In anticipation of the upcoming reporting season, this Update highlights 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 2024:

- Cybersecurity.
- Clawback policies.
- Insider trading and 10b5-1 plans.
- Share repurchases.
- A look ahead at U.S. Securities and Exchange Commission (SEC) proposed rule changes.
- Reminders and hot topics.

Cybersecurity

In July 2023, the SEC adopted new cybersecurity disclosure rules that require public companies to disclose material cybersecurity incidents and detail their approach to cybersecurity risk management, strategy, and governance. Key provisions of the new rules, which we discussed in our previous Update, include the following:

- **Form 8-K disclosure of material cybersecurity incidents.** New Item 1.05 for Form 8-K requires companies to disclose material cybersecurity incidents within four business days of determining that an incident was material (with limited exceptions). In addition, companies will be required to file an amendment to their Form 8-K if they discover any required information about a previously disclosed cybersecurity incident that was not determined or was unavailable at the time of the original Form 8-K filing. Most companies will be required to comply with the new requirements beginning December 18, 2023. Smaller reporting companies have until June 15, 2024.
- **Form 10-K disclosure for cybersecurity governance and risk management and strategy.** Regulation S-K Item 106 mandates that companies describe their processes, if any, for assessing, identifying, and managing material risks from cybersecurity threats, as well as whether there are any risks from cybersecurity incidents that have materially affected (or are reasonably likely to materially affect) the company. Companies will also be required to disclose the board's risk oversight of cybersecurity threats and management's role in assessing and managing material risks. This disclosure will be required in annual reports on Form 10-K that cover a fiscal year ending on or after December 15, 2023 (for most companies, this means the Form 10-K covering fiscal year 2023). Additionally, per the Glass Lewis 2024 Benchmark Policy Guidelines highlighted in our recent blog post, Glass Lewis may recommend voting against certain directors if it finds the board's oversight, response, or disclosure concerning cybersecurity-related issues to be insufficient.
- **Inline XBRL (iXBRL) tagging.** iXBRL tagging requirements will be applicable to all disclosure under the new rules starting one year after the applicable disclosure requirement compliance deadline for Forms 8-K and 10-K.
- **Foreign Private Issuers (FPIs).** Similar disclosure requirements apply to FPIs under Form 6-K and Form 20-F as those that apply to domestic issuers. Notably, the disclosures do not apply to Form 40-F filers.

One of the challenges for companies implementing these new disclosure rules is that cybersecurity teams' established practices and policies often do not prioritize determining the potential materiality of an incident to investors early in the incident response process. For practical guidance for company boards and management to consider in updating these practices, see our Update on the topic.

Clawback Policies

In October 2022, the SEC adopted Rule 10D-1, which directed the national securities exchanges to establish listing standards requiring companies to adopt, enforce, and disclose policies for the recovery or "clawback" of excess incentive-based compensation from current and former executive officers in the event of an accounting restatement. Both Nasdaq and New York Stock Exchange (NYSE) implemented rules requiring listed companies to adopt compliant clawback policies by December 1, 2023, which must apply to compensation received by executive officers on or after October 2, 2023. NYSE-listed companies must affirm via Listing Manager on or before December 31, 2023, that they adopted a compliant clawback policy by the deadline or are relying on an applicable exemption. Additionally, companies must file their new clawback policies as a new Exhibit 97 to their annual report on Form 10-K. This filing requirement does not extend to other clawback policies the company may have in effect.

Form 10-K has been updated to include two new check boxes on the cover page indicating whether the filing contains the correction of an error to previously issued financial statements and whether any of those corrections involved a restatement that triggered a clawback analysis. In addition, under Item 402(w) of Regulation S-K, a

company must disclose in its proxy statements if it had a restatement that required a clawback during the last fiscal year or if it has an outstanding balance of unrecovered excess incentive-based compensation relating to a prior restatement. For a detailed discussion of the clawback rules and requirements, see our prior Update.

Some investors may expect companies to adopt clawback policies that go above and beyond what is required by NYSE and Nasdaq. For example, Glass Lewis indicated in its 2024 Benchmark Policy Guidelines that it expects companies to have clawback policies that empower them to recoup incentive compensation when there is evidence of problematic decisions or actions, even when there is not a financial restatement. In addition, as discussed in an earlier Update, the U.S. Department of Justice (DOJ) has announced programs and guidance that encourage companies to implement broad clawback programs.

Insider Trading/Rule 10b5-1 Trading Plans

In our 2023 Proxy Season Client Update, we discussed amendments to Rule 10b5-1 and related amendments, including required disclosures covering the adoption, modification, and termination of Rule 10b5-1 trading plans, company insider trading policies, option grant policies and practices, and Section 16 filing requirements. The amendments became effective on February 27, 2023, but there are a range of compliance dates for various aspects of the rules.

Compliance dates for the amendments applicable to Rule 10b5-1 trading plans, Section 16 filings, and quarterly disclosures on Form 10-Q generally occurred during calendar year 2023. Notably, the annual reporting requirements will not be applicable until the Form 10-K and proxy statement for a company's first fiscal year that begins on or after April 1, 2023 (or October 1, 2023, for smaller reporting companies). These requirements include disclosures about insider trading policies in the annual report on Form 10-K (including filing a copy of the company's policy as an exhibit) and option grant policies and practices in the annual proxy statement. See our blog post regarding the Compliance Disclosure Interpretations published by the Division of Corporation Finance discussing these compliance dates.

Share Repurchases

In May 2023, the SEC adopted rule amendments requiring enhanced disclosures regarding the repurchase of a company's equity securities as discussed in more detail in our May 2023 blog post. The rules required filing an exhibit on a quarterly basis detailing daily share repurchases, as well as enhanced narrative disclosure requirements regarding company repurchase plans. These rules were poised to go into effect for reports regarding fiscal quarters beginning on or after October 1, 2023.

On October 31, the U.S. Court of Appeals for the Fifth Circuit found in *Chamber of Commerce of the USA v. SEC* that the SEC had acted "arbitrarily and capriciously" in adopting the rules and provided 30 days for the SEC to correct the identified deficiencies. On December 1, the SEC's Office of General Counsel submitted a letter to the Fifth Circuit acknowledging that the SEC was unable to correct the defects in the rule within the required 30-day period. As of the time of this Update, we expect the Fifth Circuit will now vacate the rule. At that point, the SEC could appeal the decision or propose new rule amendments to address the defects identified in the Fifth Circuit's ruling.

For now, companies are not required to comply with the rule amendments as adopted. Notably, this eliminates the need for companies to start disclosing company adoptions or modifications of Rule 10b5-1 trading arrangements on a quarterly basis under Regulation S-K Item 408(d). However, the parallel quarterly disclosure requirement regarding adoption or modification of Rule 10b5-1 arrangements by directors and officers under Regulation S-K Item 408(a) remains in place as it was adopted as part of the Rule 10b5-1 amendments discussed

above.

A Look Ahead: SEC Proposed Rule Changes

Climate Disclosures

As discussed in a prior Update, the SEC proposed extensive rules regarding climate risk disclosures in March 2022. The most recent RegFlex Agenda indicates that final rules are expected to be adopted by April 2024.

In addition to the SEC's proposed climate rules, companies should also consider other climate reporting requirements that may apply. Other disclosure mandates include the EU's Corporate Sustainability Reporting Directive, which will affect U.S. companies that conduct business in the EU, and several climate-related disclosure requirements recently enacted in California (including SB 253, the Climate Corporate Data Accountability Act and SB 261, Greenhouse Gases: Climate-Related Financial Risk). The California requirements include disclosures of Scope 1, 2, and 3 greenhouse gas (GHG) emissions and will apply to public and private companies, going beyond the requirements of the SEC's proposed rules. For more detail on the California climate-related disclosure legislation, see our prior Update.

Institutional investors, proxy advisors, and shareholder proponents also continue to focus on climate-related oversight and disclosures. In general, the focus is greatest on those companies that are the largest GHG emitters, as well as other companies for whom GHG emissions represent a financially material risk. For example, Glass Lewis has expanded its call for companies to disclose climate-related information in line with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) from the "Climate Action 100+" to companies in the S&P 500 in industries with financially material risks related to GHG emissions.

Areas of focus for climate-related disclosures include GHG emissions, alignment with TCFD recommendations or other broadly accepted reporting frameworks, and progress towards and risks related to achievement of announced climate-related goals and targets.

Shareholder Proposal Rule Amendments

In July 2022, the SEC proposed amendments to Rule 14a-8 that would, among other things, update certain substantive bases for exclusion of shareholder proposals. The proposed amendments would narrow the exclusionary bases available to companies under Rule 14a-8(i)(10), the substantially implemented exclusion, Rule 14a-8(i)(11), the duplication exclusion, and Rule 14a-8(i)(12), the resubmission exclusion. In the SEC's Fall 2023 RegFlex Agenda, these rules are slated for final action by April 2024, but this is only an estimate.

If the rules are adopted as proposed, we expect some shareholder proposals that were previously excludable to no longer be excludable. For more information on the proposed rules governing shareholder proposals, see our July 2022 blog post.

Reminders and Hot Topics

Pay Versus Performance

Last year was the first year for most companies to include the pay-versus-performance table and related disclosures in their proxy statements as required by Item 402(v) of Regulation S-K. Our July 2023 blog post provides analysis of the first proxy season, including these disclosures, and provides several considerations for companies going into this upcoming proxy season. In addition, the SEC has issued numerous Compliance and Disclosure Interpretations (CDIs) seeking to clarify outstanding questions, which should be considered when

preparing the pay-versus-performance disclosures. In addition, the SEC has issued numerous CDIs seeking to clarify outstanding questions, which should be considered when preparing the pay-versus-performance disclosures: in CDI Section 128D—issued February 10, 2023, and updated September 27, 2023, and November 21, 2023, as discussed in our February 2023 blog post, October 2023 blog post, and November 2023 blog post; and in CDI 118.08 issued September 27, 2023, on non-GAAP rules for compensation-related information.

Shareholder Proposal No-Action Requests

The staff of the Division of Corporation Finance of the SEC recently announced a change to the process for submitting no-action request letters relating to shareholder proposals under Rule 14a-8. No-action requests to the staff must now be submitted through this web form, and emailed materials will no longer be accepted.

Code of Conduct Waivers for Nasdaq-Listed Companies

Earlier this fall, Nasdaq Listing Rules 5610 and IM-5610 were updated to allow an independent committee of the board of directors to approve waivers to the code of conduct applicable to directors and executive officers. Previously, the board of directors was required to approve waivers for Nasdaq-listed companies. This update aligns the approach of Nasdaq to that of the NYSE. To take advantage of this rule change, Nasdaq-listed companies may need to update their committee charters and codes of conduct to allow for waiver by an independent committee.

XBRL Sample Comment Letter

In September 2023, the SEC published a sample comment letter to encourage companies to improve the quality of their XBRL data. We discuss the contents and implications of the SEC's comment letter in more detail in this blog post.

Share Ownership Guidelines

The Glass Lewis 2024 Benchmark Policy Guidelines calls for companies to adopt and enforce minimum executive share ownership requirements and clearly disclose those requirements in the Compensation Disclosure and Analysis (CD&A) section of their proxy statements, including "how the various types of outstanding equity awards are counted or excluded from the ownership level calculation." Glass Lewis does not favor the inclusion of unearned, performance-based, full-value awards or unexercised stock options and expects companies that include these types of outstanding awards in their calculation to provide a rationale.

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