYS

At the end of 2023, Chair Gensler reflected on the SEC's corporate governance regulatory achievements.[42] He identified three features of the federal securities laws that, he said, bolster corporate governance by including provisions regarding:

- Enhancing the integrity of all other disclosures;
- Shareholder voting and acquisition of control of issuers; and
- Executive compensation and ill-gotten compensation.

These features, he asserted, "align incentives and build trusts in markets." There is no doubt some truth to this, but three additional themes from his tenure emerge, especially relevant to nominating/governance committees.

First, the SEC strongly supported shareholder engagement with boards about director nominations and overall composition, and nominating/governance committees should consider how best to channel that energy. Second, in the event of a restatement that triggers the clawback rule, boards can anticipate that the exchange will closely review their decision-making. Robust processes and documentation should be considered well in advance. But, third, the SEC largely left boards — and the nominating/governance committee — to organize and assign their roles as they see fit.

The new universal proxy card presents the most obvious challenge for the nominating/governance committee. If they have not already done so, they may consider whether amending the company's advance notice bylaw provisions would facilitate orderly compliance with this provision. In the event the universal proxy rule is invoked, the committee will no doubt seek counsel on how to manage the process. But committees may miss an opportunity if they focus only on the possibility of a challenge. Re-examining and re-invigorating shareholder engagement practices also create new opportunities to explain the company's vision and why the board's chosen leadership team is best placed to accomplish it.

A number of the SEC's rules are in flux — of perhaps most significance to board management, climate-risk disclosure, and the SEC's oversight of proxy advisory firms. The share repurchase rule was vacated, and the SEC is showing no signs of reviving it in the near future. And three years into Chair Gensler's tenure, the SEC has yet to propose rules related to board diversity and human capital management. Nominating/governance committees can, for now, focus their energies elsewhere, although they cannot ignore the possibility that one or more of these may spring back to life.

Finally, on compensation-related changes, nominating/governance committees can review — and update as necessary — how they evaluate compensation and audit committee members, as well as the processes they follow. They should also keep in mind how best to identify nominees who are prepared to deal with these new challenges. ■

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disclosure about share repurchases. The issuer was required to disclose "the objectives or rationales for each repurchase plan or program and the process or criteria used to determine the amount of repurchases." *Share Repurchase Disclosure Modernization*, Rel. No. 34-97424 (2023). This rule was vacated. *Chamber of Commerce v. SEC*, 85 F.4th 760 (5th Cir. 2023).

[42] Gensler, *'They Are Merely the Agents:' Prepared Remarks Before the American Bar Association* (Dec. 7, 2023).