INSIGHTS

The Corporate & Securities Law Advisor

VOLUME 37, NUMBER 3, MARCH 2023

UNIVERSAL PROXY

Lessons from the First Few Contests under the Universal Proxy Rules, and the Outlook for 2023 3

Richard J. Grossman, Neil P. Stronski, Anya Richter Hodes, and Alexander J. Vargas

ACTIVISM

Advance Notice Bylaws Are Bad! 7

Michael R. Levin

HUMAN CAPITAL

The Compensation Committee Continues to Broaden Its Human Capital Management Role 9

Theresa Tovar, Robert Newbury, and Don Delves

STOCK BUYBACKS

IRS and Treasury Issue Interim Guidance on One Percent Stock Buyback Tax 13

John K. Sweet, Suyoung Moon, Abraham N.M. Shashy, Jr., Jonathan Talansky, and L. Wayne Pressgrove, Jr.

SPACS

Going Private: The Next Step for Some deSPAC Companies 18

Gerold Niggemann, Charles A. Samuelson, and Javad Husain

SEC ENFORCEMENT

SEC's Division of Enforcement Year-End Results Provide Insight into Record-Breaking Year 21

Kara Brockmeyer, Andrew J. Ceresney, Arian M. June, Robert B. Kaplan, Julie M. Riewe, Kristin A. Snyder, Jonathan R. Tuttle, and Mary Jo White

SEC Charges McDonald's and Former CEO in Connection with Disclosures Surrounding CEO's Separation 27

Martin Bell, Marc Berger, Nicholas Goldin, Jeffrey Knox, Charles Mathes, and Michael Osnato, Jr.

MARKETING

Five Tips to Help You Become a True Blogger 30

Broc Romanek

Wolters Kluwer
www.WoltersKluwerLR.com

INSIGHTS

The Corporate & Securities Law Advisor

Editor-in-Chief
BROC ROMANEK
broc.romanek@gmail.com

EDITORIAL ADVISORY BOARD

ALLISON HANDY
Perkins Coie (Seattle)

AMY WOOD
Cooley (San Diego)

BRIAN BREHENY
Skadden, Arps, Slate, Meagher & Flom (Washington DC)

BRYAN BROWN
Jones Day (Houston)

CAM HOANG
Dorsey & Whitney (Minneapolis)

DAVID THOMAS
Wilson Sonsini Goodrich & Rosati (Palo Alto)

ERA ANAGNOSTI
White & Case (Washington DC)

HILLARY HOLMES
Gibson Dunn & Crutcher (Houston)

JACKIE LIU
Morrison & Foerster (San Francisco)

JOHN MARK ZEBERKIEWICZ
Richards Layton & Finger (Wilmington)

JURGITA ASHLEY
Thompson Hine (Cleveland)

KERRY BURKE
Covington & Burling (Washington DC)

LILY BROWN
WilmerHale (Washington DC)

LYUBA GOLSTER
Weil Gotshal & Manges (New York City)

MELISSA SAWYER
Sullivan & Cromwell (New York City)

NING CHIU
Davis Polk & Wardwell (New York City)

SABASTIAN NILES
Wachtell Lipton Rosen & Katz (New York City)

SARAH FORTT
Latham & Watkins (Austin)

SCOTT KIMPEL
Hunton Andrews Kurth (Washington DC)

SONIA GUPTA BARROS
Sidley Austin (Washington DC)

VICKI WESTERHAUS
Bryan Cave Leighton Paisner (Kansas City)

EDITORIAL OFFICE
28 Liberty Street,
New York, NY 10005
212-771-0600

Wolters Kluwer
Richard Rubin, Publisher
Jayne Lease, Managing Editor

INSIGHTS (ISSN No. 0894-3524) is published monthly by Wolters Kluwer, 28 Liberty Street, New York, NY 10005. To subscribe, call 1-800-638-8437. For customer service, call 1-800-234-1660 or visit www.wolterskluwerlr.com.

For article reprints and reprint quotes contact *Wrights Media* at 1-877-652-5295 or go to *www.wrightsmedia.com.*

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other professional assistance is required, the services of a competent professional person should be sought.

—From a *Declaration of Principles* jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.

www.WoltersKluwerLR.com

UNIVERSAL PROXY

Lessons From the First Few Contests under the Universal Proxy Rules, and the Outlook for 2023

By Richard J. Grossman, Neil P. Stronski, Anya Richter Hodes, and Alexander J. Vargas

The Securities and Exchange Commission's (SEC) new universal proxy rules, which took effect for meetings after August 31, 2022, require the use of "universal" proxy cards in all director election contests, except for elections held by registered investment companies and business development companies. Previously in contested elections, the company and the dissident stockholder each distributed separate and different proxy cards.

Stockholders not attending the meeting in person and voting by proxy could only vote on a single card, limiting their choices to either the nominees on the company card or the dissident card, with no option to "mix and match." By contrast, stockholders voting in person could select any combination of candidates nominated by either side.

The new rules seek, among other things, to bridge this gap by giving stockholders voting by proxy the ability to "cherry pick" between each side's slate of nominees as all candidates up for election are listed on both sides' cards—the "universal" proxy card.

While the new rules are still in their early days, Skadden represented the target companies at two of the first three proxy fights following the new rules and there have been a few lessons learned.

Richard J. Grossman, **Neil P. Stronski**, **Anya Richter Hodes**, *and* **Alexander J. Vargas** *are attorneys of Skadden, Arps, Slate, Meagher & Flom LLP.*

Recent Universal Card Proxy Fights

To date, a handful of contested elections have been launched since the new rules took effect, and several of those companies have held annual meetings, including the two in which Skadden was involved:

1. Land & Buildings' contest against Apartment Investment and Management Co. (Aimco), in which Land & Buildings sought two of the three seats up for election on Aimco's classified board; and
2. Capital Returns Management, LLC's (CRM) contest against Argo Group International Holdings, Ltd. (Argo), where CRM sought two of seven board seats.[1]

It is worth noting that neither Aimco nor Argo were strangers to activist engagement. Land & Buildings' campaign against Aimco represents the continuation of an engagement that began in 2020, when Land & Buildings opposed Aimco's then-proposed spin-off. That same year Argo entered into a cooperation agreement with Voce Capital, resulting in the appointment of three new directors to its board. More recently in August 2022, Argo also appointed Voce Capital's chief investment officer to its board.

After facing a likely defeat at the ballot box, in part, because proxy advisory firms did not recommend its nominees (as discussed below), CRM withdrew its nomination at Argo. Land & Buildings secured one seat at Aimco's annual meeting on December 16, 2022.

Technical Considerations

The new rules require a number of technical additions and considerations to a company's proxy

© 2023 CCH Incorporated and its affiliates. All rights reserved.

statement, including the presentation of director nominees on the proxy card, disclosure of the deadline to give notice of a solicitation in support of a dissident's nominees and the treatment of undervoting and overvoting.

Proxy Mechanics. One goal of the new rules is to harmonize the company's and the dissident stockholder's proxy cards to avoid confusion at the ballot box. In order to achieve this, the new rules require, among other things, (1) both the company and dissident to list all nominees on their respective proxy cards[2] and (2) the proxy card to be presented in a clear, neutral manner.

Notwithstanding the neutrality requirement, in both contested elections under the new rules, the proxy cards clearly distinguished between the company and dissident candidates and contained recommendations of the soliciting parties. The dissidents' proxy materials also targeted individual company directors, identifying which directors were "not acceptable" to the dissident.

Notice of Deadlines. Under the new rules, companies are required to state the deadline for providing notice of a solicitation of proxies in support of director nominees other than the company's nominees for the next annual meeting. Typically, companies include such information as a standalone paragraph under their "stockholder proposals for next year's annual meeting" section of the proxy statement.

Undervotes and Overvotes. In addition, the new rules require that each universal proxy card must disclose the treatment of proxy cards containing undervotes (when a stockholder votes for fewer nominees than the number of seats up for election) and overvotes (when a stockholder votes for more nominees than there are seats up for election).

Both Aimco and Argo disclosed that, if an undervote occurs, those "unused" votes will not be counted toward any remaining nominees, and if an overvote occurs, all of such stockholder's votes in the election of directors will be deemed invalid and not be counted.

Going forward, we expect companies without a significant retail stockholder base will follow substantially similar mechanics if faced with a contested election so long as the commonly used Broadridge system for processing proxy cards is not capable of supporting an alternate approach.

Director Qualifications

Prior to the new rules, a dissident stockholder would often attempt to convince stockholders that its full slate of nominees, taken as a whole, was more qualified or better positioned to enhance stockholder value at the company than the company's nominees, taken as a whole. However, now that the new rules expressly allow for stockholders to "cherry pick" candidates from either the company's or a dissident's slate, there appears to be enhanced scrutiny on the qualifications of individual nominees. In both the Aimco and Argo contests, the companies and dissidents focused a great deal on the qualifications of their individual nominees, and criticized the qualifications of the opposing nominees.

Going forward, in preparing for a potential universal proxy fight, companies should not only consider the increased need to clearly communicate their rationale and strategy on approaches to board refreshment and composition as a whole, but also pay particular attention to individual directors who may be vulnerable to an attack due to, among other things, long tenure, service on multiple boards, or either a lack of relevant expertise and skill sets, or redundancy of expertise in the boardroom.

Proxy Advisory Services Recommendations

Based on a review of Institutional Shareholder Services' (ISS) and Glass Lewis' reports, it appears that Glass Lewis takes a more holistic view of a dissident's thesis and, consistent with past practices, Glass Lewis is "reticent to recommend the removal of incumbent directors ... unless certain issues are evident," such as poor corporate governance oversight.[3]

For Argo, ISS, and Glass Lewis both recommended a vote for the company's nominees. For Aimco, Glass Lewis recommended a vote for the company's nominees; however, ISS split its recommendation, recommending a vote for two Aimco nominees and one Land & Buildings nominee. ISS specifically declined to recommend one of Aimco's nominees, noting that the nominee was long-tenured and his specific background and qualifications were already covered on Aimco's board by more recently appointed independent directors. Conversely, ISS noted that the qualifications and background of one of Land & Buildings' nominees would complement the current Aimco board of directors.

In addition, and consistent with its past practices, ISS recommended that stockholders vote on the activist's proxy card (Land & Buildings'), notwithstanding the fact that only one Land & Buildings nominee was recommended versus two company nominees.

While one cannot draw firm conclusions from two proxy contests as to how the use of the new universal proxy card may influence contests or the recommendations of the proxy advisory firms, it does not appear that either proxy advisory service modified its general framework for evaluating election contests for a minority of the board of directors.[4]

New Rules Compliance and Disclosure Interpretations

As is common for recent amendments adopted by the SEC, the agency has published clarifying compliance and disclosure interpretations (CD&Is) concerning the new rules.[5] Most notably, CD&Is have clarified that if a company determines a dissident's nomination notice is invalid for failure to comply with the company's bylaws or the new rules, and the dissident challenges this determination by initiating litigation, the company is required to disclose the litigation in its proxy statement and provide the rationale for the company's determination that the nomination is invalid.

Potential Bylaw Amendments

Recently, several companies have amended their bylaws to reflect the new rules, along with certain additional amendments that go beyond the scope of the new rules. However, given the new rules are statutorily mandated, there is no immediate necessity to amend a company's bylaws, as we expect the SEC to vigorously enforce the new rules, decreasing the likelihood that a company by itself would have to enforce them.

Furthermore, some of the additional amendments that companies have recently implemented—for example, requiring disclosure of a dissident stockholder's limited partners—are currently being challenged in the courts and it remains to be seen whether such amendments are enforceable, and how investors and proxy advisory firms will view such bylaws in evaluating a company's overall governance practices.[6]

Companies that are considering amending their bylaws to reflect the new rules should consider the proposed scope of bylaw amendments in the context of their overall governance profile and structural defenses. If a company chooses to amend its bylaws at this time, in order to avoid litigation, it would be wise to refrain from adopting amendments perceived to be "aggressive," and keep any amendments related to the new rules narrowly focused—for example, an amendment that states that failure to follow the new rules and to provide evidence of soliciting proxies from at least 67 percent of stockholders invalidates a nomination under the company's bylaws. By doing so, a company will likely minimize and indeed avoid the potential pushback from stockholders.

Looking Ahead to 2023

The new rules are the latest development in the ever-changing world of corporate governance and contested director elections. Although it is still early and potential ramifications remain to be seen, one consequence of the new rules appears to be enhanced focus on the individual director's qualifications, including whether a specific director is long-tenured.

© 2023 CCH Incorporated and its affiliates. All rights reserved.

Another result may be an increase in the number of settlement agreements due, in part, to the increased unpredictability in outcomes of contested elections under the new rules and the somewhat greater likelihood that the proxy advisory firms will recommend in favor of at least one of the dissident's nominees.

Notes

1. Aim ImmunoTech Inc. also faced a proxy contest. However, Aim ImmunoTech prevailed in litigation in the Delaware courts, which found that the dissident stockholders' nomination did not comply with certain of the company's bylaws and was therefore invalid.
2. The new rules, however, do not restrict the order of such listing of nominees, so a company is free to list its nominees at the top and the dissident's nominees at the bottom of the proxy card.
3. Glass Lewis Proxy Paper Report – Argo Group International Holdings, Ltd., December 2, 2022.
4. *See* ISS 2023 Proxy Voting Guidelines and Glass Lewis 2023 Policy Guidelines for a more detailed description of the proxy advisory services recommendation framework for contested elections.
5. *https://www.sec.gov/corpfin/proxy-rules-schedules-14a-14c-cdi*.
6. A handful of companies have also recently amended their bylaws to preemptively claim the white proxy card. While the benefits of claiming the white proxy card may have been diluted following the use of a universal card under the new rules, it may still be beneficial for companies with a large retail stockholder base.

ACTIVISM

Advance Notice Bylaws Are Bad!

By Michael R. Levin

So, let's stop normalizing them, ok?

We've seen much discussion and debate lately about advance notice terms in company bylaws. Deal Point Data reports almost 400 US companies amended them in November and December 2022. Activist Politan Capital sued portfolio company Masimo (MASI) over them, in a closely-watched case. Board attorneys fight over how far corporate clients should go in screwing them down.

Recently, we've seen and participated in discussions where we talk through the finer points: which terms are worse than others, how activists should respond, what might companies do next to make them worse. Inevitably, an attorney or advisor defends a company's advance notice bylaws, claiming everyone does it, Delaware is okay with them, and boards want shareholder meetings to go well. Activists nod quietly, focus on the worst of them, and let the rest slide.

This is wrong! They exist solely to make life difficult for activists, and in the process disenfranchise shareholders.

Quick Refresher

For those that don't know, advance notice bylaw terms require two things:

1. An activist must notify a company of board nominees long before a shareholder meeting, typically three to four months.
2. In the notice, an activist discloses extensive detail about itself and its candidates.

Michael R. Levin *is founder and editor of The Activist Investor.*

Much of the current debate pertains to the second thing: what additional detail a company can or should demand as a condition of allowing an activist to nominate board candidates. Some companies now require disclosure of an activist's fund investors, past and future activist projects, and discussions of activist projects among family members (spouses, children, etc.).

In all this debate, we forget one central truth: Advance notice bylaws exist only as an obstacle to activists. They allow boards and management to resist or oppose a proxy contest, without any meaningful benefit to a company's shareholders.

What Companies Say

Companies argue for advance notice on two grounds:

1. They can run an orderly shareholder meeting, since the board knows what business to expect on the meeting agenda.
2. Shareholders want extensive, detailed information about activist board candidates.

We haven't heard shareholders complain about either problem. We've attended our share of annual meetings, and are usually one of the few stockholders that aren't a director, executive, employee, or advisor. Seems like an orderly meeting makes life easier mostly for the company.

Activists also disclose abundant information about themselves and nominees, without needing to comply with bylaw terms that require that information. If shareholders want more, they know where to call (activist, proxy solicitor).

Also, we have never seen a company include information about activist candidates in company proxy materials. If they collect that information from

© 2023 CCH Incorporated and its affiliates. All rights reserved.

an activist for shareholders, then they certainly don't provide it to them where shareholders typically look for it.

Furthermore, the SEC already has a form of advance notice, addressing both the content and timing of these disclosures. The proxy solicitation rules require an activist to distribute a proxy statement with the essentials about itself and the nominees. These work well enough that most company advance notice bylaws require an activist to disclose to the company what it would include in the proxy statement. And, under the new universal proxy rules, the SEC now requires a reasonable notice period: an activist must send this information to shareholders about a month before the shareholder meeting.

What Companies Mean

How, then, do advance notice bylaw terms help the company? In many ways:

1. Warn the board about potential nominees, so they can get ahead of an activist in communicating with shareholders to counter an activist's arguments for its candidates.
2. Provide the board with a form of opposition research, so it might use the disclosures to discredit the activist or its nominees.
3. Dissuade all but the most determined activist from compiling and submitting the growing pile of information the board demands.
4. Seek to disqualify an activist from nominating candidates based on failure to comply with one or another arcane or trivial detail in the extensive list of needed disclosures.

How do companies defend this? They point to Delaware Chancery Court, which frequently allows all manner of restrictive advance notice bylaw terms. Sure, it might be legal, but it doesn't make it better or right. It mostly means Delaware defers to boards, not that it helps shareholders to understand candidate qualifications and vote in an orderly way.

Why Even Care?

As companies find new and innovative ways to hamper activists, we continually must remind ourselves about the fundamental purpose of these bylaw terms.

The current debate over advance notice bylaws bears a striking resemblance to the one over shareholder rights plans starting in the 1980s. Then, companies sought to use a poison pill only to resist a coercive tender offer. They grew out of control, and became a standard if still-controversial way to limit what shareholders can own and therefore accomplish at a company.

Then, the fundamental purpose of a poison pill was to make life harder for an activist. Today, we can say the same for advance notice bylaw terms. Activists should keep this in mind as we think about and debate the nuances of these terms.

HUMAN CAPITAL

The Compensation Committee Continues to Broaden Its Human Capital Management Role

By Theresa Tovar, Robert Newbury, and Don Delves

Human capital management (HCM) turns the traditional administrative tasks, such as recruitment, training, performance management and compensation, into opportunities to boost productivity, employee engagement and business value. To stay on top of HCM matters, compensation committees are increasingly broadening their scope to address:

- Building and sustaining an inclusive and diverse workforce.
- Focusing on leadership succession, preparing for transitions beyond just top-level executives.
- Executing business strategy by acquiring and keeping key talent.
- Strengthening workforce engagement and productivity.
- Establishing a strong and healthy corporate culture.

Recent world events—including the COVID-19 pandemic, investor focus on environmental, social and governance issues (ESG), and the great resignation—have intensified the demands and responsibilities of boards and committees, leading more compensation committees to add or take on even greater HCM roles.

Willis Tower Watson (WTW) research on S&P 500 companies corroborates these anecdotal observations and provide further insights into HCM developments at the board and committee level since we first reviewed this issue in 2019.

In 2022, we can confirm the continuing changes both in name and responsibility of traditional board compensation committees. These changes reflect the current ESG climate with an HCM focus both in and out of the boardroom. The most recent study of S&P 500 companies' charters and committee names conducted by WTW's Global Executive Compensation Analysis Team revealed some noteworthy results.

Within S&P 500 compensation committee names:

- Nearly 50 percent of the S&P 500 (242 companies) now refer to the committee responsible for executive compensation oversight as something beyond just the compensation committee. This is a 10-percentage-point increase from our 2019 study findings.
- Companies are changing compensation committee names to reflect broader responsibilities at a faster clip. Fifty-four companies changed the name of their compensation committee to reflect broader duties, compared to the 45 changes over the previous decade observed during our 2019 review.
- Of the 54 companies that changed the name of their compensation committee between 2022 and 2021, 44 percent (24 companies) added "human capital."

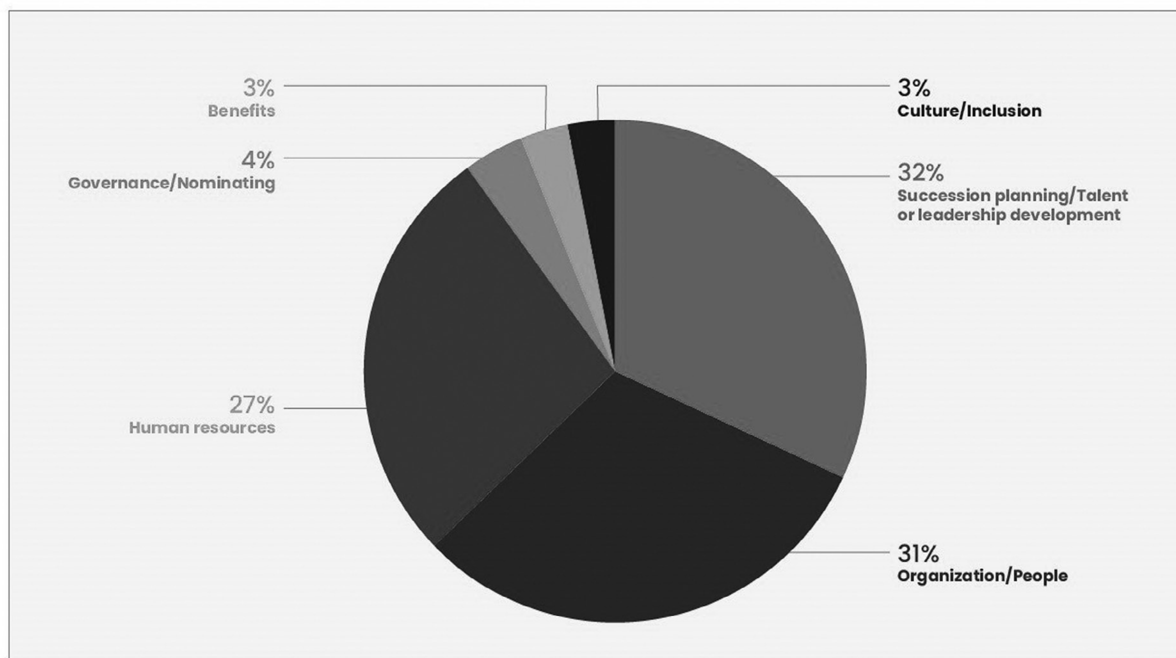
Within S&P 100 compensation committee charter reviews:

- Only seven committees' charters do not name any HCM oversight responsibilities.
- Over 75 percent of the companies require committees to maintain oversight of broad-based compensation programs and benefits.

***Theresa Tovar** is Director at Global Executive Compensation Analysis, **Robert Newbury** is Senior Director at Global Executive Compensation Analysis Team, and **Don Delves** is Managing Director at Executive Compensation and Board Advisory Practice Leader—North America, of Willis Tower Watson.*

© 2023 CCH Incorporated and its affiliates. All rights reserved.

Figure 1. Common name variants for S&P 500 compensation committees



Note: Statistics are based on 242 S&P 500 companies with committee names other than "compensation committee" or "executive compensation committee." Some boards do not have distinct compensation and governance committees. These boards typically combine compensation with governance/nominating, making "governance/nominating" a common name variant.

- In addition to overseeing broad-based compensation, nearly half (44 percent) of companies are responsible for broad-based recruitment, promotion, retention and turnover.
- 62 percent of companies have given the committee diversity and inclusion program oversight.

Increasingly, compensation committee oversight includes not only establishing and managing executive compensation matters but also instituting and maintaining global HCM concerns. Figure 1 provides a breakdown of the common compensation committee name variants used by S&P 500 companies.

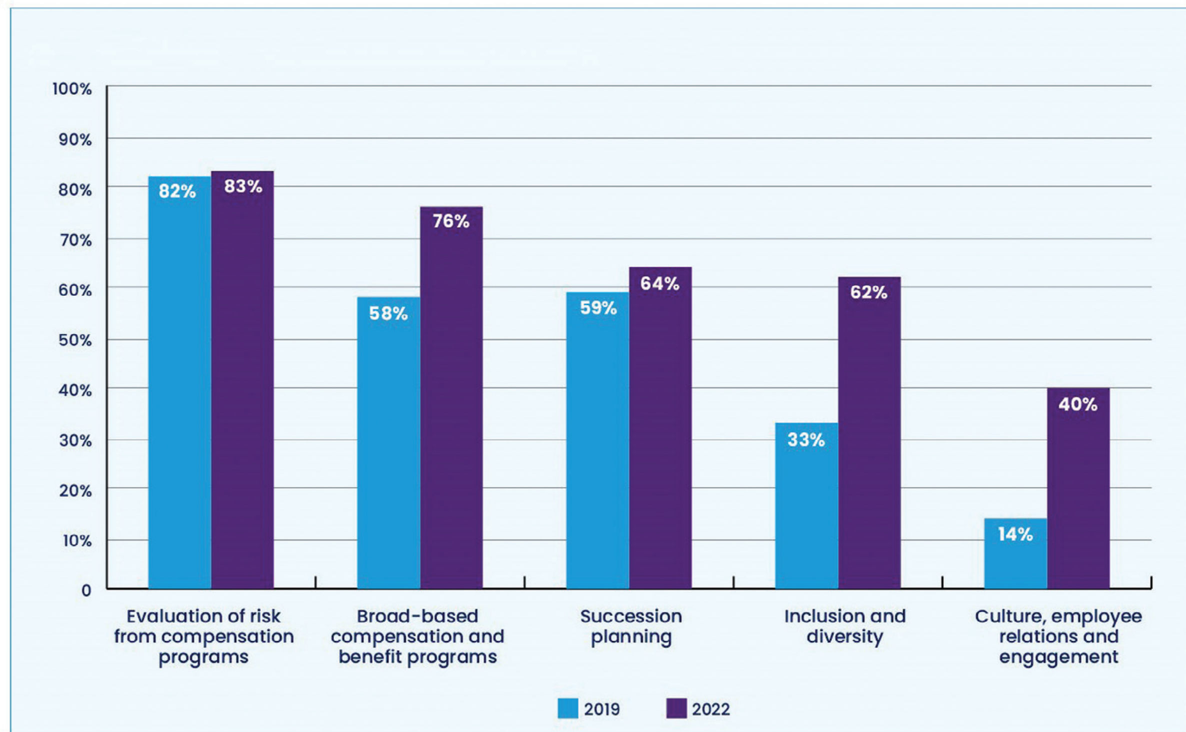
To determine whether these broader oversight responsibilities went beyond just committee names, WTW reviewed the current compensation committee charters of the 100 largest S&P 500 companies. Comparing 2019 with 2022, WTW found an increase in every topic we categorized in the first study, as shown in Figure 2.

The Role of the Compensation Committee in Human Capital Governance

News making events over the past four years have raised awareness of disparities across race/ethnicity, gender, class, and other important social markers, leading companies to step up their efforts to combat these inequalities.

WTW analysis found that inclusion and diversity (I&D) remains topical; there was a 29-percentage-point increase (62 percent in 2022 vs. 33 percent in 2019) increase between 2019 and 2022 in compensation committees adding "inclusion and diversity" to their list of responsibilities.

Figure 2. Additional duties and responsibilities conducted by S&P 100 compensation committees



Note: Statistics are based on a review of committee charters among the largest 100 S&P 500 companies as determined by revenue.

Committees are not only reviewing programs and practices related to workforce I&D but also ensuring the equitable administration of compensation programs. Currently, 76 percent of companies include oversight of broad-based compensation and benefit programs compared with 58 percent in 2019.

Another growing area of responsibility among compensation committees is "culture, employee relations and engagement" (*see* Figure 2). There was a 26 percent jump between 2019 and 2022 in compensation committees adding these responsibilities, attesting to the growing need to address changes in a post-pandemic workforce.

The sharp rise in employees working remotely may be COVID-19's most evident effect within the executive suite as well as among broad-based employees, leading to key questions such as:

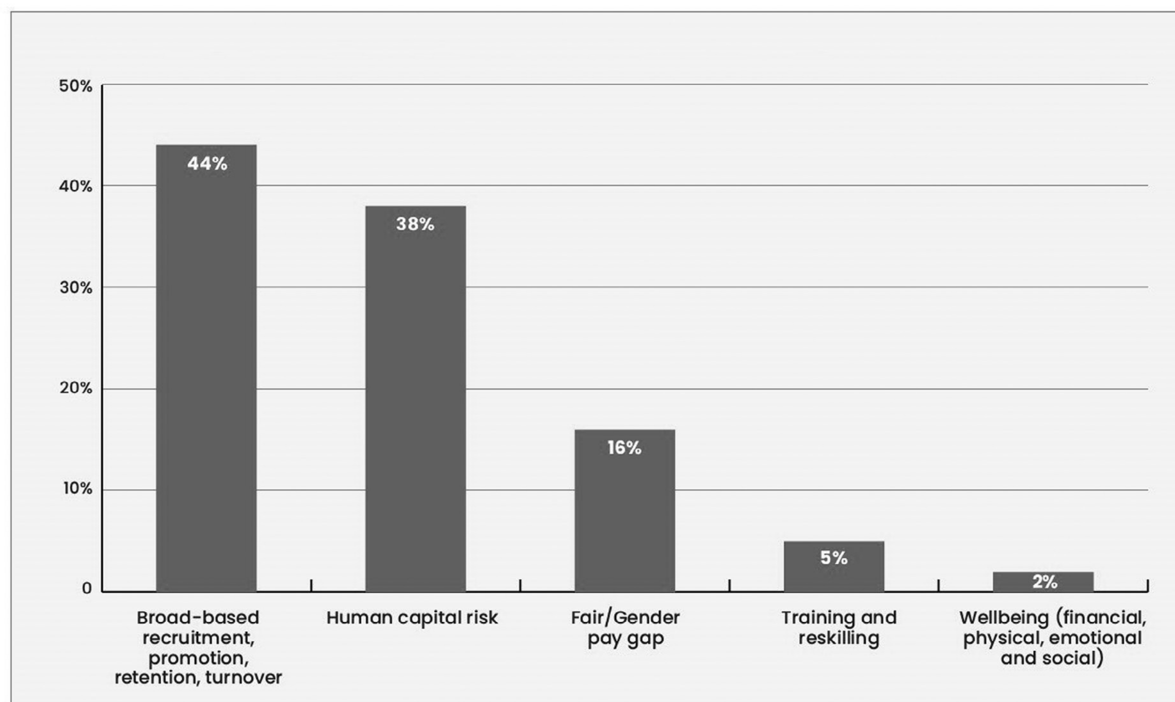
- How do we maintain the company's culture or is there a need to modify it?
- Without day-to-day in-person interaction, how do we keep employees engaged?
- What's the best way to create, manage, and maintain a positive connection between management and the workforce?

More HCM-Related Issues

Compensation committees continue to oversee traditional matters of executive succession and evaluation of risk from compensation programs. But I&D and culture, employee relations and engagement matters have made their way into committees' expanded scope of responsibilities. In WTW's review, we noted new and more focused

© 2023 CCH Incorporated and its affiliates. All rights reserved.

Figure 3. Emerging HCM duties and responsibilities conducted by S&P 100 compensation committees



Note: Statistics are based on a review of committee charters among the largest 100 S&P 500 companies as determined by revenue.

areas are being added to the committees' oversight (*see* Figure 3).

Although compensation committees' incorporation of these matters is still relatively low, advocacy and questions from investors, employees, customers, and regulators may be contributing factors that lead more compensation committees to include them.

Expanding outside HCM specifically and looking at ESG responsibilities more broadly, our 2022 review found that 14 percent of S&P 500 governance committee names included some aspect of ESG issues relating to corporate social responsibility, sustainability and the environment. In addition, 90 companies established at least one or more additional committees beyond the standard audit, compensation and governance committees to tackle the same ESG concerns.

Companies are realizing that their people are the best asset and are the key to attaining goals as they work to positively influence society, create value and improve long-term business performance.

As pressure from a variety of stakeholders continues to center on ESG issues, the functions and responsibilities of the board and its committees are deepening to include more aspects of human capital considerations.

SPACS

Going Private: The Next Step for Some deSPAC Companies

By Gerold Niggemann, Charles A. Samuelson, and Javad Husain

The public equity markets have long played an important role in providing public issuers with financing necessary to grow and innovate, while giving investors access to attractive returns.[1] But public issuers face unique challenges as well. In particular, investors (and analysts who report on public issuers) may overemphasize near-term financial results at the expense of longer-term objectives.

In 2013, Dell was taken private in a $24.9 billion leveraged buyout 25 years after its initial public offering on Nasdaq. A year later, the company's eponymous CEO Michael Dell, penned an op-ed for the *Wall Street Journal* where he noted:

> The single most important thing a company can do is invest and innovate to help customers succeed. Theoretically this should also be good for shareholders. You do what's best for customers, you grow and generate returns, and a stable base of long-term shareholders benefits from success… Yet we find ourselves in a world increasingly afflicted with myopia… as a public company [Dell's] shareholders increasingly demanded short-term results to drive returns; innovation and investment too often suffered as a result. Shareholder and customer interests decoupled.[2]

Gerold Niggemann, Charles A. Samuelson, *and* **Javad Husain** *are attorneys of Hughes Hubbard & Reed LLP.*

At the time, this observation resonated with many. As a result, the number of public issuers declined gradually for more than a decade. This development reversed in 2020. On the back of an epic bull market, the COVID-19 pandemic saw a wave of companies accessing the public equity markets for the first time, some by way of a traditional initial public offering (IPO), many others by merging with a publicly traded special purpose acquisition company (SPAC) (we refer in this article to the publicly traded combined business resulting from such a merger as a deSPAC Company).[3]

Among this new cohort of deSPAC Companies were many innovative startups with the potential to disrupt their industry. Those startups had long preferred remaining private and prioritizing investment and innovation over profitability. As an asset class, these privately held startups were available only to a select group of accredited investors with access to private placements, and not to retail investors. Then, the historically beneficial market conditions in 2020 and 2021 provided abundant public equity capital, and many startups heard Wall Street's call.

However, deSPAC Companies had to adjust to public market scrutiny, and learned that public markets are volatile and cyclical. The dilemma described by Michael Dell became the new reality of this newly minted class of public issuers, aggravated by the 2022 environment of higher inflation and tighter monetary policy, increasing pessimism around the global economy, Russia's invasion of Ukraine, supply chain issues and the continued impact of COVID-19.

These factors resulted in US and global stock market indices declining steeply, with the technology sector suffering the greatest losses.[4] Many deSPAC Companies saw their stock price fall in 2022 and,

© 2023 CCH Incorporated and its affiliates. All rights reserved.

with some exceptions, have significantly underperformed the market as a whole.[5]

The reasons for such underperformance are case-specific. That said, of the 10 largest IPOs from 2021, six issuers went public through the traditional IPO process while four went public through deSPAC; only one of the six traditional IPO issuers had de minimis revenue, while two of the four deSPAC issuers did.[6] Also, in many deSPAC transactions, the SPAC includes projections in its deSPAC proxy/prospectus. A failure of deSPAC Companies to meet the publicly disclosed projections may intensify existing downward pressure on their stock price.[7]

These developments may trigger a wave of going private transactions involving deSPAC Companies. DeSPAC Companies may be facing similar pressure from investors and analysts to the pressure faced by Dell. Founders and/or senior management of deSPAC Companies may be inclined to take them private again, as did Michael Dell. Moreover, lower valuations may attract takeover advances from more mature strategics or private equity.

Also, with a low stock price and higher borrowing costs,[8] management of deSPAC Companies may find it challenging to unlock financing, especially important for companies still in their growth stage. That, in turn, may eventually make a sale of the deSPAC Company inevitable.

Romeo—Case Study of a "Going Private" by a deSPAC Company

It took 25 years following Dell's IPO for it to go private. It took one deSPAC Company, Romeo, less than two.

In October 2020, Romeo Systems Inc., an electric vehicle (EV) battery manufacturer, announced it was going public through a merger with SPAC RMG Acquisition Corp. (RMG) in a deal that, at signing, valued the combined entity (Romeo) at approximately $1.3 billion. In its deSPAC proxy/prospectus, RMG's projected 2021 and 2022 revenue was $139.8 million and $411.9 million, respectively, while its actual revenue was only $16.8 million in 2021 and $17.3 million for the first six months of 2022. At closing, Romeo's stock traded in the mid-$30s (resulting in a total market cap of approximately $5.2 billion), before steadily declining; by May 2022, Romeo's stock was trading under $1 per share.

The dramatic decline in Romeo's share price exacerbated a liquidity crisis, and in August 2022, with a potential bankruptcy looming, Romeo and Nikola Corporation (Romeo's largest customer, a Nasdaq-listed EV infrastructure company and itself a DeSPAC Company) announced a definitive agreement pursuant to which Nikola would make an offer to Romeo's shareholders to exchange their Romeo stock for Nikola stock, to be followed by a merger after which Romeo would be a wholly-owned subsidiary of Nikola. The transaction was valued at approximately $67 million in the aggregate.[9] The transaction was completed in October 2022, less than two years after Romeo went public.

Coming Wave of Going Private Transactions Involving deSPAC Companies?

Nikola's acquisition of Romeo may presage a coming wave of deSPAC Companies going private. Faced with a sustained decline of the stock price, boards of directors of public issuers have to evaluate strategic alternatives. Boards of directors of DeSPAC Companies considering a going private transaction will need to consider a range of commercial and legal questions in determining whether a going private transaction is the right choice. Among others, a deSPAC Company will need to consider the legal factors discussed below.

Structure of Transaction

As a public company, a deSPAC Company would typically go private by way of a negotiated merger (one step) or a tender or exchange offer followed by a "squeeze-out" merger (two step).

A one-step merger requires negotiation with, and approval by, the board of directors of the deSPAC

Company, followed by approval of the requisite percentage of shares (in Delaware, a majority of the outstanding shares of capital stock). But Delaware corporate law also permits squeeze-out mergers following a tender offer where the acquirer holds a majority of the outstanding shares of capital stock.[10]

In hostile going private transactions—where the board of the deSPAC Company has not recommended the acquisition and is not cooperating with the potential acquiror—the transaction will need to be structured as a tender or exchange offer to allow the potential acquiror to proceed without the cooperation of the board.

In negotiated going private transactions of Delaware corporations, either a one-step merger or a two-step transaction will likely be viable (although a two-step transaction may result in the acquiror obtaining a control position faster, assuming it is conditioned upon acceptance by holders of more than 50 percent of the outstanding shares).

Fiduciary Duties

DeSPAC Companies typically are structured as Delaware corporations (onshore corporations), or Cayman, Dutch or Luxembourg corporations (offshore corporations). In Delaware, directors owe fiduciary obligations to all stockholders; in addition, controlling stockholders owe fiduciary duties to minority stockholders.[11] Directors or controlling stockholders of offshore corporations may similarly have fiduciary obligations.

If the going private transaction results in a Delaware deSPAC Company being acquired by a third-party acquirer (as with Romeo), the directors' performance of their fiduciary duties will, assuming they are not conflicted, be analyzed under the "business judgment" rule. This rule, as a general principle, puts the burden of proof on the plaintiff and protects directors from judicial hindsight (and therefore liability). In a takeover context, Delaware courts would apply heightened scrutiny under the "Revlon" doctrine which requires the directors to seek the highest value for the target's shareholders that is reasonably attainable.

On the other hand, a going private transaction with an acquirer that is already controlling the target (or, as was the case with Dell, may be considered a controlling stockholder of the target)[12] may result in the application of the "entire fairness" standard. The entire fairness standard will require the directors and/or controlling stockholder to show the transaction was entirely fair to the minority stockholders, both in terms of process by which the transaction was entered into, and in terms of the price obtained for the sale.[13] This is a high bar.

In any case, directors of a deSPAC Company may be reticent to approve a going private transaction at a significant discount to the deSPAC valuation, even if the share price has fallen precipitously since the deSPAC, as was the case with Romeo. In particular, if they were on the board at the time of the deSPAC closing, directors may be concerned about lawsuits from private *investment* in public equity (PIPE) investors (who will typically have invested at $10 per share at the time of the deSPAC, and unlike the SPAC investors, without redemption rights). Engaging a financial advisor to provide a fairness opinion (as Romeo did in its going private transaction) may be advisable even where the acquirer is a third-party to protect the board and management against claims for breach of the duty of care. Even where minority protections are applied, directors approving the transaction will want to ensure that they are covered by a D&O insurance policy and/or the indemnification provisions of the company's governing documents in light of potential claims from minority stockholders (and the always litigious plaintiff's bar).

Disparate Shareholder Base

Alternatively, absence of one or a group of controlling shareholders may create practical difficulties in approving a going private transaction. It is notoriously difficult to get retail investors to vote; for example, in August 2022, DWAC (the SPAC involved in the proposed Truth Social deSPAC) was unable to obtain shareholder approval for extension of DWAC's SPAC life despite the share price trading

© 2023 CCH Incorporated and its affiliates. All rights reserved.

well above the per share liquidation value. As a result, DWAC's sponsor had to overfund the trust account to trigger an automatic extension.

Moreover, retail investors most likely will have purchased their shares in the deSPAC Company at market prices, whereas SPAC IPO investors and PIPE investors typically will have paid $10 per unit or per share, respectively, and SPAC sponsors will have received their shares for nominal consideration; hence, the valuation of the deSPAC Company in a going private transaction may be attractive to some groups of shareholders and not to others. Accordingly, the stockholder base and any resulting difficulties in obtaining transaction approval should be carefully reviewed when considering a going private transaction.

Derivative Securities

The typical SPAC goes public through the issue and sale of units for $10 per unit. Those units generally comprise one Class A common share and a fraction of a warrant to purchase one Class A common share at $11.50. Even where the overwhelming bulk of a SPAC's Class A common shares are redeemed in connection with the deSPAC closing in return for a pro rata share of the trust account balance, the warrants that formed part of the IPO units will remain outstanding until redeemed or exercised in accordance with their terms.

Consideration should be given to the specific terms of the warrants and any other outstanding classes of securities. In stock-for-stock deals, warrants of the deSPAC Company will often be exchanged for warrants to purchase shares of the acquiror, with the number of shares issuable upon exercise of the warrants and the exercise price being adjusted based on the exchange ratio. At times, the terms of the warrants may stipulate that the exercise price is subject to reduction if the anti-dilution provisions are triggered.

Heightened Disclosure Obligations May Apply

If an affiliate of the deSPAC Company is engaged in the going private transaction, such as where a controlling shareholder is seeking to take a deSPAC Company private, Rule 13e-3 of the Securities Exchange Act of 1934, as amended (the Exchange Act), would require heightened disclosure for the benefit of minority shareholders.[14]

Such disclosure would be included in the front of the tender offer or proxy statement disclosure documents, in a section titled "Special Factors." In the current era of heightened Securities and Exchange Commission (SEC) scrutiny around all things SPAC-related, conflicts disclosure and methods by which the conflicts were reviewed and cleansed will need to be considered carefully.

Lock-Up Period

The deSPAC Company capital stock held by many of the constituencies in a deSPAC often will be subject to a lock-up period (typically one year, although oftentimes there will be an early release if the deSPAC Company's stock trades above certain thresholds for a certain period of time). The terms of any such lock-ups should be considered and waivers may be needed to permit the holders of shares subject to lock-ups to vote in favor of a merger or to tender their shares in a tender offer.

Conclusion

As summarized above, there are certain legal issues that will be commonly faced in connection with potential going private transactions. However, particularly in respect to deSPAC companies each potential transaction will be unique based on the potential target's capital structure, management, the interests of various parties, and contractual terms by which the public issuer and its key shareholders are subject. In addition, hostile takeovers will invariably raise a host of issues not covered in this analysis.

To aid a potential acquiror or target in structuring a potential going private transaction, legal and financial advisors should be brought into the loop at the early stages of a potential transaction to help prepare a realistic and efficient path to successful closing.

Notes

1. Based on calculations of the NYU Stern School of Business, the average S&P 500 annual return since it adopted 500 stocks into the index in 1957, through December 31, 2021, is approximately 11.9 percent on a gross basis (assuming reinvestment of dividends).
2. *Wall Street Journal*, November 24, 2014.
3. According to Statista, 53 percent and 58 percent of companies going public did so by way of deSPAC in 2020 and 2021, respectively, compared to only 10 percent and 16 percent of companies going public in 2016 and 2017, respectively. SoFi reported that the number of IPOs more than doubled from 2019 to 2020, and then more than doubled again from 2020 to 2021 (going from 232 in 2019 to 480 in 2020 and then 1,035 in 2021).
4. On October 14, 2022, the tech-heavy Nasdaq was down more than 35 percent from its all-time closing high of November 19, 2021. Also on October 14, 2022, the S&P 500 index closed down approximately 22 percent from its all-time closing high of November 19, 2021.
5. Over the same time period referenced in *supra* n.4, according to FactSet Research, the De-SPAC Index declined by nearly 75 percent.
6. One of the six traditional IPO issuers had no revenue in its prior fiscal year, while the other five had revenue ranging from $21.6 billion to $332 million; two of the four deSPAC issuers had less than $5 million of revenue in their prior fiscal year, while the other two had revenue ranging from $565 million to $469 million.
7. Contrast Romeo with Bowlero Corp., another deSPAC Company. In its proxy/prospectus, the acquiring SPAC, Isos Acquisition Corp., included revenue and Adjusted EBITDA projections for FY2022 of $772 million and $244.8 million, respectively; Bowlero's actual revenue and Adjusted EBITDA for FY2022 was $911.7 million and $316.4 million, respectively. Bowlero's closing share price on December 2, 2022 was $13.66, or approximately 40 percent above the closing price at the time of the de-SPAC in December 2022.
8. According to BMO, new high-yield issuances in October 2022 indicated a 12.8 percent yield, compared to a 6.6 percent yield 12 months earlier.
9. Based on approximately 22 million shares of Nikola stock being issued, based on a closing share price on October 14, 2022 (the date of closing), of $3.06.
10. *See* Section 251 of the DGCL. Unlike Delaware, many other states require the acquirer hold 90 percent of the target's shares to effect a squeeze-out merger.
11. *See*, example, Kahn v. Lynch Communication Sys. Inc., 638 A.2d 1110 (Del. 1994). Many Post-SPAC Companies are "controlled companies" or otherwise have significant stockholders which may trigger fiduciary obligations.
12. At the time of the Dell go-private transaction, Michael Dell served both as Board Chair and Chief Executive Officer, and owned approximately 13 percent of the company's voting power. Given that, and the fact that Michael Dell was going to control the post-transaction company, the transaction was structured to comply with the minority stockholder protections described in *infra* n.13.
13. Broadly speaking, a transaction that must meet the "entire fairness" standard shifts the burden of proof to the defendant directors, and requires a showing that the transaction was fair as to both price and process. Under Delaware law, an acquisition by a controlling stockholder that would otherwise be reviewed under the entire fairness doctrine will instead be reviewed under the business judgment rule if certain minority stockholder protections are applied, including the terms of the transaction being negotiated, and the transaction being approved, by a special committee comprised solely of independent directors, and the transaction and its terms being approved by a majority of the minority stockholders in a fully informed, uncoerced vote.
14. Of particular note is the fact that Rule 13e-3 requires disclosure of alternatives considered and information on the fairness of the transaction (Items 7 and 8 of Schedule 13E, respectively).

© 2023 CCH Incorporated and its affiliates. All rights reserved.

STOCK BUYBACKS

IRS and Treasury Issue Interim Guidance on One Percent Stock Buyback Tax

By John K. Sweet, Suyoung Moon, Abraham N.M. Shashy, Jr., Jonathan Talansky, and L. Wayne Pressgrove, Jr.

On December 27, 2022, the Internal Revenue Service (IRS) and Treasury issued Notice 2023-2 (Notice), which provides guidance relating to the application of the new excise tax on repurchases of corporate stock (Stock Buyback Tax) under Section 4501 of the Internal Revenue Code of 1986, as amended (Code).[1]

Among other things, the Notice provides detailed rules for calculating the amount of the Stock Buyback Tax as well as rules relating to the reporting and payment of the tax. In general, under the Notice, the Stock Buyback Tax applies broadly to stock repurchases (including repurchases of preferred stock) and to certain "economically similar" transactions. Notably, although the Notice does not include any rules specifically addressing special purpose acquisition companies (SPACs), it does provide some relief to SPACs by excluding certain liquidations from the scope of the Stock Buyback Tax.

General

The Stock Buyback Tax generally applies to certain "repurchases" of corporate stock by publicly traded US corporations (covered corporations), or certain of their affiliates, after December 31, 2022.[2] The term "repurchase" is defined broadly by reference to Section 317(b), which generally includes any acquisition of stock by a corporation in exchange for cash or property other than its own stock or stock rights.

For this purpose, a "repurchase" also includes certain "economically similar" transactions, which the Notice defines to include only (1) certain types of reorganization transactions, (2) split-off transactions (as opposed to pro rata "spin-off" transactions), and (3) certain complete liquidations (generally, liquidations of a covered corporation whose shareholders include an 80 percent or greater parent corporation as well as minority shareholders). Complete liquidations not described in the preceding sentence are not subject to the Stock Buyback Tax.

Calculation Methodology

The Stock Buyback Tax is imposed at a rate of 1 percent on the "stock repurchase excise tax base" of a covered corporation, which is equal to:

1. The aggregate fair market value of all repurchases of a covered corporation's stock during the taxable year; *less*
2. The fair market value of such repurchases to which one of the statutory exceptions described below applies; *less*
3. The aggregate fair market value of stock of the covered corporation issued by the covered corporation during its taxable year under the "netting rule" (described below).

De Minimis Exception

Under a *de minimis* exception, the Stock Buyback Tax does not apply if the aggregate fair market value of a covered corporation's repurchases of its stock during a taxable year does not exceed $1,000,000.

John K. Sweet, Suyoung Moon, Abraham N.M. Shashy, Jr., Jonathan Talansky, *and* **L. Wayne Pressgrove, Jr.** *are attorneys of King & Spalding LLP.*

Statutory Exceptions for Certain Repurchases

The statutory exceptions (which reduce the stock repurchase excise tax base) include:

- Repurchases in "economically similar" transactions, to the extent qualifying for tax-deferred treatment (more specifically, to the extent the shareholder receives property that is permitted (under Section 354 or Section 355) to be received without the recognition of gain or loss);
- Repurchases by a dealer in securities in the ordinary course of business;
- Repurchases by a regulated investment company (RIC) or by a real estate investment trust (REIT);
- Repurchases that are treated as dividends for federal income tax purposes (under Section 301(c)(1) or Section 356(a)(2)); and
- Repurchases, to the extent the repurchased stock (or an amount of stock equal to the fair market value of the repurchased stock) is contributed to an employer-sponsored retirement plan.

Netting Rule

Under the "netting rule," the fair market value of stock repurchased during the taxable year generally is reduced by the value of any new issuances of stock by the covered corporation (including stock issuances to employees) during the same taxable year. For a corporation with a taxable year that includes, but does not end on, December 31, 2022, stock issuances during the portion of its taxable year prior to January 1, 2023 are taken into account under the netting rule, even though repurchases prior to January 1, 2023 are not included in the calculation of its stock repurchase excise tax base.

Under the Notice, certain issuances of stock are disregarded for purposes of the netting rule and therefore are not taken into account as a reduction to a covered corporation's stock repurchase excise tax base. Such disregarded issuances include stock distributions by a covered corporation with respect to its stock (that is, a stock dividend) and stock issued by a covered corporation to certain of its affiliates. In addition, to avoid a double benefit to taxpayers, stock issued in connection with a repurchase described in the first bullet above under "Statutory Exceptions for Certain Repurchases" generally is not taken into account under the netting rule.

Other disregarded issuances include (1) deemed issuances under Section 304(a)(1) (relating to certain related-party stock sales), (2) certain deemed issuances of fractional shares, (3) issuances by a covered corporation that is a dealer in securities, to the extent the stock is issued in the ordinary course of the dealer's business of dealing in securities, and (4) issuances by a target corporation in a reverse subsidiary merger that is governed by Section 368(a)(2)(E).

Valuation

In general, stock is valued (1) in the case of a repurchase, at the time at which ownership of the repurchased stock (as determined for federal income tax purposes) transfers to the covered corporation, and (2) in the case of an issuance (except for certain issuances to employees), at the time at which ownership of the stock (as determined for federal income tax purposes) transfers to the recipient. Because the tax base is measured by reference to value and not the number of shares issued or repurchased, the Stock Buyback Tax could potentially apply when the number of shares repurchased during a taxable year is the same as the number of shares issued during that year.

In the case of stock that is traded on an established securities market (publicly traded), the covered corporation must use one of four methods to determine the value of the stock repurchased or issued, as applicable, specifically (1) the daily volume-weighted average price on the date of issuance or repurchase, (2) the closing price on the date of issuance or repurchase, (3) the average of the high and low prices on the date of issuance or repurchase, or (4) the trading price at the time of issuance or repurchase. The selected method generally must be applied consistently to all repurchases and issuances during the taxable year.

© 2023 CCH Incorporated and its affiliates. All rights reserved.

Stock that is not publicly traded must be determined as of the date of issuance or repurchase, as applicable, using a reasonable valuation method in accordance with principles set forth in regulations under Section 409A.

Rules for Reporting and Paying the Stock Buyback Tax

The Notice provides for annual reporting of the Stock Buyback Tax on IRS Form 720. To facilitate the computation of the tax, the IRS intends to issue an additional form that taxpayers will be required to attach to the Form 720. Although the Form 720 typically is filed quarterly, the Stock Buyback Tax will be subject to reporting once per taxable year, on the Form 720 that is due for the first quarter after the close of the taxpayer's taxable year.

Accordingly, a corporation with a taxable year ending on December 31, 2023 would report its Stock Buyback Tax for 2023 on the Form 720 for the first quarter of 2024, due on April 30, 2024. According to the Notice, it is expected that the deadline for payment of the Stock Buyback Tax would be the same as the filing deadline, and that no extensions would be permitted for reporting or paying the Stock Buyback Tax.

Reliance

Taxpayers may rely on the interim guidance under the Notice until the issuance of forthcoming proposed regulations.

Observations

SPAC Considerations

A typical SPAC raises money by issuing stock in an initial public offering for the purpose of acquiring an operating business in what is commonly referred to as a "de-SPAC" transaction. SPAC stock generally is redeemable at the option of a shareholder in connection with a de-SPAC transaction. If a de-SPAC transaction is not consummated within a specified time frame (typically not more than two years), the SPAC is required to liquidate.

These SPAC liquidations generally are governed by Section 331. The Notice provides relief for these liquidations by excluding from the Stock Buyback Tax distributions in complete liquidation under Section 331. However, the Notice generally does not provide relief for redemptions of SPAC stock outside the liquidation context (for example, a redemption in connection with a de-SPAC transaction).

Application to Preferred Stock

Given the objectives of the Stock Buyback Tax (for example, to prevent the use of stock repurchases to manipulate a corporation's stock price or earnings per share), some commentators had recommended a policy-based exception for repurchases of certain types of stock, such as non-convertible preferred stock that does not participate in corporate growth.

The Notice does not include any such exception. To the contrary, the Notice includes an example illustrating that a redemption of mandatorily redeemable preferred stock is a "repurchase" that is subject to the Stock Buyback Tax.

Statutory Exception for Repurchases Treated as Dividends

The statutory exception for a repurchase that is treated as a dividend is narrowly constructed. In order to qualify for the exception, the covered corporation must establish that the shareholder treats the repurchase as a dividend on the shareholder's federal income tax return.

To establish this, the corporation must, among other things, obtain certification from the shareholder that the repurchase is treated, as to that shareholder, as a distribution under Section 301, or has the effect of the distribution of a dividend under Section 356(a)(2). Qualifying for this exception may be difficult in practice.

SEC ENFORCEMENT

SEC's Division of Enforcement Year-End Results Provide Insight into Record-Breaking Year

By Kara Brockmeyer, Andrew J. Ceresney, Arian M. June, Robert B. Kaplan, Julie M. Riewe, Kristin A. Snyder, Jonathan R. Tuttle, and Mary Jo White

On November 15, 2022, the US Securities and Exchange Commission's (SEC or Commission) Division of Enforcement (Division) announced its enforcement results for fiscal year 2022 (FY 2022).[1] While there was only a modest increase in the overall number of enforcement actions brought by the agency, 6.5 percent over fiscal year 2021 (FY 2021), monetary sanctions increased sharply, to a record $6.4 billion, a 67 percent increase over FY 2021.

The actions highlighted by the SEC in its press release continue to provide valuable insights into evolving trends and areas of continued enforcement focus. Digital assets remained in the spotlight in FY 2022, while the focus on Special Purpose Acquisition Companies (SPACs) in FY 2021 has been replaced by a growing trend of actions involving recordkeeping violations, environmental, social, and governance (ESG) issues, cybersecurity, and private funds.

The results for this second year under the Biden administration, and the first full fiscal year under Chair Gensler, return to near pre-COVID-19 pandemic levels, although the number of actions continues to be relatively low overall by recent historical standards.

Kara Brockmeyer, Andrew J. Ceresney, Arian M. June, Robert B. Kaplan, Julie M. Riewe, Kristin A. Snyder, Jonathan R. Tuttle, *and* **Mary Jo White** *are partners of Debevoise & Plimpton LLP.*

FY 2022 Statistics

The SEC brought 462 new stand-alone enforcement actions in FY 2022, a 6.5 percent increase over FY 2021. New actions remain below pre-pandemic levels, but there have been increases of similar magnitude for two years in a row, potentially signaling a return to Obama-era enforcement levels. The numbers of "follow-on" administrative proceedings and actions against issuers who were delinquent in making required filings with the SEC, as well as total actions, have all increased for the first time in three years. (*See* Exhibit 1.)

Three types of actions continued to constitute the majority of stand-alone actions brought during FY 2022:

1. Investment adviser and investment company matters (26 percent of the total);
2. Securities offering matters (23 percent of the total); and
3. Issuer reporting/accounting and auditing matters (16 percent of the total).

There were, however, some significant year-over-year increases involving several types of actions, including issuer reporting/accounting and auditing matters (43 percent increase), insider trading (54 percent increase), and broker-dealer matters (28 percent increase). On the other hand, securities offering matters decreased 34 percent year-over-year, likely reflecting the reduced focus on retail fraud as compared to the Clayton administration. There were six Foreign Corrupt Practices Act (FCPA) matters brought in FY 2022, which continued to trend lower than recent averages. (*See* Exhibit 2.)

The increased level of activity in insider trading and issuer reporting/accounting and auditing matters aligns with some of the recent high-profile cases

© 2023 CCH Incorporated and its affiliates. All rights reserved.

Exhibit 1—SEC Enforcement by the Numbers

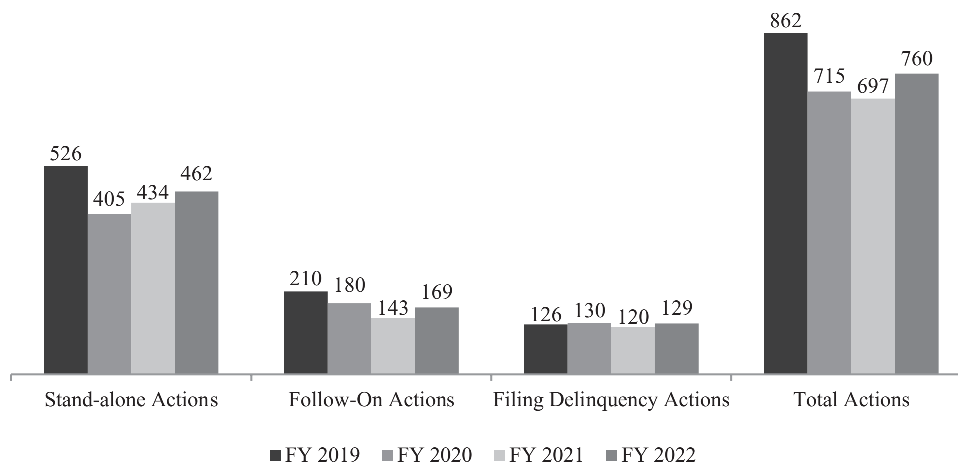


Exhibit 2—Standalone Enforcement Actions by Primary Classification

Primary Classification	FY 2019		FY 2020		FY 2021		FY 2022	
Investment Adviser / Investment Co.	36%	191	21%	87	28%	120	26%	119
Broker-Dealer	7%	38	10%	40	8%	36	10%	46
Securities Offering	21%	108	32%	130	33%	142	23%	106
Issuer Reporting / Audit & Accounting	17%	92	15%	62	12%	53	16%	76
Market Manipulation	6%	30	5%	22	6%	26	7%	32
Insider Trading	6%	30	8%	33	6%	28	9%	43
FCPA	3%	18	2%	10	1%	5	1%	6
Public Finance Abuse	3%	14	3%	12	3%	12	4%	19
SRO / Exchange	1%	3	0%	0	0%	1	0%	1
NRSRO	0%	0	1%	3	0%	2	0%	1
Transfer Agent	0%	1	0%	1	0%	2	2%	7
Miscellaneous	0%	1	1%	5	2%	7	1%	6

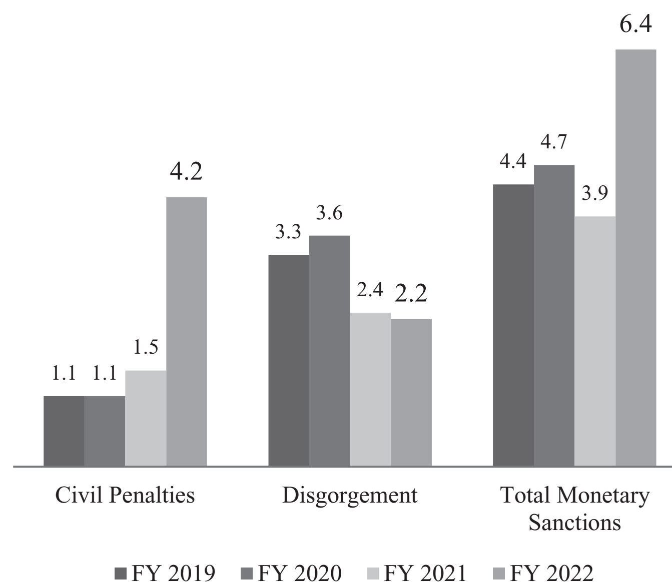
brought by the SEC, including the first-ever insider trading case involving cryptocurrencies,[2] an insider trading case charging a former member of Congress,[3] and the largest-ever penalty imposed by the SEC against an accounting firm.[4]

The Division's Trial Unit conducted 15 trials during FY 2022, a high for the last 10 years. The Commission won favorable verdicts in 12 of those cases, a record suggesting that the Commission can be beaten at trial in certain cases.

Largest Penalty Total by Far in SEC History

Although the total number of actions increased only modestly, the Commission imposed a record $6.4 billion in monetary sanctions in FY 2022, the most in the SEC's history, including $4.2 billion in penalties and $2.2 billion in disgorgement. As shown in Exhibit 3, while disgorgement continued to decline, penalties increased almost threefold from FY 2021, setting another record for the Commission. Indeed, FY 2022 marks the first time in SEC history

Exhibit 3— Breakdown of Monetary Sanctions Imposed by the SEC (in Billion USD)



that penalties exceeded the amount of disgorgement imposed.

This marked increase in penalties and total monetary sanctions underscores the SEC's willingness to use "every tool in [its] toolkit," including "penalties that have a deterrent effect and are viewed as more than the cost of doing business."[5] Perhaps in recognition of this, Enforcement Director Gurbir Grewal noted that the SEC may not break monetary relief records each year, because the Division expects "behaviors to change. [It] expects compliance."[6]

In addition, the SEC's press release highlighted that in several actions, the Commission "recalibrated" penalties and combined them with prophylactic remedies, such as retention of independent compliance consultants and admissions, to "deter future misconduct and enhance public accountability[.]"

While the total value of monetary sanctions imposed is significant, it must be noted that approximately $1.1 billion of the $4.2 billion total came in a single investigative sweep relating to recordkeeping violations at multiple Wall Street firms, with the resulting 11 settlements filed together during the last week of the agency's fiscal year.[7]

Focus Areas

As noted above, the SEC's press release highlighted the Commission's actions targeting broker-dealer (and one investment adviser) recordkeeping violations involving "off channel" business communications, as well as actions related to digital assets, ESG, cybersecurity, and private funds. For reasons discussed below, we expect to see continued activity in these areas in the new fiscal year.

Recordkeeping Violations by Regulated Entities

Recordkeeping violations received significant attention during FY 2022, primarily due to high-profile actions against many of the largest Wall Street firms following an investigative sweep relating to the preservation and supervision of business-related communications on personal devices.[8] The SEC's FY 2022 announcement specifically called out actions against 16 broker-dealers and one investment adviser for "widespread and longstanding failures to maintain and preserve work-related text message communications conducted on employees' personal devices."

© 2023 CCH Incorporated and its affiliates. All rights reserved.

The Commission imposed a $125 million penalty against one broker-dealer in December 2021,[9] and during the last week of FY 2022 announced charges against 16 other prominent Wall Street firms, imposing combined penalties of more than $1.1 billion for similar recordkeeping violations.[10] In each case, the respondents admitted to the violations and agreed to "undertakings designed to remediate past failures and prevent future misconduct." We expect continued enforcement attention in this area as companies increasingly integrate evolving technology into their communications in light of the remote work environment. Indeed, several large asset management firms recently disclosed that they are responding to another wave of SEC requests relating to electronic communications.[11]

Digital Assets

In May 2022, the SEC announced an addition of 20 positions to its Crypto Assets and Cyber Unit, which nearly doubled the unit's size.[12] Notably, crypto assets have continued to garner significant enforcement attention in FY 2022. In February, the Commission settled an administrative proceeding against BlockFi, a cryptocurrency trading and lending platform, finding that BlockFi sold unregistered securities and failed to register as an investment company.[13] Recent enforcement actions in the crypto area also included proceedings against several individuals responsible for a blockchain-based pyramid scheme,[14] and the Commission's first insider trading case involving digital assets against Ishan Wahi and his associates, which was accompanied by a parallel criminal case by the Department of Justice.[15]

ESG

In parallel with multiple recent proposed rules addressing ESG concerns, the Commission brought several ESG-related actions in FY 2022. For example, the Commission imposed a $1.5 million penalty against BNY Mellon Investment Advisor, Inc. for ESG-related misstatements regarding investment quality review for mutual funds.[16] The SEC also brought enforcement actions against Vale S.A., one of the world's largest iron ore producers for ESG misstatements,[17] and Wahed Invest, LLC, a robo-adviser,[18] for failing to adopt and implement adequate policies and procedures to monitor its ESG strategy. The press release for the year-end results highlighted that the Division has "focused attention on [ESG] issues with respect to public companies and investment products and strategies" and "applies time-tested principles concerning materiality, accuracy of disclosures, and fiduciary duty" in evaluating ESG claims. ESG is a quickly growing area of investment activity and one that the SEC will continue to be focused on in FY 2023.

Cybersecurity

Cybersecurity was another area of focus for the SEC in FY 2022. Again, in parallel with proposed rules, the Commission brought enforcement actions concerning failures to comply with recordkeeping and customer information safeguarding obligations. The SEC's year-end press release highlighted the agency's actions against several financial institutions concerning insufficient policies and procedures related to identity theft[19] and failure to protect customers' personal identifying information.[20]

Private Funds

Consistent with Chair Gensler's stated emphasis on enforcement in the private fund space,[21] the SEC brought a number of actions against private fund advisers in FY 2022 concerning fraudulent concealment of risks, misappropriation of investor funds, and misrepresentation of fund performance, fees, and expenses. These actions followed a January 2022 Risk Alert published by the Division of Examinations that identified four categories of deficiencies related to private fund adviser compliance issues.[22] The Division also brought actions against an investment adviser and associated portfolio managers concerning an options trading strategy[23] and against private fund advisers for violations of the Custody Rule, misrepresenting fund performance,

and misusing investor funds. In addition, the SEC charged an investment adviser in a matter involving management fee offsets.[24] In another example, the SEC filed a settled action against the Infinity Q Diversified Alpha Mutual Fund for mispricing its net asset value as part of an overvaluation scheme.[25]

Gatekeepers

In addition to the areas of focus discussed above, the SEC continued to target perennial areas of enforcement. The SEC brought a series of actions against so-called gatekeepers, that is, auditors and lawyers, for "failing to live up to their heightened trust and responsibility." Specifically, the FY 2022 press release highlighted several significant actions against auditors, including, but not limited to, charges against the China-based affiliate of Deloitte for failure to comply with US auditing requirements concerning audits of US issuers and foreign companies listed on US exchanges.[26] The Deloitte action called out certain actions by the auditor, such as allowing clients to select their own samples for testing and prepare their own audit documentation. We expect the focus on auditors to be magnified in light of the newly revitalized Public Company Accounting Oversight Board, which is likely to be much more active in the enforcement space, not least because its current Chair is a former SEC enforcement trial attorney.

The FY 2022 press release also noted both settled and litigated proceedings against lawyers in fraudulent securities offerings,[27] and it highlighted an action against a "recidivist" transfer agent for violating a previously imposed associational bar.[28] While such enforcement actions are not new or unusual, the Commission appears to have highlighted them to send a broader message that this area remains a focus.

Individual Accountability

The SEC's press release identified "individual accountability" as a "pillar" of the SEC's enforcement program, and FY 2022 results seem to bear this out. More than two-thirds of the stand-alone enforcement actions during the fiscal year involved at least one individual, though this is down from levels in recent years.

In addition to highlighting actions against public company executives and senior personnel in the financial industry, the press release noted actions brought under Section 304 of the Sarbanes-Oxley Act of 2002 in which the SEC ordered a number of executives to return bonuses and compensation in light of misconduct at their firms, even though they were not charged in those actions or otherwise responsible for the misconduct. For example, in August 2022, the SEC ordered three former executives of an infrastructure company to return nearly $2 million in bonuses following their company's restatement of its financial results due to misconduct by another former official.[29]

Whistleblower Protections

Following a record-breaking year for whistleblower activity in FY 2021, the SEC in FY 2022 issued 103 whistleblower awards. These totaled approximately $229 million, a 59 percent decrease in amounts awarded. FY 2022 was nonetheless the SEC's second highest year in terms of both award amounts and the number of individual awards. The press release also highlighted that the Whistleblower Program received a record high number of tips—12,300—during the fiscal year. These results demonstrate the health of the Whistleblower Program and seem to indicate that the SEC has succeeded in its efforts to incentivize reporting.

Conclusion

While enforcement activity continued to increase in FY 2022, it still remained below pre-pandemic levels. On the other hand, the SEC is increasing its focus on a number of key industries, issues, and

© 2023 CCH Incorporated and its affiliates. All rights reserved.

initiatives. The recent troubles in the crypto world may yield more enforcement actions in FY 2023, and it is already clear that the SEC is continuing to focus on the recordkeeping, ESG, and cybersecurity issues. Looking ahead to FY 2023, considering these priorities and the SEC's continued commitment to robust enforcement in more traditional cases concerning insider trading and financial reporting and accounting, we expect that the SEC's level of enforcement activity will grow, penalties will continue to be high, and the aggressive enforcement environment will continue.

Notes

1. Press Release, SEC Announces Enforcement Results for FY22 (Nov. 15, 2022), *https://www.sec.gov/news/press-release/2022-206*.
2. *See* Debevoise FinTech Blog, New DOJ and SEC Insider Trading Actions Fail to Clarify Issue of Digital Assets as Securities (Aug. 3, 2022), *https://www.debevoisefintechblog.com/2022/08/03/new-doj-and-sec-insider-trading-actions-fail-to-clarify-issue-of-digital-assets-as-securities/*.
3. *See* Debevoise Insider Trading Disclosure Update, Vol. 8, Issue 1 (Sept. 29, 2022), *https://www.debevoise.com/insights/publications/2022/09/insider-trading-disclosure-update-volume-8*.
4. Press Release, Ernst & Young to Pay $100 Million Penalty for Employees Cheating on CPA Ethics Exams and Misleading Investigation (June 28, 2022), *https://www.sec.gov/news/press-release/2022-114*.
5. Press Release, SEC Announces Enforcement Results for FY22 (Nov. 15, 2022), *https://www.sec.gov/news/press-release/2022-206*.
6. *Id.*
7. Press Release, SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures (Sept. 27, 2022), *https://www.sec.gov/news/press-release/2022-174*.
8. *See* Chris Prentice, SEC scrutiny into Wall Street communications shifts to investment funds – sources, Reuters (Oct. 11, 2022), *https://www.reuters.com/business/sec-scrutiny-into-wall-street-communications-widens-investment-funds-sources-2022-10-11/*.
9. Press Release, JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay $125 Million Penalty to Resolve SEC Charges (Dec. 17, 2021), *https://www.sec.gov/news/press-release/2021-262*.
10. Press Release, SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures (Sept. 27, 2022), *https://www.sec.gov/news/press-release/2022-174*.
11. *See* Chris Prentice, SEC scrutiny into Wall Street communications shifts to investment funds—sources, Reuters (Oct. 11, 2022), *https://www.reuters.com/business/sec-scrutiny-into-wall-street-communications-widens-investment-funds-sources-2022-10-11/*.
12. Press Release, SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit (May 3, 2022), *https://www.sec.gov/news/press-release/2022-78*.
13. Press Release, BlockFi Agrees to Pay $100 Million in Penalties and Pursue Registration of its Crypto Lending Product (Feb. 14, 2022), *https://www.sec.gov/news/press-release/2022-26*. *See also* Debevoise FinTech Blog, "Will the SEC Let BlockFi Register Digital Asset Interest Accounts?" (May 10, 2022), *https://www.debevoisefintechblog.com/2022/05/10/digital-asset-interest-accounts-and-the-sec/*.
14. Press Release, SEC Charges Eleven Individuals in $300 Million Crypto Pyramid Scheme (Aug. 1, 2022), *https://www.sec.gov/news/press-release/2022-134*.
15. *See* Debevoise FinTech Blog, New DOJ and SEC Insider Trading Actions Fail to Clarify Issue of Digital Assets as Securities (Aug. 3, 2022), *https://www.debevoisefintechblog.com/2022/08/03/new-doj-and-sec-insider-trading-actions-fail-to-clarify-issue-of-digital-assets-as-securities/*.
16. Press Release, SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations (May 23, 2022), *https://www.sec.gov/news/press-release/2022-86*.
17. Press Release, SEC Charges Brazilian Mining Company with Misleading Investors about Safety Prior to Deadly Dam Collapse (Apr. 28, 2022), *https://www.sec.gov/news/press-release/2022-72*.
18. Press Release, SEC Charges Robo-Adviser With Misleading Clients (Feb. 10, 2022), *https://www.sec.gov/news/press-release/2022-24*.

19. Press Release, SEC Charges JPMorgan, UBS, and TradeStation for Deficiencies Relating to the Prevention of Customer Identity Theft (July 27, 2022), *https://www.sec.gov/news/press-release/2022-131*.
20. Press Release, Morgan Stanley Smith Barney to Pay $35 Million for Extensive Failures to Safeguard Personal Information of Millions of Customers (Sept. 20, 2022), *https://www.sec.gov/news/press-release/2022-168*.
21. Speech, Prepared Remarks at the Institutional Limited Partners Association Summit, Chair Gary Gensler (Nov. 10, 2021), *https://www.sec.gov/news/speech/gensler-ilpa-20211110*.
22. *See* Debevoise Update, SEC Continues Focus on Private Fund Adviser Disclosures and Other Topics (Feb. 4, 2022), *https://www.debevoise.com/insights/publications/2022/02/sec-continues-focus-on*.
23. Press Release, SEC Charges Allianz Global Investors and Three Former Senior Portfolio Managers with Multibillion Dollar Securities Fraud (May 17, 2022), *https://www.sec.gov/news/press-release/2022-84*.
24. Press Release, SEC Charges Private Equity Fund Adviser with Fee and Expense Disclosure Failures (Dec. 20, 2021), *https://www.sec.gov/news/press-release/2021-266*.
25. Press Release, SEC Seeks Special Master to Oversee Return of Remaining Funds to Harmed Investors of the Infinity Q Mutual Fund (Nov. 10, 2022), *https://www.sec.gov/litigation/litreleases/2022/lr25575.htm*.
26. Press Release, Deloitte's Chinese Affiliate to Pay $20 Million Penalty for Asking Audit Clients to Conduct Their Own Audit Work (Sept. 29, 2022), *https://www.sec.gov/news/press-release/2022-176*.
27. *See, e.g.*, Press Release, SEC Charges Philadelphia Lawyer with Fraud (July 7, 2022), *https://www.sec.gov/enforce/33-11080-s*.
28. Press Release, SEC Charges Recidivists for Violations of a Previous Commission Order (Sept. 21, 2022), *https://www.sec.gov/litigation/litreleases/2022/lr25514.htm*.
29. Press Release, SEC Charges Infrastructure Company Granite Construction and Former Executive with Financial Reporting Fraud (Aug. 25, 2022), *https://www.sec.gov/news/press-release/2022-150*.

SEC Charges McDonald's and Former CEO in Connection With Disclosures Surrounding CEO's Separation

By Martin Bell, Marc Berger, Nicholas Goldin, Jeffrey Knox, Charles Mathes, and Michael Osnato, Jr.

On January 9, 2023, the Securities and Exchange Commission (SEC) announced charges against McDonald's Corporation (McDonald's) and Stephen J. Easterbrook, McDonald's former CEO who was terminated without cause in November 2019. The SEC charged McDonald's with including false and misleading disclosures relating to the circumstances of Easterbrook's separation in its proxy statement in violation of Section 14(a) of the Securities Exchange Act of 1934 (the Exchange Act) and Rule 14a-3 promulgated thereunder, and charged Easterbrook with violating the antifraud provisions of the Exchange Act and the Securities Act of 1933 (the Securities Act).

The SEC also found that Easterbrook caused McDonald's to file reports that contained materially false or misleading information in violation of

Martin Bell, **Marc Berger**, **Nicholas Goldin**, **Jeffrey Knox**, **Charles Mathes**, *and* **Michael Osnato, Jr.** *are attorneys of Simpson Thacher & Bartlett LLP.* **Katherine Hardiman** *assisted with the preparation of this article.*

© 2023 CCH Incorporated and its affiliates. All rights reserved.

the Exchange Act, including the Form 8-K disclosing his termination, and Easterbrook was charged with fraud for his role in contributing to the false statements in the Form 8-K. These charges are notable because they may signal the SEC's heightened interest in public disclosures related to mutually-agreed separations between executives and their companies.

Background

According to the SEC's cease-and-desist order, on November 1, 2019, McDonald's exercised its discretion to terminate Easterbrook without cause after conducting an internal investigation and determining that Easterbrook, in violation of McDonald's policy, had a consensual relationship with a former McDonald's employee.

The parties entered into a separation agreement that allowed Easterbrook to maintain unvested stock options and certain stock units valued at almost $44 million that he would have forfeited had he been terminated for cause. Upon Easterbrook's departure from the company, he disseminated a letter to company employees, and McDonald's issued a press release and Form 8-K that were filed with the SEC, disclosing that Easterbrook had a relationship with an employee in violation of company policy. On April 9, 2020, McDonald's filed a proxy statement that disclosed Easterbrook was terminated without cause, rather than for cause, but did not disclose the company's exercise of discretion in reaching this determination.

Months later, in July 2020, following a supplemental internal investigation, McDonald's determined that Easterbrook had inappropriate relationships with other McDonald's employees. This discovery contradicted statements Easterbrook made to counsel during the first internal investigation and was inconsistent with statements attributed to Easterbrook in McDonald's public filings. Shortly thereafter, on August 10, 2020, McDonald's sued Easterbrook in the Delaware Court of Chancery. The parties settled the suit in December 2021, with McDonald's agreeing to dismiss the suit in exchange for Easterbrook's payment to the company of compensation he received under the separation agreement.

While the SEC found that McDonald's failed to disclose that it exercised discretion in terminating Easterbrook without cause in violation of Section 14(a), it did not impose a fine or penalty on McDonald's due to McDonald's substantial cooperation in the investigation. This cooperation included McDonald's voluntarily providing information beyond what was required to be produced, briefing the SEC regarding key facts and documents, and making directors and employees promptly available for testimony. The SEC also recognized that McDonald's took affirmative remedial action against Easterbrook in the form of efforts to claw back compensation to recover value for McDonald's shareholders.

The SEC found that Easterbrook violated the antifraud provisions of the Exchange Act and the Securities Act and caused McDonald's to violate the Exchange Act when he failed to disclose his relationships with additional McDonald's employees. The SEC required Easterbrook pay disgorgement and prejudgment interest of approximately $52.5 million, which was deemed satisfied by the compensation Easterbrook repaid to McDonald's in the Delaware Chancery action, and a civil monetary penalty of $400,000, and barred him from serving as an officer or director of most SEC-registered issuers for five years.

Key Takeaways

The SEC's charges demonstrate the SEC's willingness, using enforcement tools, to second-guess judgments and determinations made by companies in situations about whether to characterize a departure as with or without cause. Those somewhat nuanced decisions are the product of various factors, including good faith evaluation of the facts and litigation risk to the company.

While the SEC's pursuit of this investigation may have been influenced by Easterbrook's apparent lack

of candor in the initial internal investigation, which in turn was incorporated in McDonald's public filings, the case signals that the SEC may now be more willing to scrutinize areas of internal governance and employment decisions at the board level. In the case of senior management, where termination of employment has clear disclosure implications, companies would be well-served to ensure that the parties responsible for preparing the corresponding public disclosures are fully aware of the key facts and judgments underpinning the employment determination—particularly as to the nature of the conduct leading to termination, the form of termination, and compensation-related impacts.

They should additionally make appropriate disclosures regarding such separations, including in proxy statements and Forms 8-K, mindful of the possibility that the SEC may effectively pursue them for disclosures that are deemed insufficient.

This matter also demonstrates the importance of the company's cooperation and the SEC's novel decision to prominently highlight efforts to claw back compensation through litigation as a remedial measure warranting lenient treatment. This recognition is analogous to the SEC's recent applications against corporate executives of Section 304 of the Sarbanes-Oxley Act, that statute's compensation clawback provision.

Given the SEC's generally aggressive views surrounding clawback of executive compensation, companies in the uncomfortable position of discovering executive misconduct following termination without cause may want to consider various options of recouping lost compensation.

© 2023 CCH Incorporated and its affiliates. All rights reserved.

MARKETING

Five Tips to Help You Become a True Blogger

By Broc Romanek

Given that I celebrated 20 years as a securities law blogger this past May—20 years!—I thought I would share a few ideas about what it takes to become a blogger that people will enjoy.

The first thing to consider is: What is the purpose of blogging? The primary goal often is to help market yourself. Nothing wrong with that. That is a core tenet in life—to get others to like you. The key in any personal or work relationship. Some people feel a clench when they hear the term "marketing" but it doesn't have to be painful. It doesn't have to feel offensive if you realize that's part of the bargain of being a human.

So how to best market yourself on a blog? The simple answer is "be human." People enjoy reading things that feel like there is a human on the other side of the keyboard. They struggle to read content that is sterile. Unfortunately, many law firms abide by the principle of avoiding being conversational in their communications at all cost. That's not being human.

Here are five quick tips.

1. Don't Feel Pressure to Be Someone You're Not

This is about finding your "voice." So that you can connect as you—whomever that may be—with the community. People can "feel" who the author is. How you think and speak is unique to you. Try to have that shine through.

Personally, I feel like I come through my writings as a little bit of a meathead. What I mean is that I'm not the most eloquent writer. But that's okay. That works for a lot of people. I'm simple, direct, and willing to share.

By presenting yourself as a human, you're building trust and a relationship ensues. Everyone out there isn't going to love what you do. That's just the way life is and you can't avoid it. Even the best rainmakers don't land every client, right? Just a small fraction.

The bottom line is to be authentic. Did what I just write sound like me? Or is it too staid? Too bold? If you're a playful person, let that shine through. If you're not, don't pretend to be. And of course, if what you wrote doesn't sound like it was written by a human, then that's not you. You're a human.

2. Each Blog Entry Should Have a Single Author

Your blog entries should come from you. There might be others who participate and review and all that. But it's important that we're connecting as humans. If a blog entry has multiple entries, it's hard to connect. If you can, you might even have a miniature picture of yourself by your byline to further illustrate your humanness.

If you want to call out someone for their help in formulating the thoughts in a particular blog entry, that's fine. Calling them out in the body of a blog is more powerful anyway than sharing a byline that no one will likely spend the time to parse.

I find it humorous that I even have to waste one of my five tips on this topic but law firms love to bestow authorship credit on hordes of people. Not many other fields do that kind of thing. For a reason.

Broc Romanek *is the editor of Insights and he also blogs on Perkins Coie's PublicChatter.com.*

3. Length of the Blogs Can Be Fairly Short

People have short attention spans these days. I believe the best blogs are pretty short—three to six paragraphs should be plenty.

You can have stories that are "to be continued" as a device to cover a lot of ground. That may happen naturally on occasion anyway as you get feedback on a particular blog and that commentary in response will provide you with ideas for new blogs. Once you get going, the momentum can really take you places you didn't expect to go. That can be fun.

Of course, you may want to draft a lengthy piece periodically and that's okay too. Some stories told of the human interest variety—the gripping ones—may best be told in one shot and not in a series of blogs.

4. If You Can, Tell Stories

The small details are what sets a good blog apart from one that is not. Are there anecdotes in what you just wrote? The more informal conversational nature of what you write, the better. I always say, "write like you speak." When you have a conversation, note how often you and your partner are telling a tale. That's how humans naturally communicate.

And of course, the topics you choose to write about is important. Is my topic one that my core audience will care about. Is it something that is on people's mind? Or should be? Or am I just parroting others without considering what the audience really cares about?

5. Develop a Journalist's Ear

You'll find that if once you get into blogging, you'll develop a journalist's ear. What do I mean by that? You'll be talking to someone—or watching a show on TV—and something will spark an idea for a blogging topic.

Or spark an idea for just a turn of phrase that you like. For example, on Sunday, I was watching Dan Rather interview the members of Crosby, Stills, & Nash and Graham Nash mentioned how "Our life is made up of ordinary moments" which is how he banged out the lyrics of their song "Our House" in about 10 minutes. Ordinary moments? What a great line and something that I used as a line in my next blog entry.

When you get these flashes, these ideas, the key is to write them down right away. Or you will likely forget. That's one of the keys to being a journalist. Carrying a pad around or writing down notes in your phone on a regular basis.

© 2023 CCH Incorporated and its affiliates. All rights reserved.

To subscribe, call 1-800-638-8437 or order online at www.WoltersKluwerLR.com

Ordering Additional Copies of INSIGHTS

Get multiple copies at a terrific discount and have the most up-to-date information available at your fingertips.

Discount Schedule

25-49	=	20%
50-99	=	30%
100-299	=	40%
300-999	=	47%

March/ 10041527-0750

Wolters Kluwer Legal & Regulatory US connects legal and business communities with timely, specialized expertise and information-enabled solutions to support productivity, accuracy and mobility. Serving customers worldwide, our products include those under the CCH, ftwilliam, Kluwer Law International, MediRegs, and TAGData names.