Katten

Capital Markets Compass

December 22, 2021

Editorial Note

We lead this issue of the *Compass* with an overview of the 2022 proxy season provided by Lawrence Levin, national co-head of Katten's Capital Markets practice, and Alyse Sagalchik, partner in Katten's Capital Markets practice. You'll also see our review of the SEC's commentary on the SPAC IPO process and coverage of SEC proposed amendments regarding the rules governing Rule 10b5-1 plans. If you have any questions about the *Compass* or any articles in this issue (or would like a particular topic to be covered in our next issue), please reach out to your Katten contact or to any of the Capital Markets partners listed on the last page of the newsletter. Meanwhile, we wish you a safe, healthy and happy New Year!

Timothy J. Kirby and Jennifer L. Howard

In This Issue

Katten Partners Present 2022 Proxy Season Update

By Lawrence D. Levin and Alyse A. Sagalchik

On December 2, Larry Levin and Alyse Sagalchik, partners in Katten's Capital Markets practice, along with Ernst & Young LLP and Meridian Compensation Partners (Meridian), shared updates for the 2022 proxy season as part of Katten's annual proxy season program. As discussed during the presentation, there are various matters for registrants to consider as the 2022 proxy season nears, many of which are briefly discussed below.

- ***Amendments to Regulation S-K Financial Disclosure***. In February, the US Securities and Exchange Commission (SEC) adopted amendments to Regulation S-K items that impact financial disclosures in Form 10-K that are frequently incorporated by reference into proxy statements for annual meetings. Specifically, the amendments (i) eliminated Item 301 of Regulation S-K, thereby removing the requirement to provide five years of selected financial data, and (ii) revised Item 302 of Regulation S-K such that companies are no longer required to provide two years of selected quarterly financial data in tabular form, but, instead, when there are one or more material retrospective changes for any of the quarters within the last two fiscal years and any subsequent interim period for which financial statements are included, are required to disclose the reasons for those changes. The amendments also modified Item 303 of Regulation S-K, by, among other things:

  (a) adding a new subsection that requires companies to disclose the principal purposes of Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A) from management's perspective, including an emphasis on both an analysis of short-term results and future prospects;

  (b) modifying the requirements for liquidity and capital resources disclosure, to require companies to provide a broad discussion of material short- and long-term cash requirements (including capital expenditures) in lieu of the former requirement to discuss material commitments for capital expenditures;

(c) revising the requirement relating to costs and revenues to clarify that companies are required to disclose known events that are "reasonably likely" to cause (rather than those that "will cause") a material change in the relationship between costs and revenue;

(d) clarifying that companies are required to disclose material changes in net sales or revenue, rather than only material increases;

(e) eliminating the requirement to discuss the impact of inflation and price changes unless they are part of a known trend or uncertainty that had or is expected to have a material impact on the company;

(f) replacing the requirement to discuss off-balance sheet arrangements with a more general requirement to integrate disclosure of off-balance sheet arrangements within the broader context of MD&A;

(g) eliminating the requirement to include a contractual obligations table; and

(h) permitting companies, when discussing interim results, to compare their most recently completed quarter to either the corresponding quarter of the prior year (as currently required) or to the immediately preceding quarter. Note that, if a company changes its presentation from period to period, the company must discuss the reasons for changing the basis of comparison and provide both comparisons in the first filing in which the change is made.

These changes are part of the SEC's continued efforts to modernize and simplify disclosure requirements, reducing compliance burdens while still improving the quality and accessibility of disclosure to the marketplace. These amendments became effective in February but companies are required to comply with them beginning with the Form 10-K for their first fiscal year ending on or after August 9.

- ***Climate Change Disclosure***. As companies prepare for the 2022 proxy season, they should also take into account the SEC's September sample comment letter on climate change in which the SEC noted that companies should consider additional MD&A disclosure regarding the impact of climate change and climate change regulation on operations and financial results. The SEC's illustrative comment letter noted that a number of existing rules require disclosure regarding climate-change related risks and opportunities and indicated that, where a registrant includes disclosure in its corporate social responsibility report (CSR report) that is more expansive than in its SEC filings, the registrant may be required to explain why it did not provide the same level of disclosure in its SEC filings.
- ***Human Capital Management and Other ESG Matters***. In 2020, the SEC adopted a rule requiring public companies to disclose in their Form 10-K information related to human capital management matters to the extent such disclosure would be material to an understanding of their business. Meridian conducted a study of human capital matters disclosure as well as other ESG matters that provides interesting insights into the ways in which companies are approaching those issues.
- ***Risk Factor Disclosure***. The SEC continues to focus on risk factor disclosure. Risks that may be particularly relevant for upcoming annual reports include risks related to cybersecurity, COVID-19 developments, labor and supply shortages and supply chain issues, inflation, the transition away from LIBOR, the uncertain tax environment, changing trade relations, the impact of climate change and related regulation and heightened antitrust enforcement.
- ***Shareholder Proposals***. In September 2020, the SEC adopted amendments to Rule 14a-8 that, among other things, (i) revise the ownership thresholds for shareholders to be eligible to submit an initial shareholder proposal, (ii) clarify that a single person may not submit multiple proposals at the same shareholders' meeting (whether the proposal is submitted as a shareholder or as a representative of a shareholder), and (iii) raise the required level of support that a shareholder proposal must receive in order to be eligible for submission at a future shareholders' meeting. The amendments apply to any shareholder proposal submitted for an annual or special meeting to be held on or after January 1, 2022 but provide for a transition period for the application of the increased ownership submission thresholds.
- ***Board Diversity***. In August, Nasdaq adopted board diversity rules that, subject to specified exceptions and accommodations, generally require a Nasdaq-listed company to have (or explain why it does not have) at least two "diverse" members of its board of directors consisting of one director who self-identifies as female and one director who self-identifies as an "underrepresented minority" or LGBTQ+. An "underrepresented minority" means, for this purpose, an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American

or Alaska Native, Native Hawaiian or Pacific Islander, or two or more of the foregoing. The board diversity requirement applies to foreign private issuers (FPIs) as well, except that, for this purpose, FPIs may use a definition of "diverse" that aligns with the demographic characteristics of underrepresented groups in the country of the registrant's principal executive office and may satisfy the rule by having either (i) one female director and one director of a historically underrepresented community or (ii) two female directors. There are also accommodations under the rule for Nasdaq-listed issuers that qualify as smaller reporting companies or that have small boards (meaning a board consisting of five or fewer members).

The Nasdaq board diversity rule also requires all Nasdaq-listed companies to publicly disclose information voluntarily provided by directors with respect to their self-identified gender, racial characteristics and LGBTQ+ status in a prescribed matrix. After the first year of disclosure, the matrix must disclose the diversity statistics for both the current year and the immediately preceding year. A Nasdaq-listed issuer must initially include a board diversity matrix by the later of (a) August 8, 2022 or (b) the date on which it files its proxy statement or, if it does not file a proxy statement, the date on which it files its Form 10-K or 20-F during the 2022 calendar year.

- ***Continued SEC Focus on Perk Disclosure***. As reflected in SEC enforcement actions in 2021, the SEC continues to focus on perquisite disclosure in proxy statements. In that regard, issuers should be aware of compliance and disclosure interpretation (C&DI) 219.05 issued by the SEC staff in September 2020, which provides guidance to issuers concerning the evaluation of perquisites in the context of the ongoing COVID-19 pandemic. Read a more detailed description of the guidance.
- ***Virtual/Hybrid Shareholder Meetings***. As the 2022 proxy season approaches, it is anticipated that many companies will hold their meetings virtually or using a hybrid model. While most public companies are likely already aware of the SEC staff's and proxy advisory firms' guidance in 2020 concerning virtual and hybrid shareholder meetings, it is important to (i) remember to review and analyze pertinent state laws and a company's corporate governance documents to ensure that the desired format of a company's shareholder meeting is permitted thereunder, (ii) consider ways to ensure transparency, even if the shareholder meeting is entirely or partially virtual, and (iii) include appropriate disclosure in the company's proxy statement concerning the logistical details of the meeting, the availability of technical support prior to and during the meeting and any procedures and requirements for shareholders to be able to access and/or participate in the meeting.

For more information, view the presentation slides or watch the full recorded webinar.

SEC Proposes to Increase Reporting of Proxy Votes and Executive Compensation Votes

By Jennifer L. Howard

The Securities and Exchange Commission (SEC) has proposed a new rule that would require an institutional investment manager to report annually on Form N-PX how it voted proxies relating to executive compensation matters (i.e., "say-on-pay"). The proposal also includes amendments to Form N-PX that would enhance the information that registered closed-end investment companies, mutual funds and exchange-traded funds are required to report annually on Form N-PX.

Investment Manager Reporting Obligation on 'Say-On-Pay' Voting Matters

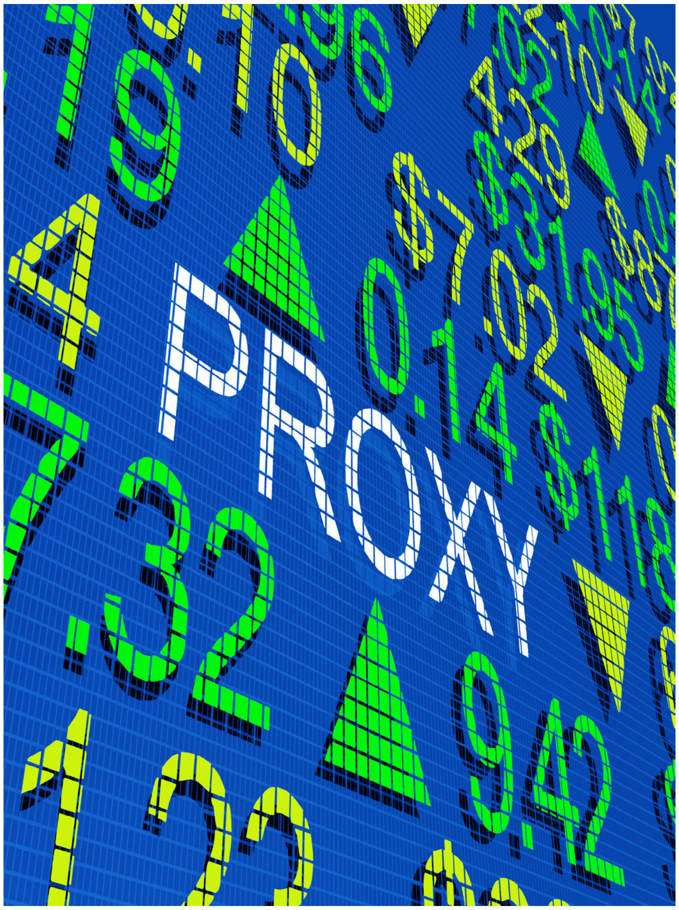
The proposal would require investment managers that are subject to Section 13(f) of the Securities Exchange Act of 1934 (the Exchange Act) to report annually how they voted their proxies on executive compensation matters.

Section 13(f) of the Exchange Act requires an investment manager to file a report with the SEC if it exercises investment discretion for accounts holding certain equity securities with an aggregate fair market value on the last trading day of any month of any calendar year of at least $100 million. Under the proposal, these investment managers would provide information on executive compensation voting matters by filing Form N-PX with the SEC no later than each August 31. Similar to current proxy voting disclosures for funds that file Form N-PX, the "say-on-pay" disclosures would cover a 12-month period from July 1 to June 30.

Enhanced Fund Proxy Voting Disclosures

The proposal would also implement amendments to Form N-PX with the goal of enhancing proxy voting disclosures, while providing greater protection and transparency for investors. The updated Form N-PX would:

- include a requirement that funds and investment managers match the description of each voting matter to the same language as the issuer's form of proxy;
- require funds and investment managers to categorize each matter by type to help investors identify votes of interest and compare voting records. Notably, the proposed categories and subcategories include certain ESG (environmental, social and governance) related topics, such as environment or climate, human rights or capital/workforce, and diversity, equity and inclusion;



- prescribe how funds and investment managers organize their reports and require use of a structured data language to make the filings easier to analyze; and
- require funds and investment managers to disclose how any securities lending activity impacted their voting.

While the proposal would continue to require only an annual N-PX filing, the SEC asked for comment on whether funds and investment managers should report more frequently. For example, the SEC noted that similar shareholder proposals may appear on the ballots of many issuers in a given proxy season, and more frequent public reporting of proxy votes (either in an N-PX filing or on a fund's website) could provide shareholders with better access to how a fund is involved in the governance activities of its portfolio companies, including within a single proxy season.

The comment period for the proposal closed on December 14. The SEC is now evaluating the comments and is expected to release a final rule in the coming months.

SEC Proposes Amendments to Rule 10b5-1 Plans and Increased Disclosure About Insider Trading Policies

By Irina Nica

Major changes may be on the horizon for "Rule 10b5-1" plans, which allow (1) company insiders to sell their company's stock (often an important piece of an employee's compensation package) or (2) an issuer to repurchase its shares, each at times when it otherwise might be prevented from doing so under the insider trading laws designed to prohibit trading by those who possess material non-public information (as is often the case for a company's officers, directors and management) or because of issuer-imposed blackout periods.

There have been calls for reforming Rule 10b5-1 for several years:

- former Securities and Exchange Commission (SEC) Chair Jay Clayton had previously proposed requiring cooling-off periods following adoption, amendment or termination of a plan;
- in late spring of 2021, bipartisan legislation was re-introduced in the US Senate to direct the SEC to study whether Rule 10b5-1 should be amended;
- more recently, SEC Chair Gary Gensler stated that Rule 10b5-1 plans "have led to real cracks in our insider trading regime" and directed SEC staff to consider and recommend restrictions on the use of such plans; and
- on August 26, the Investor as Owner Subcommittee of the SEC's Investor Advisory Committee (IAC), released draft recommendations regarding amendments to rules governing Rule 10b5-1 trading plans, which the IAC formally approved at its meeting held on September 9.

Therefore, unsurprisingly, on December 15, the SEC proposed amendments regarding the rules governing Rule 10b5-1 trading plans that are mostly in line with the IAC's approved recommendations and include the following proposed changes:

Increased Restrictions on Trading Windows

The first set of recommendations aims to limit methods by which critics have suggested market participants have tried to evade Rule 10b5-1's restrictions by:

(1) requiring a "cooling off" period of at least 120 days for directors and officers subject to reporting requirements under Section 16 of the Securities Exchange Act of 1934 (Section 16 Directors and Officers), and at least 30 days for issuers, between the adoption or modification of a 10b5-1 plan and the execution of the first trade under that plan;

(2) limiting "overlapping" plans, where a single person has more than one Rule 10b5-1 plan in effect at any given time, to one active plan per person within a 12-month period; and

(3) limiting single-trade plans, where only a single trade is made for the duration of a 10b5-1 plan, to one single-trade plan within a 12-month period.

Notably, the SEC also stated that a modification of a Rule 10b5-1(c) trading plan, including cancelling a trade, is equivalent to terminating the prior trading arrangement and adopting a new Rule 10b5-1 trading plan.

The SEC noted that academic studies conducted concerning the potential abuse of Rule 10b5-1 plans found that opportunistic trading behavior most commonly occurred in plans (1) having

short cooling-off periods, (2) executing only a single trade; and (3) which were adopted and began trading prior to that same quarter's earnings announcement. The SEC indicated the above proposals would address these issues regarding Section 16 Directors and Officers by extending the length of time between the adoption of a 10b5-1 plan and the commencement of trading, thereby ensuring such insiders cannot adopt a plan that executes a trade in the same quarter. Additionally, limiting the availability of the affirmative defense under Rule 10b5-1(c)(1) for overlapping plans and single-trade plans to one active plan per person within a 12-month period and one single-trade plan during any consecutive 12-month period would prevent gamesmanship and signal to the market a plan was entered in good faith.

Furthermore, current rules allow any person with material non-public information about a company or its securities to trade in such company's securities under an effective Rule 10b5-1 trading plan, provided, among other considerations, that such plan was adopted in good faith (and not as part of a scheme to evade Rule 10b5-1 prohibitions) and at a time when such person was not aware of any material nonpublic information. An additional proposed amendment would require that Section 16 Directors and Officers now furnish to the issuer a written certification, at the time of the 10b5-1 plan's adoption, that such insider is not aware of any material nonpublic information regarding the issuer and is adopting such 10b5-1 plan in good faith.

Enhanced Public Disclosure of Rule 10b5-1 Plans and Insider Trading Policies

The remaining SEC amendments propose to require public disclosure of Rule 10b5-1 plans and insider trading policies by:

(1) requiring issuers to disclose in their quarterly reports the adoption or termination of 10b5-1 plans by the issuer itself and any of its directors and officers, as well as the material terms of such 10b5-1 plans;

(2) requiring issuers to disclose in their annual reports their insider trading policies and procedures, or explain why the issuer has not adopted any such policies and procedures; and

(3) modifying Form 4s to include the following additional fields: (a) a checkbox to indicate whether a specific trade was made pursuant to a 10b5-1 plan, and (b) a field to indicate the date of adoption or modification of the associated 10b5-1 plan.

The SEC also is proposing new rules regarding reporting of gifts of stock by Section 16 Directors and Officers as well as new executive compensation disclosure relating to certain awards to directors and certain executive officers that are made within specified time periods. These proposals include:

(1) requiring all "bona fide" gifts of stock by Section 16 Directors and Officers to be reported on Form 4 before the end of the second business day following the date of such gift; and

(2) requiring issuers to include in their executive compensation disclosure any option grant policies and practices and to provide tabular disclosure showing option grants made within 14 days of the release of certain material nonpublic information, and the market price of the underlying securities on the trading day before and after the release of such information.

The SEC will seek public comment on the proposed amendments for 45 days following the publication of the comment request in the *Federal Register*. The complete release of the proposed amendments is available here.

Mark Wood, National Capital Markets Practice Co-Head, Speaks With *Bloomberg Tax* on Proactive Disclosures as SEC Continues to Scrutinize SPACs; Chairman Gensler's Latest Comments on SPAC Regulation

By Mark D. Wood, Timothy J. Kirby and Elizabeth C. McNichol

Recent SEC Comment Letters

Recent Securities and Exchange Commission (SEC) comment letters reveal the SEC's close examination of special purpose acquisition companies (SPACs) and their proposed business combinations show no signs of letting up. SPACs have recently received comment letters on topics ranging from conflicts of interest disclosure (including notably whether such SPAC "may be incentivized to complete an acquisition of a less favorable target company or on terms less favorable to shareholders rather than liquidate"), to target company valuation methodologies and the process by which SPACs are reviewing and narrowing down potential acquisition candidates.

With respect to SPACs that have already found an acquisition target, a majority of recent comment letters have requested that registrants provide additional detail about specific risks associated with the target business. For example, the SEC has requested more explicit disclosure be provided regarding net loss histories, material regulatory hurdles and the anticipated additional research and development expense necessary before a target company becomes profitable.

Mark Wood, co-head of Katten's national Capital Markets practice, spoke with *Bloomberg Tax* recently about ways that clients can proactively improve their disclosure to ensure a smooth registration process and reduce the risk a potential business combination is held up by regulators: "We're always thinking about are there ways we could improve our disclosure to make sure we're providing best information, and also to head off SEC comments." The full article is available here.

Latest Remarks From Chairman Gensler on SPACs Renew Calls for Robust Disclosure

Continuing themes highlighted in the previous edition of the *Katten Capital Markets Compass*, in prepared remarks delivered to the Healthy Markets Association on December 9, SEC Chairman Gary Gensler again signaled that implementing new rules for SPACs remains a key objective of his administration and that market participants should expect proposals for new regulations in the coming year. Despite increased regulatory scrutiny and periods of widespread pricing pressure, more than 580 blank-check companies reached the market in 2021, raising more than $155 billion — roughly the same amount raised by traditional operating companies undertaking initial public offerings (IPOs) over the same period. Indeed, in a record year for new listings, SPACs accounted for over three-fifths of all US IPOs.[1]

Consistent with previous public statements, Chairman Gensler's latest remarks focused on increasing investor protections and minimizing perceived potentials for abuse of the SPAC structure, both at the time of the initial SPAC IPO and during the proposed business combination, or de-SPAC, which Chairman Gensler has referred to as the "SPAC Target IPO." Gensler asked the audience:

> Are SPAC investors — both at the time of the initial SPAC blank-check IPO and during the SPAC target IPO — benefiting from the protections they would get in traditional IPOs, with respect to disclosure, marketing practices, and gatekeepers? In other words, are like cases being treated alike? Currently, I believe the investing public may not be getting like protections between traditional IPOs and SPACs. Further, are we mitigating the information asymmetries, fraud, and conflicts as best we can? Due to the various moving parts and SPACs' two-step structure, I believe these vehicles may have additional conflicts inherent to their structure. There are conflicts between the investors who vote then cash out, and those who stay through the deal — what might be called "redeemers" and "remainers." Thus, to reduce the potential for such information asymmetries, conflicts, and fraud, I've asked staff for proposals for the Commission's consideration around how to better align the legal treatment of SPACs and their participants with the investor protections provided in other IPOs, with respect to disclosure, marketing practices, and gatekeeper obligations.

Focus on PIPEs

Chairman Gensler's recent remarks also notably discussed a less publicized (but often critical) component of the business combination process – the supplemental committed financing

[1] Data provided by SPAC Research.

provided by PIPE investors ("PIPE" referring to a private investment in public equity). The availability of supplemental PIPE financing can be crucial to ensuring that there is sufficient cash to pay the merger consideration and that the on-going business is appropriately capitalized. The PIPE also provides a critical backstop against the possibility of significant shareholder redemptions (as such redemptions reduce the cash available in the SPAC's trust, which may be applied to the merger consideration and/or fund operations and growth after the transaction) – providing certainty to the target company that the transaction will be able to close. Although shareholder redemption rates have generally fallen in recent months amid improving market conditions, [studies](#) have shown that historically SPACs could expect over half of shareholders to choose to redeem their shares rather than continue on as shareholders of the combined company. Indeed, a third of all SPACs over the last six years experienced a greater than 90 percent redemption rate – resulting in the supplemental financing from PIPE investors becoming an indispensable part of the business combination process by providing funding certainty.

The participation of PIPE investors in the business combination process also serves the important function of signaling to the market that a proposed transaction has been vetted by institutional investors that are willing to take on risk alongside public shareholders. In his remarks, Chairman Gensler cited concerns that a "PIPE investor may gain access to information the public hasn't seen yet, at different times, and can [therefore] buy discounted shares based upon that information." Significantly, however, Chairman Gensler did not announce any specific proposals in this regard, beyond voicing continued support for transparent and robust disclosure. The SEC's Investment Advisory Committee had previously cited: (1) the acceptable range of terms under which any additional financings such as PIPEs might be sought at the time of an acquisition; (2) the identity and relationship of PIPE investors to the sponsor, target management and other interested parties; and (3) whether any side payments are to be made to certain shareholders as an inducement not to redeem their stock in the de-SPAC transaction as significant disclosure items which SPACs may wish to consider when preparing their offering documentation.

Concerns Regarding Dilution and Merger Announcements

In his remarks, Chairman Gensler also made clear he remains concerned that retail investors may not appreciate the various dilution events associated with SPAC structuring, whether from PIPE investors selling down their positions or via the award of sponsor "promote" shares, stating "[R]etail investors may not be getting adequate information about how their shares can be diluted throughout the various stages of a SPAC. For instance, SPAC sponsors generally get to pocket 20 percent of the equity — but only if they actually complete a deal later." A lack of complete and/or fulsome disclosures in connection with the announcements of proposed business combinations also was cited by the Chair as a continued area of focus: "SPAC target IPOs often are announced with a slide deck, a press release, and even celebrity endorsements. The value of SPAC shares can move dramatically based on incomplete information, long before a full disclosure document or proxy is filed. Thus, SPAC sponsors may be priming the market without providing robust disclosures to the public to back up their claims. Investors may be making decisions based on incomplete information or just plain old hype."

Proposals Expected in April 2022

Although Chairman Gensler did not outline specific proposals in his latest remarks, SPAC market participants have been advised that, consistent with previous public comments, the focus of any new regulations will likely center around ensuring the provision of complete and transparent disclosure to the investing public — the SEC's latest publicly released agenda pencils in an April 2022 target date for proposing SPAC-related rule amendments. Until that time, as with any disclosure made by a public company, participants in the SPAC market are advised that the provision of accurate and complete disclosure to investors, free of material omissions, remains best practice.

SEC Comment Period Ends for Controversial Proposal Regarding Clawbacks of Executive Incentive Compensation Without Official Action

By Maximillian Licona and Ryan A. Lilley

On October 14, Chairman Gensler announced that the Securities and Exchange Commission (SEC) would reopen the comment period for the controversial compensation clawback rule that it had initially proposed in 2015 in response to requirements of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (the "proposed clawback rule"). The proposed

clawback rule would direct stock exchanges to require listed companies to implement a clawback policy for incentive-based compensation paid to executive officers when a company has to restate its financials in a wide range of circumstances, including instances where financials were merely found to contain errors due to human or other error. In revisiting the proposed clawback rule, Chairman Gensler cited recent regulatory and market developments, noting, "I believe we have an opportunity to strengthen the transparency and quality of corporate financial statements as well as the accountability of corporate executives to their investors."

The proposed clawback rule, however, would require businesses to claw back incentive-based compensation granted to both current and former executives for as many as three years before a restatement occurs, with companies that do not comply facing delisting from stock exchanges. However, such clawbacks would only be required to go back as far as the calendar year in which the final rule became effective. For example, if the final rule becomes effective in the 2022 calendar year, an issuer would be required to claw back incentive-based compensation based on erroneous financial results ending December 31, 2022. This compliance date would be applicable regardless of when the issuer's stock exchange proposes its corresponding listing rules.

Significantly, the proposed clawback rule would define an accounting restatement as the process of a company revising previously issued financial statements to reflect the correction of errors that materially affect those statements, without delineating the types of errors that might be material to investors. This approach is significant because it would not capture the types of revisions in which companies address minor errors, by correcting the issue in their subsequent financial statements.[2] Note, however, the SEC's request for additional feedback asked respondents to comment on whether the current definition of restatements requires broadening.

For reference, the proposed clawback rule currently includes the following key components:

- recovery of incentive-based compensation is triggered where a company is required to prepare an accounting restatement due to material non-compliance with any financial reporting requirements under US federal securities laws;
- applicable to any company listed on a national securities exchange or association and to all current or former executive officers (i.e., all "Section 16" officers, including the principal accounting officer) of such company, and more broadly to any other person who performs policy-making functions for such company;
- three-year look-back period from date of restatement;
- recovery on a "no fault" basis, leading to clawbacks regardless if any misconduct occurred or if the executive officer was not responsible for the misstated financial statements;
- compensation granted, earned or vested based wholly or in part upon the attainment of any financial reporting measure, including stock price and total shareholder return, subject to recovery, with the amount recoverable based on what would have been paid absent a restatement;

[2] These types of revisions, sometimes called "little r" restatements, accounted for 75.7 percent of all restatements by US-based public companies in 2020, up from 34.8 percent in 2005, according to Audit Analytics. Major restatements, by comparison, represented just 24.3 percent of all restatements in 2020, which is down from 65.2 percent in 2005. However, note that the rise in "little r" restatements has attracted attention from the SEC, and based on recent SEC commentary, it seems likely that "little r" restatements will face greater scrutiny from the SEC in the future. As a result, this enhanced scrutiny may lead to a greater number of major restatements, which, in turn, may lead to an increase in scenarios where companies would need to claw back incentive-based compensation from executive officers.

- potential delisting for failure to adopt, disclose or enforce a clawback policy;
- prohibition of indemnifying against, or paying the premiums for an insurance policy to cover, losses incurred under the clawback policy; and
- certain required disclosures, including: (1) publicly filing the policy with the SEC; and (2) disclosure of events subject to or actions taken as a result of the clawback policy.

In reopening the comment period, the SEC asked that specific consideration be given to certain topics, including:

(a) whether the SEC should expand the types of accounting restatements that would trigger application of the proposed clawback rule by interpreting "restatement" under the Dodd-Frank Act to include not only (1) those restatements to correct errors that are material to the previously issued financial statements that formed part of the proposed clawback rule, but also (2) additional restatements required to correct errors that would result in a material misstatement if the errors were left uncorrected in the current report or the error correction was recognized in the current period;

(b) whether recovery should be triggered on (1) the date a company's board, board committee or authorized officer (if board action is not required) concludes, or reasonably should have concluded, that the company's previously issued financial statements contain a material error; or (2) the date a court or regulator directs a company to restate its previously issued financial statements to correct a material error (with the SEC specifically asking commenters to opine on whether the "reasonably should have concluded" standard is too vague); and

(c) whether to add check boxes to Form 10-K that indicate (1) whether the previously issued financial statements include an error correction; and (2) whether any such corrections are restatements that triggered a clawback analysis, along with other disclosures that might be useful to investors on restatements generally and the decision whether or not to claw back compensation.

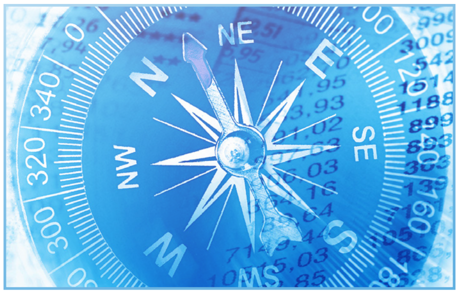
The comment period was open from October 21 through November 22 and, to date, the SEC has not announced whether they will be extending the comment period or reviewing the comments received to date before publishing a final rule. If and when a final rule is adopted, stock exchanges also will be required to issue their own proposed listing rules effecting the policy, which will in turn need to be vetted and approved by the SEC, a process that often takes months.

To prepare for the possibility that the new rule takes effect, public company boards should be informed of the proposed clawback rule and its potential impact on existing incentive-based compensation plans. Companies also should consider how they will need to amend their existing clawback policies (or adopt new ones) to sufficiently address the requirements under the clawback rule, if and when adopted.

Other Recent Developments

By Vlad M. Bulkin and Jennifer L. Howard

- On December 15, the Securities and Exchange Commission (SEC) proposed amendments to its disclosure rules regarding an issuer's repurchases of its equity securities, often referred to as buybacks. The proposed rules would require an issuer (including a foreign private issuer) to publicly furnish via EDGAR a new Form SR before the end of the first business day following the day the issuer executes a share repurchase. Form SR would require disclosure identifying the class of securities purchased, the total amount purchased, the average price paid, and the aggregate total amount purchased on the open market in reliance on certain safe harbors under the Securities and Exchange Act of 1934, as amended (the Exchange Act). The proposed rules also would require issuers to provide additional periodic disclosure regarding buybacks, including the issuer's objective and rationale for the buyback, the process used to determine the amount of the buyback, any policies and procedures relating to officer or director purchases and sales of securities during a repurchase program, and whether any repurchases are conducted pursuant to a 10b5-1 plan.



- On December 14, the SEC Division of Corporation Finance (the Division) announced that it would be discontinuing its 2018-implemented policy under which some Rule 14a-8 shareholder proposal no-action requests receive an oral response only. The staff noted, "Beginning with the publication of this announcement, we will return to our prior practice and the staff will once again respond to each shareholder proposal no-action request with a written letter, similar to those issued in prior years. Our response letters will be posted publicly on the Division's website in a timely manner."
- On December 2, the SEC adopted amendments to finalize rules implementing the submission and disclosure requirements in the Holding Foreign Companies Accountable Act. The rules apply to registrants the SEC identifies as having filed an annual report with an audit report issued by a registered public accounting firm that is located in a foreign jurisdiction and that the Public Company Accounting Oversight Board is unable to inspect or investigate (each, a Commission-Identified Issuer). The final amendments require each Commission-Identified Issuer to submit documentation to the SEC establishing that, if true, it is not owned or controlled by a governmental entity in the public accounting firm's foreign jurisdiction. The amendments also require a Commission-Identified Issuer that is a "foreign issuer," as defined in Exchange Act Rule 3b-4, to provide certain additional disclosures in its annual report for itself and any of its consolidated foreign operating entities. If a registrant is identified as a Commission-Identified Issuer based on its annual report for the fiscal year ended December 31, 2021, the registrant will be required to comply with the submission or disclosure requirements in its annual report filing covering the fiscal year ended December 31, 2022.
- On November 17, the SEC adopted final rules requiring parties in a contested election to use universal proxy cards that include all director nominees presented for election at a shareholder meeting. The rule changes will give shareholders the ability to vote by proxy for their preferred combination of board candidates, similar to voting in person. The final rules will require dissident shareholders and registrants to provide shareholders with a proxy card that includes the names of all registrant and dissident nominees, and will apply to all non-exempt solicitations for contested elections other than those involving registered investment companies and business development companies (Regulated Funds). The SEC ultimately decided to exclude Regulated Funds from the final rules after considering various comments, many of which focused on the unique structure of Regulated Funds and the differences between Regulated Funds and operating companies. Compliance will be required for any shareholder meeting involving a contested director election held after August 31, 2022.
- Also on November 17, the SEC proposed amendments to its proxy voting advice rules in response to investor concerns that the current rules may inhibit the timeliness and independence of proxy voting advice. The proposed amendments would rescind the following two conditions to the availability of two exemptions from the proxy rules' informational and filing requirements available for proxy advisory firms, adopted in July 2020: (1) the firms must make their advice available to the companies that are the subject of their advice at or before the time that they make the advice available to their clients; and (2) the firms must provide their clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding the firms' proxy voting advice by registrants that are the subject of the advice. SEC Chairman Gary Gensler noted, "Proxy advice voting businesses play an important role in the proxy process. Their clients deserve to receive independent proxy voting advice in a timely manner."

Save the Date

ESG Shareholder Proposals Webinar

January 6

Capital Markets partner **Farzad Damania** will discuss the environmental, social and governance (ESG) programs for private and public companies during a webinar at 12 p.m. ET on Thursday, January 6.

For more information, contact Katten Webinar Support.

CMC State of the Industry Conference 'SOTI' 2022

January 23-25

Financial Markets and Regulation chair **Gary DeWaal** will participate in Commodity Markets Council's 2022 State of the Industry Conference being held January 23-25 in Miami Beach.

Learn more about SOTI 2022.

Virginia Law & Business Review Law and Business Symposium

February 11

Financial Markets and Funds partner **Daniel Davis** is scheduled to speak at a Law and Business Symposium on February 11 at the University of Virginia School of Law in Charlottesville. The symposium will explore DeFi's current and future impact on the American financial system.

In Case You Missed It

NASAA 2021 Fintech and Cybersecurity Symposium

Financial Markets and Regulation chair **Gary DeWaal** participated in NASAA's "The Future of Decentralized Finance (DeFi): What if there is no center to hold?" panel discussion on December 14. The panel unpacked what "decentralization" means to the industry, what it means to regulators and whether there needs to be a new idea of a central mover that regulators can use to enforce investor protection.

Learn more about the NASAA 2021 Fintech and Cybersecurity Symposium.

2022 Proxy Season Update

Katten, Ernst & Young LLP and Meridian Compensation Partners held a webinar on December 2 featuring a timely discussion of key legal, governance and financial reporting developments and trends impacting public companies in the 2021 annual reporting and proxy season. Panelists included **Lawrence Levin**, national co-head of Katten's Capital Markets practice, and **Alyse Sagalchik**, partner in Katten's Capital Markets practice.

For more information, view the presentation slides or watch the full recorded webinar.

Business Development Company (BDC) Fall Forum

Financial Markets and Funds partner **Vlad M. Bulkin** moderated the "Current Trends for Large Scale BDCs: Opportunities For Quality Income" panel discussion on November 16 during the Active Investment Company Alliance's Business Development Company (BDC) Fall Forum. Panelists from some of the largest BDCs discussed how they have been performing for the most recent quarter; and the benefits of being a large BDC when sourcing deals and securing leverage.

Learn more about the Business Development Company Fall Forum.

Katten's 2021 Financial Markets Litigation and Enforcement Symposium Series

Katten hosted its annual FMLE Symposium Series over three days in November. The virtual symposium featured discussions on current regulatory enforcement and litigation issues facing the financial services industry. The series also continued the discussion on the importance of expanding diversity in the financial services legal industry. On November 2, Financial Markets and Funds partners **Daniel Davis** and **Carl Kennedy** spoke about "Futures: Emerging Trends and Enforcement Priorities." On November 11, Katten partners, **Susan Light**, Financial Markets and Funds, **Michael J. Lohnes**, Securities Litigation, and **Patrick M. Smith**, Litigation, spoke on "Market Trading Issues and Hot Topics." The same afternoon, Financial Markets and Funds partners **Richard D. Marshall** and **Paul McCurdy** spoke on a "Securities Regulatory and Enforcement Update — Asset Management" panel. The series closed on November 18, with Litigation partner **Nicole A. Saleem** moderating a panel of in-house counsel from the financial institutions that pledged their commitment to diversity in an open letter to the legal community.

Read more about the series:

The State of Futures: Emerging Trends and Enforcement Priorities

Market Trading Trends: Expect Regulatory Guidance to Accelerate

Securities Regulatory and Enforcement: Four Asset Management Trends

Global Financial Institutions Legal Departments Share D&I Successes and Lessons Learned

Katten's Capital Markets Practice

Capital markets activity is subject to complex disclosure and regulatory requirements from multiple agencies. Pragmatic guidance on public and private financing transactions requires a multipronged perspective. Katten's work on thousands of securities matters keeps clients' capital-raising deals on track and governance practices sound. For more information, click here.

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