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Corporate Governance Considerations Under the SEC's Proposed Climate Disclosure Rules

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The U.S. Securities and Exchange Commission's recently proposed rules governing climate-related disclosures, if adopted as proposed, would represent a sea change to the existing public-company disclosure regime. While much attention has been paid to the greenhouse gas emissions and other climate-related data aspects of the proposed rules, they also include significant corporate governance disclosure requirements.

For example, proposed new Item 1501(a) of Regulation S-K would require companies to describe the board of directors' oversight of climate-related risks, including the following, as applicable to a particular company:

- The identity of any board members or board committee responsible for the oversight of climate-related risks.
- Whether any member of the board has expertise in climate-related risks and a description of the nature of the expertise.
- The processes by which the board or board committee discusses climate-related risks, including how the board is informed about climate-related risks, and the frequency of such discussion.
- Whether and how the board or board committee considers climate-related risks as part of its business strategy, risk management and financial oversight.
- Whether and how the board sets climate-related targets or goals and how it oversees progress against those targets or goals, including the establishment of any interim targets or goals.

While only one portion of the proposed rules is specifically focused on the topic of governance, because of the interconnectedness of all parts of the proposed rules, we encourage companies to think about governance as part of an

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integrated approach both to complying with all of the proposed rules and to articulating an appropriate narrative regarding the company's overall strategy to climate-related risks and opportunities.

Approaching the Proposed Disclosure Requirements with Stakeholder Reaction in Mind

We expect the proposed rules to galvanize shareholder voting and activism, in particular as institutional shareholders and proxy advisory firms focus more intently on the adequacy of board and management oversight. Might voting guidelines be further modified considering the disclosures required by the proposed rules? Will an approach to climate-related risk that fully complies with adopted disclosure rules but is perceived to be a less-than-fulsome embrace of climate-related risk and disclosure lead to complaints relating to responsiveness and accountability and eventually efforts to have board or committee members replaced? We think the answer to each of these questions is likely to be "yes."

As companies think about corporate governance through the lens of compliance with the proposed rules, they should keep potential stakeholder reaction to disclosures in mind, in addition to the systemic changes they may need to make to comply with the rules and, of course, governance that is actually appropriate and effective under the company's particular circumstances.

Board Composition and Expertise in Climate-Related Risk

The proposed rules could be read effectively to require that public company boards have an additional skill set, lest a company be required to disclose that no member of the board or applicable committee has any expertise in climate-related risks. Companies therefore should be thinking about board composition in view of this disclosure requirement. Questions a company may wish to consider include:

- What does it mean to have expertise in climate-related risk?
- Is there a specific type (or types) of expertise in that general category that is particularly relevant to the company's circumstances?
- Does the board currently have one or more members with relevant expertise, and for that matter, how many should it have?
- If, based on the foregoing, the board desires to bring on new members with relevant expertise, should they take the place of existing directors or should the board be expanded?

Individuals with the relevant climate-related experience and expertise likely will be in high demand. Accordingly, companies might benefit from prioritizing the assessment of board expertise and beginning a search for candidates if appropriate.

Board Committee Evolution and Considerations

We expect that the adoption (or anticipated adoption) of the proposed rules will lead the boards of many public companies to form a board committee with responsibility for oversight of climate-related risks and related disclosures if they have not already, whether with sole responsibility for climate-related matters or with broader environmental, social and governance or environmental, health and safety responsibility. Boards that currently have such a committee may want to reassess the appropriateness of the committee's responsibilities and composition in light of the proposed rules.

As companies evaluate the committee issue, questions to consider include:

- Should the committee be an entirely new committee; should it replace an existing committee; or should the responsibilities of an existing committee be expanded?
- If the responsibilities of an existing committee are to be expanded, would those existing responsibilities fit naturally with climate-related oversight responsibilities?
- Should the committee consist solely of independent directors, or at least non-employee directors, or would it be appropriate for a current executive serving on the board (e.g., a COO) to serve on the committee?
- Should the committee include a single "climate-related risk expert" or will there be pressure (external or even intra-committee) for there to be more than one, not unlike how many public company audit committees have more than one person who qualifies as an "audit committee financial expert"?
- What is the relationship of the new committee to the audit committee, and are there any overlapping responsibilities, especially relating to disclosures in SEC filings or other public disclosures? In that regard, we note that the proposed rules' requirement to include qualitative and quantitative disclosures regarding the impacts of climate-related matters in the notes to audited financial statements is one area in which there clearly would be some overlap necessitating coordination between committees.
- When will the committee meet and how would that fit into board/committee meeting schedules, and are there committee membership conflicts that would preclude concurrent meetings of different committees?

The questions and challenges identified above touch just one aspect of the SEC's proposed climate-related rules and are certainly not a comprehensive list of what public company boards will need to consider if the rules survive in substantially their current form. Regardless of the proposed rules, stakeholder support for climate-focused strategies and management requires ongoing board and executive leadership attention and execution, which we think should be driving companies to consider the matters discussed above as they may apply during the time prior to implementation of the final rules, or even in a world in which the final rules are not implemented or are implemented in a substantially scaled-back form.

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