International
Comparative
Legal Guides

Practical cross-border insights into corporate governance law

Corporate Governance 2023

16th Edition

Contributing Editors:
Adam O. Emmerich & Sabastian V. Niles
Wachtell, Lipton, Rosen & Katz

ICLG.com

Q&A Chapters

USA

Wachtell, Lipton, Rosen & Katz

Sabastian V. Niles

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

This discussion focuses on publicly traded corporations incorporated under the laws of a state within the United States of America (for example, Delaware, the most common state of incorporation for U.S. companies) with securities listed on a U.S. stock exchange. Non-U.S. companies afforded "foreign private issuer" ("FPI") status whose securities are traded on a U.S. stock exchange are generally subject to the laws of their home state of incorporation and modified versions of U.S. stock exchange rules; however, some U.S. laws will apply equally to FPIs and U.S. companies.

1.2 What are the main legislative, regulatory and other sources regulating corporate governance practices?

U.S. companies are governed by a variety of legal regimes relating to corporate governance matters. These consist of state law and federal statutory rules and regulations of various government agencies, including rules promulgated by the U.S. Securities and Exchange Commission (the "SEC") and self-regulatory organizations such as stock exchanges that impose requirements on companies whose securities are listed and trade on such exchanges. In addition to those sources of law, the U.S. corporate governance regime derives principles from a variety of non-legal sources.

State corporate law rules are derived from the laws of the state of incorporation and the organizational documents of each company. Each state has its own corporate code, with Delaware's General Corporation Law (the "DGCL") being the most common for large, publicly traded corporations, as the majority of U.S. public companies are incorporated under the laws of the state of Delaware. State corporate laws generally include a mix of mandatory provisions as well as "default" rules that may be modified by provisions in a company's certificate of incorporation (also referred to as a charter) or bylaws, enabling self-ordering and tailored governance features to be established on a company-by-company basis.

The primary sources of federal rules and regulations include the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act") and regulations promulgated by the SEC under those and other acts. The Securities Act regulates the offer and sale of securities, primarily through a disclosure-based approach that reaches some governance topics. The Exchange Act mandates certain annual, quarterly and interim reporting of financial and other material matters in addition to proxy disclosure and other requirements concerning shareholder votes and meetings. Other relevant federal regulations imposing disclosure and compliance requirements include the Sarbanes Oxley Act of 2002 ("SOX") and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). SOX imposed a variety of substantive requirements to enhance the integrity of financial statements and reporting. The Dodd-Frank Act requires additional disclosure in proxy statements, non-binding shareholder votes on items related to executive compensation and facilitated greater access for shareholder-proposed director nominees to the company proxy. Anticipated SEC rulemakings are expected to address environmental, social and governance-related ("ESG") topics, human capital management, cybersecurity governance, board diversity and other matters.

Certain federal statutes and rulemakings provide for streamlined or reduced disclosure requirements on smaller public companies, and various pending pieces of legislation may further modify these federal statutes. Particular areas of corporate practice are also governed by specialized federal statutes that may have governance implications (for example, regulations promulgated by the Federal Reserve and other federal and state agencies with respect to banks and other financial institutions, and by other similar regulatory bodies in respect of communications, transportation and other regulated fields).

Stock exchange listing rules are issued by the New York Stock Exchange ("NYSE") and the NASDAQ, the two predominant U.S. stock exchanges. Companies must comply with these rules, many of which relate to corporate governance matters, as a condition to being listed on the exchange. Exchange listing rules address a variety of corporate governance matters, including director independence, the composition of various board committees, board diversity, board evaluation, requirements to submit certain matters to a vote of shareholders beyond the requirements of state law and the company's organizational documents, regulation of dual-class stock structures and other special voting rights, topics to be covered by corporate governance guidelines and their publication, and certain requirements related to disclose on the corporation's public website. These rules are enforced by the threat of public reprimand from the exchanges, temporary suspension of trading for repeat offences and permanent delisting for perennially or egregiously non-compliant companies. Other stock exchanges are in the process of emerging and may have their own governance-related listing rules that go beyond or otherwise differ from NYSE and NASDAQ frameworks. For example, a new stock exchange, the Long Term Stock Exchange,

has begun considering listings (especially cross-listings) with a range of corporate governance requirements that differ significantly from NYSE and NASDAQ, including as they relate to sustainability, the issuance of financial guidance and ESG-related matters.

Non-legal sources, such as industry and third-party best practice guidelines, recommendations, shareholder proxy advisory firms such as Institutional Shareholder Services ("ISS") and Glass Lewis, proposals advanced by shareholders and the evolving views of the institutional investor community, provide additional sources of governance pressure and expectations. The investor community's views have become particularly influential as the shareholder base of most U.S. publicly traded corporations consists of an overwhelming majority of institutional shareholders, including index funds, mutual funds, hedge funds and pension funds. As a result, major institutional investors are increasingly developing their own independent views on preferred governance practices and engaging with companies on such matters.

Because of the federal system of U.S. law, different sources of law are not always harmonised and corporations are often subject to different obligations to federal and state governments, regulators at each level of government and demands of other relevant bodies, such as the applicable stock exchange. This mosaic of rules and regulations, and the mechanisms by which they are implemented and enforced, make for an environment of frequent change and evolution.

1.3 What are the current topical issues, developments, trends and challenges in corporate governance?

In the U.S., questions about the basic purpose of corporations, how to define and measure corporate success, the weight given to stock prices as reflecting intrinsic value, how to balance a wider range of stakeholder interests (including employees, customers, communities, and the economy, environment and society as a whole) beyond the investor and the role of companies in addressing negative externalities and having positive impacts, have become issues for concern and focus within corporate boardrooms and among policymakers and investors. Many of the corporate governance issues facing boards today illustrate that corporate governance is inherently complex and nuanced, and less amenable to the benchmarking and quantification that was a significant driver in the widespread adoption of corporate governance "best practices". Prevailing views about what constitutes effective governance have morphed from a relatively binary, check-the-box mentality to tackling questions such as how to prioritize and balance the interests of all constituencies in advancing the sustainable, long-term success of the corporation as a whole, how to craft a well-rounded board and effective board culture, how to effectively oversee the company's management of risk (including ESG-related risks), and how to forge relationships with shareholders and stakeholders that meaningfully enhance the company's credibility. The role of the board in overseeing corporate strategy and resilience, fostering reputation and trust in the corporation and effectively partnering with management as an advisor and strategic counselor continues to evolve. In particular, this past year has seen the emergence in the U.S. of "anti-ESG" dynamics, which have become deeply politicized in certain camps, with certain politicians, political candidates and legislative actors at the state (and, at times, federal) level taking oppositional stances on a range of issues.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

"[H]elp[ing] the corporation build long-term, sustainable growth in value for shareholders and, by extension, other stakeholders" has been described by the NYSE Commission on Corporate Governance as the "fundamental objective" of the board. In light of increasing pressure on public companies to promote short-term interests at the expense of long-term value and a decline in long-term investment, corporate governance is being increasingly viewed as a framework for aligning boards, management teams, investors and stakeholders towards long-term value creation and guarding against the perils of short-termism. In particular, there is increasing recognition that the value chain for alignment towards the long term across public companies, asset managers, asset owners and ultimate beneficiaries (long-term savers and retirees) – each with their own time horizons, goals and incentives – is broken.

While some argue that short-termism is not a concern, additional academic and empirical evidence is being published showing the harm caused to GDP, national productivity and competitiveness, innovation, investor returns, wages and employment from the short-termism in U.S. public markets. Absent evidence that private sector solutions to resist short-termism are gaining traction, legislation to promote long-term investment and regulation to mandate long-term oriented stewardship is expected to be considered. Congress, the SEC, state governments, stock exchanges, academics, the Business Roundtable and other organizations concerned with our corporate business system are re-evaluating their positions on corporate governance and its impact on the economy and society.

As mentioned above, an anti-ESG movement has also arisen, at times proposing state-level legislation that would regulate the ability of pension funds and regulated financial service firms to address certain ESG-related matters.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

In the U.S., a unitary board of directors, elected by shareholders and subject to fiduciary duties, is charged with overseeing the corporation's business and affairs. Accordingly, unlike in some jurisdictions where shareholders directly determine key business matters, such as corporate strategy, dividend and share repurchase policy, capital raising and material acquisitions, the U.S. model is director-centric, giving broad authority to the board of directors to exercise their business judgment on most matters and delegate day-to-day decision making to management. The U.S. model is director-centric, giving boards broad authority to exercise their business judgment on most matters and, therefore, under U.S. state law, it is generally not necessary to seek shareholder approval of management decisions other than for fundamental changes. Under most state laws, shareholder approval is generally required to approve only relatively fundamental matters such as: (1) an amendment to the corporation's charter; (2) a merger; or (3) the sale of all or substantially all of the corporation's assets. Accordingly, in most cases, including most asset sales and spinoffs, absent a special provision in the company's governing documents, shareholders do not have a right to vote on or ratify management's decisions.

Under NYSE and NASDAQ exchange rules, shareholder approval may be triggered by share issuances involving: (1) 20% or more of the common stock or voting power of an issuer; (2) a change of control (often in the context of funding a large acquisition); and (3) issuances to certain related parties (subject in each case to certain limited exceptions). While shareholder approval is not required for most business matters, shareholders will typically engage with the management teams of U.S. companies and, in certain cases, with directors to provide input and perspectives to be considered by the board and management. Shareholders participate in non-binding votes on various matters, including a vote at least every three years to approve the compensation of their Named Executive Officers or "NEOs", and a vote at least every six years to determine the frequency of these "say-on-pay" votes.

If shareholders are not satisfied with the company's strategic direction, governance, operation or management, they may seek to change the composition of the board of directors (including through nominating their own candidates), register dissatisfaction through their votes, submit shareholder proposals (generally precatory) to be voted on by shareholders, inspect corporate books and records for proper purposes, pursue litigation and/or apply public and private pressure. Under Rule 14a-8 of the federal Securities Exchange Act, shareholders can propose and vote on additional non-binding resolutions, often featuring issues related to social justice or corporate responsibility. See also question 2.3 regarding shareholder meetings.

In addition, Delaware law, as a general matter, requires shareholders to be treated equally (e.g., with respect to dividends) within share classes. As a result of this basic tenet of Delaware law, all shareholders, whether a minority or controlling shareholder, have a number of equal rights with respect to their shares, on a per share basis where applicable. However, different share classes may be accorded differential voting and economic rights.

2.2 What responsibilities, if any, do shareholders have with regard to the corporate governance of the corporate entity/entities in which they are invested?

Generally, none. However, robust concepts of investor stewardship and responsibility are beginning to take hold in the U.S. as concerns regarding the excesses of short-termism and shareholder power give rise to debates regarding whether shareholders should have governance-related responsibilities (even if not liability), such as through voluntary stewardship obligations and taking a long-term view with respect to governance, sustainability and business matters. In addition, shareholders may propose and vote on ESG-related shareholder proposals, vote against directors where oversight failures or other issues are identified and influence corporate governance that way too. See also question 2.4.

For those shareholders or groups of shareholders acting in concert who acquire more than 5% of a company's stock, there is an obligation under Regulation 13D of the Securities Exchange Act to publicly disclose their ownership stake within the next 10 days. This disclosure must discuss the shareholder or group's investment purpose, and include any plans or proposals related to significant transactions. Passive investors that acquire more than 5% of a company's stock who certify that their purpose is not to effect change or influence control of the issuer can instead disclose ownership on a short-form version of Schedule 13D. See also question 2.6 for discussion of shareholders' disclosure obligations.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have with regard to such meetings?

Shareholders' meetings are typically held annually, as provided by state law and the organizational documents of the company. The DGCL, for example, requires annual meetings to be held for director elections and if a company has not held such a meeting within 13 months of the prior year's meeting, shareholders may petition the Delaware courts to order such a meeting. Meetings held in addition to the regular annual meeting are called special meetings. Annual and special meetings may be convened by the board and, to the extent provided for in the company's charter or bylaws, shareholders satisfying certain ownership requirements (which vary across companies) may have the right to call special meetings of the shareholders or act by written consent *in lieu* of a meeting. Subject to the inclusion of any shareholder proposals or nominations that are submitted in accordance with state and federal law, the board sets the agenda of the meeting. Actions to be considered at a meeting may be binding or non-binding (precatory), and a typical annual shareholder meeting will include, at a minimum, the election of directors, ratification of the company's selection of an outside auditor (voluntary) and the non-binding "say on pay" vote. Many companies have adopted advance notice bylaws that require shareholders to provide advance notice and satisfy other procedural requirements in order to propose business at a meeting.

Shareholders have the right to attend meetings in order to vote but more commonly vote by "proxy". Shareholders also have the right, subject to applicable law and satisfying disclosure and filing requirements when applicable, to communicate with other shareholders privately or publicly regarding matters to be considered at a meeting and may through their votes support, oppose or abstain from matters. Shareholders' meetings were historically usually held in person, although companies shifted largely to virtual shareholders' meetings conducted entirely online and may continue that practice more often post-pandemic. Each meeting has a "record date" fixed by the board, and only persons holding shares as of such date are entitled to vote. Advance notice of the meeting must be given to shareholders by specified deadlines, and such notice must set forth the matters to be considered at the meeting. When items are subject to a shareholder vote, the company must provide shareholders with comprehensive proxy statements containing the recommendation of the board, information about the proposals to be considered, disclosure of interests of directors and officers that may differ from the general interests of shareholders and other mandatory items.

In late 2021, the SEC announced new universal proxy card rules for situations where shareholders have nominated candidates for positions on the board. The new rules hold that after August 31, 2022, all valid director candidates must be listed on both the company proxy card and the dissident proxy card. This means that instead of choosing between management's entire slate or a dissident's entire slate, shareholders can now pick and choose among the director candidates put forward by each group.

Shareholder meetings are conducted in accordance with the company's charter and bylaws, including as to who chairs the meeting. Depending on the topic at issue, the specific vote requirement for shareholder action may be a majority of the outstanding shares, a majority of the shares present and entitled to vote, a majority of voted shares, or a plurality of voted shares. In certain cases involving related party transactions subject to a shareholder vote, the standard is voluntarily tightened to count

only votes of unaffiliated or disinterested shareholders; however, this is typically not legally required, and related party transactions are typically matters of board review and approval rather than the subject of a shareholder vote. Actions taken at a meeting will not be effective in the absence of a sufficient quorum of shares being represented at the meeting. The specific quorum requirement is generally specified in the company's bylaws.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities? Are there any stewardship principles or laws regulating the conduct of shareholders with respect to the corporate entities in which they are invested?

By nature of the corporate form, shareholders are not liable for the acts or omissions of the corporation and generally do not owe any duties to other shareholders or to the corporation. This lack of fiduciary duties on the part of shareholders to other shareholders has recently become a point of controversy, however, now that shareholders wield extraordinary influence over the decisions of – and regularly exert substantial pressure on – boards of directors and management teams, including in situations where the interests and priorities of a given investor may not align with the interests of other shareholders. Concepts of stewardship – perhaps in time backed by potential liability or any other enforcement mechanism – are in the early stages of emergence to address the concern that shareholders may be exercising power without responsibility.

While specific requirements often seen in Europe and other jurisdictions related to the protection of minority shareholders, such as mandatory tender offer obligations, are generally not hardwired into the U.S. rules and regulations, certain attention must be paid to minority shareholders when there is a controlling shareholder. Companies with a controlling shareholder (and such controlling shareholder) are generally subject to heightened legal scrutiny and disclosure requirements with respect to transactions between such companies and their controlling shareholders. Corporate shareholders generally acquire fiduciary duties only if they control the corporation, which is rarely the case at most U.S. publicly traded companies in which shareholdings are widely dispersed and is itself a high bar, generally requiring ownership of more than a majority of the common stock or otherwise demonstrating "domination" of the corporation through actual exercise of direction over corporate conduct and, in the limited subset of cases where such shareholder-level fiduciary duty may apply, are generally limited to precluding a controlling shareholder from leveraging its position as such to extract benefits from the corporation at the expense of the minority shareholders or from transferring control to a known "looter".

Stewardship concepts and principles on the part of investors are slowly emerging in the U.S. Many shareholders have done little more than tell corporations that they were in favor of sustainable long-term investment and ESG principles and that corporations should be more transparent and keep shareholders up to date as to their strategy and operations. A few shareholders, principally the index funds such as BlackRock, State Street and Vanguard, but increasingly even some of the larger actively managed funds, are publishing commentaries and writing letters to portfolio companies to encourage companies to adopt sustainable long-term investment policies, advance diversity, equity and inclusion matters and follow effective ESG principles, integrating sustainability considerations into corporate strategy, operations and reporting. Previously, the senior corporate governance heads of major U.S. investors came together to develop the first stewardship code for the U.S. market and launched the Investor Stewardship Group and ISG's associated Framework for U.S. Stewardship and Governance. The ISG Framework would operate to hold investors, and not just public companies, to a higher standard, rejecting the scorched-earth activist pressure tactics to which public companies have often been subject, and instead requiring investors to "address and attempt to resolve differences with companies in a constructive and pragmatic manner". In addition, the ISG Framework emphasizes that asset managers and owners are responsible for their ultimate long-term beneficiaries, especially the millions of individual investors whose retirement and long-term savings are held by these funds, and that proxy voting and engagement guidelines of investors should be designed to protect the interests of these long-term clients and beneficiaries. Corporations and shareholders have increasingly coalesced around acceptance of The New Paradigm as produced for the World Economic Forum and subsequently updated and revised (i.e., "The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment"), including the stewardship principles to be followed by asset managers and institutional investors to assure support for boards of directors that are effectively pursuing sustainable long-term strategies and ESG principles, consistent with those that a number of major asset managers and institutional investors have announced that they are supporting. The past few years has witnessed an accelerated focus and consensus around the importance of ESG, sustainability and resiliency-maximizing considerations in creating and protecting corporate value and health and the interests of society at large.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Yes. State law fiduciary duties of directors and officers are predominantly enforced by private actions led by plaintiffs' lawyers. These private actions generally fall into one of two categories: direct suits, typically in the form of class-action suits on behalf of a particular group of the corporation's shareholders (typically all shareholders who bought or sold during a particular period or all unaffiliated shareholders); and "derivative" suits purportedly on behalf of the corporation itself. Putative class-action suits must satisfy the criteria under the Federal Rules of Civil Procedure or analogous provisions of state law before being permitted to proceed as a class action, including the numerosity of the class members, the commonality of legal and factual issues between members of the class, the typicality of the claims or defenses of the representative parties to the class, and the fairness and adequacy of the representative parties' protection of the class interests. Derivative suits, creatures of state corporate law, provide a mechanism by which shareholder plaintiffs can in theory represent the corporation in suing the corporation's own board of directors or management, sometimes after complying with a "demand" procedure in which the plaintiff must request that the corporation file suit and be rebuffed. In certain circumstances, especially when it can be shown that the board of directors is for some reason conflicted with respect to the alleged breach of duty, this "demand" requirement is excused and the shareholder will be permitted to pursue a claim in the corporation's name without further enquiry.

Shareholders may also seek to have the SEC or other regulatory and enforcement bodies initiate investigatory and enforcement actions against companies and their personnel for violations of applicable law.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Certain state laws and provisions of a company's organizational documents may impose restrictions (or special approval requirements) on covered transactions between a company and significant shareholders. For example, Section 203 of the DGCL restricts the ability of a shareholder who owns 15% or more of a company's outstanding stock from engaging in certain business combination transactions with the company unless certain requirements are met or an exception applies.

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act) and relevant regulations hereunder, a shareholder's acquisition of voting securities in excess of specified thresholds usually requires prior notice to the Federal Trade Commission and U.S. Department of Justice and clearance from regulatory authorities. These HSR Act-related requirements are currently under review as they relate to positions held by shareholders. In addition, investments and acquisitions by non-U.S. persons may also be regulated and restricted by applicable laws, such as where national security concerns are relevant through the auspices of the Committee on Foreign Investment in the United States (CFIUS) and implementing statutes and regulations, as well as in regulated industries where special considerations apply, such as aircraft, financial services, and communications media.

In addition, in terms of limitations on acquiring stakes in public companies, a critically important tool for enabling boards of directors to discharge their fiduciary duties in the face of the threat of hostile takeovers and significant accumulations under current law remains the shareholder rights plan, or "poison pill". The shareholder rights plan entails a dividend of special "rights" to each of the corporation's shareholders. In the event that a shareholder amasses equity ownership in excess of a predetermined threshold – often 10% to 15% – without the approval of the board of directors, the rights held by every other shareholder "trigger" and convert into the right to purchase stock of the corporation at a price substantially below the current market value. Alternatively, most rights plans provide that the board of directors may instead choose to exchange one share of common stock for each right held by shareholders other than the hostile bidder or activist shareholder. Either way, the result of this conversion or exchange is that the ownership position of the triggering shareholder is substantially diluted. The rights plan is the only structural takeover defense that allows a board to resist a hostile takeover attempt, and it has also been deployed in numerous activism situations. While it does not provide complete immunity from a takeover, it allows the board to control the process and provides the corporation with leverage to bargain for a higher acquisition price and the power to reject underpriced or otherwise inappropriate bids. It is also implemented exclusively by the board of directors and does not require shareholder approval, so it can be put in place in very short order. Implementing a rights plan in a given situation requires significant judgment, including taking into account investor reaction and the potential of ISS "withhold" recommendations if a rights plan has a term of greater than one year and is not subject to shareholder ratification. As a result, and because a rights plan can be adopted quickly, most corporations adopt a rights plan only after a threat appears – and prior to that time, the plan is kept "on the shelf". Keeping a rights plan on the shelf offers almost all of the protection of an active rights plan without any risk from an adverse ISS recommendation, but it can leave a corporation vulnerable to "stealth acquisitions", in which an activist shareholder purchases just under 5% of the company's stock, and then buys as much as possible on the open market within the next 10 days. Because Regulation 13D under the Securities Exchange Act gives shareholders 10 days after acquiring over 5% of a company's stock to publicly disclose their ownership stake, this technique can result in an acquisition of a substantial portion of a company's equity before it is ever disclosed. Similarly, Regulation 13D does not cover all forms of derivatives; however, potential rulemakings may expand 13D's scope as it relates to derivatives. Under current rules, while all interests must be disclosed after a shareholder crosses the 5% threshold, only some derivative interests are counted towards that threshold – generally, only those that are settled "in kind" (for stock of the corporation rather than for cash from the derivatives counterparty), and only those that can be exercised within the next 60 days. However, because an activist may accumulate its position in a corporation, without public disclosure, the board of directors may not have any warning of the activist's behaviour, and there is thus some risk that a company may not be able to adopt a rights plan in time to avoid a significant accumulation of stock in unfriendly and opportunistic hands.

With respect to disclosure, shareholders or groups of shareholders who own or acquire beneficial ownership of more than 5% of a corporation's registered equity securities will also be required to file reports with the SEC under Regulation 13D. Investors who are not "passive" and are interested in influencing the Company, or are directors or officers will be required to file a Schedule 13D within 10 days of the acquisition of more than 5% in beneficial ownership of the Company's stock disclosing such ownership and the investment purpose (e.g., control intent), as well as amendments to report subsequent changes of more than 1%. However, this 10-day filing requirement only starts ticking once the 5% beneficial ownership threshold is reached. During the 10-day period between crossing the 5% threshold and making the Schedule 13D filing, investors are permitted to further increase their ownership. This may involve making direct share purchases, as well as purchasing options and other derivatives. The 10-day window allows investors the ability to increase their interest in a company, in some cases quite dramatically, before the Schedule 13D alerts the market as to their ownership, even after crossing the 5% threshold. Investors who have a "passive" interest in the Company and own more than 5% but less than 20% of the Company's stock or are otherwise exempt investors will be permitted to file the shorter Schedule 13G on a delayed schedule after year-end. The SEC has proposed new rules that would reform the beneficial ownership reporting regime, including as to 13D-related requirements among others, to address and accelerate timing and update requirements and capture derivatives in a more comprehensive and effective fashion. Short selling abuses and practices may also be addressed.

Section 13F of the Exchange Act requires institutional investment managers with over $100 million of assets under management to disclose their ownership of exchange-traded stock, shares of closed-end investment companies, shares of exchange-traded funds and certain convertible debt securities, equity options and warrants within 45 days after the end of each quarter, rather than equity positions as of the date of filing (resulting in a meaningful lag). Hedge funds who have transferred their equity positions into total return swaps or other derivatives prior to the end of a quarter may be able to avoid disclosing such positions under Schedule 13F, even if they still have economic exposure to the company. Confidential treatment of specific 13F positions may also be sought from the SEC while the investment manager is in the process of accumulating a position, and the SEC often grants such requests for Schedule 13F purposes,

including in the context of activist or strategic accumulations. A proposal by the SEC to increase the 13F threshold several fold was withdrawn after strong opposition from many quarters due to concerns that the proposal would reduce transparency, empower activist funds and was not being advanced in the context of broader disclosure and ownership reforms. The SEC, and Congress, have been considering a range of potential updates of the Section 13F regime that would expand transparency, accelerate reporting and address various disclosure gaps.

As noted in question 3.4 below, Section 16 filings of transactions in the company's securities are required to be made of directors, officers and 10% shareholders, and a company's annual proxy statement is required to specify the beneficial ownership in the company's equity securities of the company's directors, officers and 5% shareholders.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Investors who do not have a "passive" intent and cross the 5% threshold must publicly report their ownership positions and intent on a Schedule 13D. This disclosure must also address the shareholder's identity and background (including as to members of any filing group), source of financing including a discussion of the shareholder's plans or proposals with respect to the company as to a wide variety of matters (including as to extraordinary transactions, acquisitions and dispositions, or changes to the company's board or management, dividend policy, corporate structure or business) and set forth various arrangements, relationships or understandings regarding the company's securities and include certain items as filed exhibits. Material changes to these disclosures must also be publicly reported. In addition, under the U.S. antitrust rules, the acquisition of equity securities in excess of specified thresholds usually requires prior approval of regulatory authorities. Such approval, in turn, would require notice to be given to the targeted company of the intention to exceed this amount, effectively previewing to the target the shareholder's intention to not be a "passive investor" who would qualify for certain exemptions from such notice. Whether these rules will be amended to provide more flexibility to shareholders to build non-passive positions without triggering antitrust-related disclosures remains to be seen. While such filings may be confidential as to third parties, the target will be on notice of potential activity.

2.8 What is the role of shareholder activism in this jurisdiction and is shareholder activism regulated?

Shareholder activism and engagement are increasingly viewed as fixtures in the governance of publicly traded companies in the U.S. Every proxy season sees many activist campaigns of all kinds ranging from high-profile economic campaigns involving large public companies and "name-brand" activists to historically lower-profile efforts by social activists, individual retail shareholders and, increasingly, larger institutions seeking to advance environmental, social, political or governance agendas (or ant-ESG agendas) using the corporate voting machinery. In discussing shareholder activism in the United States, it is helpful to separate shareholder activists into three separate categories: (1) "economic" activism by hedge funds or other "fund" activists: this category consists of professional funds investors who make sizeable (but still minority) investments in a target company and then publicly or privately advocate for change, often characterized by a drive for short-term shareholder value; (2) 14a-8 proposal activism, by which shareholders (often pension funds or individual retail shareholders) submit proposals for a shareholder vote under Exchange Act Rule 14a-8, which requires a company to include a shareholder proposal in its proxy materials if certain requirements are met (which now feature a tiered approach for holding periods and minimum economic stake); and (3) much more recently, ESG and anti-ESG activism in which shareholders will threaten to run (or run) a traditional proxy contest seeking to replace board members or withhold campaigns against directors on the basis of ESG themes such as climate change or issues related to diversity, equity and inclusion, or, conversely, encouraging resistance to the consideration of such issues. 14a-8 proponents vary widely and include retail shareholders, social justice groups, religious organizations, labour pension funds, individuals and other coalitions. In recent years, all types of activism are on the rise. Assets under management by activist hedge funds remain at elevated levels, encouraging continued attacks, including on many large successful companies. Meanwhile, ESG concerns have given rise to an increasing number of campaigns by 14a-8 activists, both individuals and institutional shareholders, and support for ESG-driven proxy contests and withhold campaigns. Shareholder success in replacing several directors at ExxonMobil in a high-profile proxy fight on a platform based on climate change, energy transition readiness, financial performance and capital allocation issues, within the context of questioning the company's board composition, has heightened focus on these issues. Companies have also succeeded in fending off proxy contests relating to ESG issues, where the company can establish an effective handling of the underlying matters and that board change is not necessary (including because "special interest" or "narrowly focused" directors would not advance effective broader board oversight).

Proxy advisory firms have tremendous influence on the outcome of shareholder activism campaigns. The SEC has recently implemented rules designed to enhance the accuracy and transparency of proxy voting advice provided by proxy advisory firms to investors, including increasing disclosure around material conflicts of interest in proxy voting advice, providing an opportunity for a period of review and feedback through which companies and other soliciting parties would be able to identify errors in the proxy voting advice and codifying that proxy advisor vote recommendations are considered proxy solicitations and are therefore subject to the anti-fraud provisions of Rule 14a-9 prohibiting any materially false or misleading statement. However, the SEC subsequently decided to pause the enforcement of these rules as they relate to the proxy advisory firms in the face of litigation pending fresh review by the SEC of such rules and potential rulemaking, and the SEC recently announced a repeal of several of these enhanced requirements relating to proxy advisory firms.

Prior to the pandemic's onset, activists had been setting new records, targeting a large number of companies, deploying more capital and winning a greater number of board seats than ever before. Campaigns by the most well-known activist hedge funds had been surging in recent years, and more than 100 hedge funds were known for engaging in activism, and several mutual funds and other institutional investors had also begun deploying the same kinds of tactics and campaigns as the dedicated activist funds. In 2022, after the macro-economic impacts following Russia's war in Ukraine and inflation, supply chain and other pressures and related market downturns, activism continued to surge as 2022 wore on, with announcements of new high-profile

campaigns by activists against a range of companies continuing, and often resolved through engagement and negotiation. The year 2023 has seen a continuation of this trend.

In addition to the "traditional" activist shareholder, "debt default activism" recently emerged on the scene. In these situations, debt investors purchase a company's debt on the theory that the company is already in default and then actively seek to enforce that default in a manner by which they stand to profit. The playbook of such an activist starts with the investor identifying a financing transaction, even one effected years earlier, that it can claim did not comply with a covenant in the issuer's debt documents. Next, the investor amasses both a short position in the company's debt (in some cases through a credit default swap that collects upon a default) and a long position in the debt sufficient to assert a default and possibly even a blocking position. (Typically, the activist's long exposure is smaller than their short position, so the investor is "net short".) The investor, finally, asserts the alleged default, often in a public letter, and if its long position is large enough (for example, 25% of a bond tranche), it can also serve a formal default notice, triggering a high-stakes litigation.

Legislators and regulators have largely stayed out of the fray of shareholder activism, notwithstanding some of the adverse impacts and varying views on the excesses of shareholder activism. The SEC has sought to play an even-handed role ensuring that both sides provide full and fair disclosure and are not misleading in their proxy solicitations and has recently, as encouraged by the legislature in the Dodd Frank Act, taken some initial action as part of proposed rulemaking to curb abuses by activists of the Regulation 13D early-warning disclosure system and lack of transparency in derivative accumulations by proposing updated disclosure frameworks. Specifically, in 2022, the SEC proposed amendments to Regulation 13D-G to modernize the beneficial ownership reporting rules, including by shortening filing deadlines and expanding the securities included for assessment of beneficial ownership. These proposed amendments would be a significant update to reporting requirements adopted in 1968. The frequency and impact of hedge fund activism has prompted some legislators to propose federal legislation but to date these changes have yet to be adopted. Concerns over opportunistic activist attacks and takeover bids at companies who have been weakened by the pandemic may have an impact on future legislation.

See questions 2.6 and 2.7 as well.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

U.S. companies are managed under the direction of a single-tiered, unitary board of directors, elected by the shareholders and subject to fiduciary duties, and with full control over the company's business and affairs. Directors must be natural persons under state law but need not be shareholders (however, directors usually do have equity in the company). The board's basic responsibility is to exercise its business judgment and act in a manner reasonably believed to be in the best interests of the company and its shareholders. Boards typically delegate day-to-day management to the CEO and other senior management, all of whom serve at the pleasure of the board, and focus on oversight of strategy and risk management. Outside directors are typically referred to as non-management directors and as independent directors where they qualify as such under applicable rules. Boards will also determine their own committee structures (including as to the exchange-managed committees, such as the nominating and governance committee, the compensation committee and the audit committee) and board leadership structures (for example, with respect to the identity of the chair of the board and whether the chair is a different person than the CEO). Directors owe the corporation and its shareholders fiduciary duties such as the duty of care and the duty of loyalty. The duty of care encompasses the obligation to act on an informed basis after due consideration and appropriate deliberation. The duty of loyalty encompasses the obligation to act in the best interests of the corporation and the shareholders, as opposed to the directors' personal interests. Corollary duties – such as duties of good faith and duties of candour and disclosure to shareholders when submitting matters for shareholder action – also often apply, and there is a legal framework for considering a director's oversight duties. The board is generally entitled to take into account long-term as well as short-term interests and set the appropriate time frame for achievement of corporate objectives. Under U.S. law, courts will typically not second-guess business decisions of the board where the "business judgment rule" applies, which involves a rebuttable presumption that directors are discharging their duties in good faith, on an informed basis and in a manner the directors reasonably believe to be in the best interests of the corporation and its shareholders. The NYSE requires boards to conduct annual board evaluations, and though NASDAQ does not have this requirement, NASDAQ-listed companies commonly conduct board evaluations. While still uncommon in the publicly traded universe, an increasing number of companies are implementing alternative for-profit corporate firms such as the "public benefit corporation" that would further empower (and require) boards to balance stockholder pecuniary interests with the interests of those materially impacted by corporate conduct and specified public benefits that the corporation has determined to advance.

3.2 How are members of the management body appointed and removed?

Members of the board of directors are elected by the shareholders, with the board having the right to alter the size of the board and appoint directors to fill vacancies, whether created by newly created directorships or resignations of incumbent directors. State law and the corporation's charter and bylaws will establish the extent to which directors may be removed with or without cause, whether a shareholder vote is required for removal, the voting standard that must be met and any judicial authorities to remove directors. The board of directors, and not the shareholder body, appoints and removes corporate officers.

3.3 What are the main legislative, regulatory and other sources impacting on compensation and remuneration of members of the management body?

The board of directors has the legal authority to determine compensation for directors and officers. At public companies, stock exchange rules mandate that committees of the board play a central role in compensation decisions. On account of these requirements, an independent compensation committee of the board usually determines and approves the CEO's compensation. Non-CEO executive officer compensation is also usually determined by the independent compensation committee, although stock exchange rules permit the full board to make such determinations after receiving the compensation committee's

recommendation. Heightened independence rules apply to the members of compensation committees and committee advisors. Using an independent compensation committee also facilitates tax deductibility of certain compensation, although tax rules in this regard are in a period of flux.

Compensation philosophies and programs are often developed with the input of third-party compensation consultants. The appropriate mix of fixed compensation (for example, annual base salary) and variable compensation (that is, short- and long-term performance incentives), as well as the form of compensation (for example, stock options, restricted shares, restricted stock units or cash-based payments) vary among companies, as determined by the compensation committee in its business judgment based on the particular needs of the business. ESG-related components are also beginning to be incorporated into compensation design at some companies. Equity-based components are common, and shareholder approval is required of most equity compensation plans under stock exchange rules, including those involving grants of equity-based awards to directors and officers. In addition, Dodd-Frank's requirement of non-binding shareholder advisory votes on executive compensation, popularised as "say on pay", provides shareholders with means for expressing dissatisfaction with compensation practices, which may also be expressed directly to the company outside of the annual meeting context. While these votes are non-binding, companies that receive low approval ratings face intense pressure to modify executive compensation programs. Courts typically respect compensation decisions so long as the directors act on an informed basis, in good faith and not in their personal self-interest. Except in the case of certain financial institutions (where special "safety and soundness" provisions apply), regulators generally cannot contest compensation decisions.

Director compensation is also within the purview of the board of directors and the company's director compensation program must be publicly disclosed. In recent years, there have been a handful of instances where outsized director compensation has been scrutinized and litigation has been pursued.

3.4 What are the limitations on, and what disclosure is required in relation to, interests in securities held by members of the management body in the corporate entity/entities?

Directors and officers (as well as 10% shareholders) are required to file Section 16 forms reporting their beneficial ownership of the Company's registered securities. Such persons must file a Form 3 at the time the Company registers its securities (or within 10 days after becoming subject to the provision), a Form 4 within two days of changes in beneficial ownership, and a Form 5 within 45 days after the end of the Company's fiscal year to report any transactions that should have been reported earlier on a Form 4 or were eligible for deferred reporting.

Company insiders (including officers, directors and 10% shareholders) can be forced to return any profits made from the purchase and sale (or sale and repurchase) of Company stock if both transactions occur within a six-month period and applicable exemptions do not apply.

To the extent a director or officer acquires or holds substantial equity positions, the limitations and disclosures that would apply generally to shareholders seeking to acquire or hold such positions as discussed in question 2.6 would also generally apply to the director or officer.

Companies may also establish (and enforce) company-specific stock ownership guidelines on directors and officers as well as restrictions on hedging or pledging of securities by such individuals.

3.5 What is the process for meetings of members of the management body?

In addition to regular meetings of the board of directors, boards may convene more frequently through special meetings of the board. Who may call a special board meeting is set forth in the company's organizational documents and governance guidelines. Notice and quorum requirements for board meetings are also set forth in the company's charter or bylaws (as is ability to waive notice requirements); the DGCL sets a majority of the total number of directors as the default quorum requirement. Board business may also be conducted through duly-constituted committees, which will also meet and act as needed and in accordance with notice and quorum requirements and committee charters. Boards may generally act by written consent *in lieu* of a meeting if such consent is unanimous.

3.6 What are the principal general legal duties and liabilities of members of the management body?

See questions 3.1, 3.8 and 5.1.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

Effective boards typically perform dual roles: (i) advisor to and business partner of management; and (ii) monitor and overseer of management. Core board responsibilities include:

- Choosing and monitoring the performance of the CEO and establishing succession plans.
- Monitoring corporate performance and providing advice to management as a strategic partner.
- Evaluating and approving the company's annual operating plan, long-term strategy and major corporate actions.
- Determining risk appetite, setting standards for managing risk and monitoring risk management matters from an oversight posture.
- Planning for and dealing with crises.
- Determining executive and director compensation.
- Handling board development and director succession matters effectively, including recruiting, interviewing and nominating director candidates and monitoring the board's performance, composition and effectiveness.
- Reviewing the company's corporate governance practices and considering changes.
- Taking centre stage in any proposed transaction involving a conflict of interest with management.
- Setting high standards for corporate social responsibility and overseeing how ESG-related matters, corporate purpose and consideration relating to stakeholders and sustainability matters are incorporated into corporate strategy, operations, risk oversight and reporting.
- Monitoring compliance and establishing an appropriate "tone at the top".
- Supporting long-term relationships with shareholders and stakeholders.
- Overseeing relations with government, community and other constituents.

See also questions 1.3 and 1.4 above.

3.8 Are indemnities, or insurance, permitted in relation to members of the management body and others?

Yes, and the available scope of indemnification and permitted insurance is broad. Under DGCL Section 145, companies have extensive power to indemnify directors, officers and others against threatened, pending and completed legal actions. The only limitations in civil suits are: first, that the indemnified person must have acted in good faith and with a reasonable belief that he or she was serving the best interests of the company; and second, that a company may not indemnify a person found liable to the company itself, unless a court rules otherwise. In addition to providing broad indemnification protections in corporate bylaws, U.S. companies commonly opt to protect their directors further by including in their corporate charters a provision eliminating or limiting personal liability for monetary damages for breach of fiduciary duty as a director. DGCL Section 102(b)(7) 3 permits such provisions so long as they do not eliminate or limit liability for any breach of the duty of loyalty, for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, for unlawful dividend payments or unlawful stock purchases or redemptions, or for any transaction from which the director derived an improper personal benefit. Charter provisions implemented pursuant to DGCL Section 102(b)(7) provide powerful protection for directors. In addition, recent amendments to Delaware law now permit companies to implement charter amendments that would provide certain limitations on liability for officers too, subject to certain exceptions. Expense advancement is also an important and customary aspect of indemnification bylaws. DGCL Section 145(e) provides that companies may provide advance payment of expenses to officers and directors in defending legal actions upon receipt of an undertaking to repay the advancement if it is ultimately determined that the person is not entitled to indemnification. It further provides that companies have the discretion to determine the terms and conditions under which they wish to provide advancement to former directors and officers or other employees or agents. D&O insurance is also regularly provided to directors and officers at the company's expense and in some cases companies will enter into additional direct agreements with directors regarding indemnification.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

As discussed above, a unitary board of directors, elected by shareholders and subject to fiduciary duties, is charged with overseeing the corporation's business and affairs, including setting and directing corporate strategy. Directors are fiduciaries of the corporation and its shareholders and are expected to focus on promoting and developing the long-term and sustainable success of the company. In the U.S., hostile takeovers and shareholder activism can pose significant threats to U.S. corporations and execution of long-term corporate strategies, especially where such developments result in the capture of corporate control or influence over corporate policy by short-term oriented shareholders or bidders pursuing short-term profits, short-sighted breakups of a company, the excess return of capital to shareholders or incurrence of inadvisable amounts of leverage. In other situations, companies are able to navigate such situations effectively, including through making prudent adjustments to the corporate strategy in a manner that is responsive to the interests of long-term shareholders and other stakeholders and aligned with the long-term success of the company. Practices are also evolving as to how ESG-related matters should be incorporated into corporate strategy and operations.

4 Other Stakeholders

4.1 May the board/management body consider the interests of stakeholders other than shareholders in making decisions? Are there any mandated disclosures or required actions in this regard?

For several decades, there has been a prevailing assumption among many CEOs, directors, scholars, investors, asset managers and others that the sole purpose of corporations is to maximize value for shareholders. This exclusive focus on shareholder wealth maximization has exacerbated pressure on corporations to take actions to maintain or boost near-term stock price. Recently, there has been increasing concern about the negative consequences of shareholder primacy and the short-termism it has facilitated, as well as the longer-term impact on broader socioeconomic and sustainability issues. In 2019, the Business Roundtable issued a statement on the purpose of a corporation, signed by 181 public company CEOs, departing from its long-standing endorsement of shareholder primacy and embracing stakeholder governance, which posits that the fiduciary duty of management and the board of directors is to promote the long-term value of the corporation for the benefit of all its constituents, not solely to maximize shareholder wealth. Several prominent institutional investors, including BlackRock, the Vanguard Group and State Street Global Advisors, subsequently issued public statements similarly endorsing stakeholder governance as part of long-term value creation and safeguarding against risks to value.

Stakeholder governance is fully consistent with well-established principles of corporate law and the existing fiduciary framework for directors. Directors have a fiduciary duty to promote the best interests of the corporation, and in fulfilling that duty, directors exercise their business judgment in considering and reconciling the interests of various stakeholders and their impact on the business of the corporation. Indeed, the special genius of Delaware law in particular, and one of the primary reasons why it has become the indisputably preeminent jurisdictional choice of most major U.S. public companies, is that it has been animated by a fundamental sense of pragmatism and its fiduciary duty framework has afforded corporations the breathing room they need to address evolving business challenges as well as expectations of shareholders. Companies and investors alike have been rethinking the ways in which they engage and have been providing robust and increasingly tailored disclosures about their approaches to: strategy, purpose, and mission; board involvement, composition and practices; board oversight of strategy and risk management; the business case for long-term investments, reinvesting in the business and retraining employees, pursuing research and development, innovation, and other capital allocation priorities; sustainability, ESG and human capital matters; stakeholder and shareholder relations; corporate governance; and corporate culture. In addition, recent caselaw developments with respect to *Caremark*-related fiduciary claims against boards alleging lack of oversight have also underscored the importance of board-level reporting and oversight systems regarding mission-critical risks especially, including risks that may arise from stakeholder-related impacts and harms to the corporation and shareholders and compliance violations, and using board committees and management-level structures effectively to ensure that material risks are overseen, managed and mitigated appropriately. Particularly, in 2022 the SEC proposed rules related to climate change risk, including disclosure of board oversight and governance related to material climate impacts, greenhouse gas emissions, and transition plans reduction targets. The SEC also made similar proposals related to cybersecurity disclosures to require that

boards report material cybersecurity incidents within four business days of determining the materiality of the incident. Similar proposals related to human capital management and board diversity are expected in 2023.

4.2 What, if any, is the role of employees in corporate governance?

With respect to board composition, there are no requirements for employee or labour representation (or other mandated representation for particular constituencies) on the board of directors. In the M&A context, there are no required pre-notification or consultation provisions under U.S. law relating to employees. Some collective bargaining agreements ("CBA") may contain provisions that provide union employees with certain benefits, or the right to re-re-negotiate their CBA, in the event of a change in control, but these matters are contract-specific, and are, however, not legally required and do not provide a consent right on a bid. As the world seeks to recover from the COVID-19 pandemic and related matters, it is expected that the private sector's treatment of employees and other human capital-related matters will be even more closely scrutinized. Macro-economic, supply chain, inflation and employment-related trends in 2022 have also influenced thinking regarding the role of the board with respect to employees and other workers as to corporate governance matters.

4.3 What, if any, is the role of other stakeholders in corporate governance?

Anti-ESG movement dynamics aside, the interests of non-shareholder constituencies may be considered by the board and management for their impact on creating corporate and shareholder value, in addressing risks to the corporate enterprise, making business judgment and implementing effective shareholder and stakeholder engagement and relations programs, as well as advancing legal and regulatory compliance objectives. Many states formally permit (or require) boards to consider the interests of non-shareholder constituencies such as employees, business partners and local communities, as well as broader constituencies such as the economy as a whole. However, several states have also taken anti-ESG positions recently. Examples include Florida Governor Ron De Santis proposing legislation alongside the Trustees of the State Board of Administration to prohibit SBA fund managers from considering ESG issues when investing state money, and Texas holding a hearing to probe the ESG investment policies of BlackRock and other large asset managers.

As a practical matter, U.S. companies and large institutional investors are increasingly recognizing that the long-term success of the company and its status as a durable enterprise requires giving due regard to the interests of important stakeholders, rather than focusing solely on the desires of shareholders.

4.4 What, if any, is the law, regulation and practice concerning corporate social responsibility and similar ESG-related matters?

The corporate response to the COVID-19 pandemic and related matters has emphasized the health, welfare and safety of employees, customers, communities and other key constituencies. In addition, heightened attention to employee-related matters and diversity, equity and inclusion-related concerns have impacted corporate behavior and practices. Prior to the pandemic's onset, while not a matter of significant legal regulation in the U.S. beyond compliance, corporate social responsibility, including treatment of environmental, social and ethical issues, was increasingly recognized as an appropriate matter of business judgment for the board. The modern public company is expected to set, and meet, high standards of social responsibility. Related risks are expected to be addressed through robust risk oversight and management processes. Companies often voluntarily disclose performance and policies in this area. Specific disclosure requirements may apply in some of these areas and substantive laws may also apply, such as for anti-bribery, anti-corruption and anti-discrimination rules or environmental mandates. See question 4.1 for a discussion of disclosure requirements related to climate impact and cybersecurity. Shareholder proposals increasingly involve sustainability, environmental and social issues, including: greenhouse gas emissions and renewable-energy concerns; international labour standards and human rights; and diversity, equality and non-discrimination issues, particularly with respect to sexual orientation and, recently, the concept of racial equity and civil rights audits. Where such proposals receive significant support, companies will have to determine whether and how to demonstrate responsiveness. See also question 5.3 below.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency and what is the role of audits and auditors in these matters?

The fundamental responsibility for a company's financial statements and disclosures rests with management and the independent auditor. Each NYSE-listed company must have an internal audit function to provide management and the audit committee with ongoing assessments of a company's risk management processes and systems of internal control. However, as part of its oversight role, the board has ultimate responsibility for overseeing management's implementation of adequate disclosure controls and procedures. Under the federal securities laws, directors can be held liable for their material misstatements or omissions of material facts in public filings. In some cases, liability is limited to circumstances where the director acted with scienter (actual knowledge or reckless disregard), and various defences, including demonstrating appropriate due diligence, may be available. Violations of the corollary fiduciary duties of candour and disclosure may also result in liability. Regulation FD generally prohibits selective disclosure of material information and requires public disclosure of information selectively disclosed to investors, subject to certain exceptions.

The federal securities laws require public companies to file annual, quarterly and periodic current reports triggered by the occurrence of specified events. The contents of such reports are prescribed by law, and false and misleading statements are generally prohibited. Annual reports contain audited financial statements and comprehensive information about the business, performance and relevant risk factors, quarterly reports contain unaudited interim financial statements and other business information, and current reports disclose the occurrence of certain material events, such as entry into material agreements, completion of significant acquisitions or dispositions of assets, and changes in officers or directors and amendments to the corporation's charter or bylaws. Public companies must have adequate internal controls over financial reporting, and

publicly filed annual and quarterly reports must contain related certifications from the CEO and CFO. All public companies must have their financial statements audited annually by a registered independent accounting firm in compliance with U.S. generally accepted accounting principles and generally accepted auditing standards (U.S. GAAP and U.S. GAAS). The company's external auditor – in the case of large public companies, usually one of the major registered public accounting firms – must publicly file its signed annual report attesting to the quality of the audit and the company's internal control over financial reporting. The federal securities laws require prompt disclosure with respect to changes in the external auditor and any revision to or inability to rely on prior audited financial statements.

A public company's accounting and audit function involves an independent committee of the board (referred to as the audit committee), external independent auditors, internal auditors and senior management. Federal law and stock exchange rules require that an independent audit committee of the board (comprising financially literate members, none of whom may accept consulting or advisory fees from the company, with "comply or explain" disclosure required if no member qualifies as a financial expert) be responsible for the appointment, compensation, retention and oversight of the independent auditor and for oversight of certain internal audit function-related matters. While not required, shareholders are typically asked to ratify such auditor's appointment. No aspect of an audit committee's role is more vital than its oversight of the audit process. An audit committee should have procedures in place to ensure that it stays abreast of evolving standards and best practices in this area. The PCAOB has promulgated strengthened independence and ethics rules and adopted auditing standards relating to the transparency and quality of audit reports, including requirements for enhanced disclosures of certain "critical audit matters", and the effectiveness of communications between an audit committee and the independent auditor.

5.2 What corporate governance-related disclosures are required and are there some disclosures that should be published on websites?

Required governance-related disclosures include: information concerning the composition of the company's board of directors and management team; independence determinations regarding the board and director qualifications; the existence of a board diversity policy; corporate governance guidelines that address qualification standards for directors, responsibilities for directors, director access to management and independent advisers, compensation of directors, education and orientation of directors, management succession, and evaluation of board performance (as provided under NYSE rules); board committee structures and committee charters; the number of board meetings held and director attendance issues; how shareholders may communicate with the board; whether the company has a code of ethics and any waivers of such codes; the board's leadership structure and role in risk oversight; risks arising from compensation policies that may have a material adverse effect on the company; related party transactions; and other matters.

When items are brought before the shareholders for their approval, such as for election of directors or consideration of significant transactions such as mergers or the sale of all or substantially all corporate assets, proxy statements containing the recommendation of the board, information about the proposals to be considered, disclosure of interests of directors and officers that may differ from the general interests of shareholders and other mandatory items must be filed. Proxy statements for the annual meetings at which directors are elected contain extensive information about the board and senior management, governance practices, director and executive compensation, auditor information and other matters.

The websites of major public companies will typically include corporate governance and sustainability-related information, including the company's organizational documents (charter and bylaws), key corporate governance guidelines and policies including as to director independence criteria, committee charters for the audit, compensation and nominating and governance board committees, business codes of conduct, proxy statements and annual reports, sustainability reports, Section 16 filings reporting trades by directors and officers and information concerning the company's board of directors and management teams. While stock exchange rules require or provide the option of posting certain governance information to the company's website, most company websites go beyond what is strictly required.

5.3 What are the expectations in this jurisdiction regarding ESG- and sustainability-related reporting and transparency?

As discussed above, in 2022 the SEC proposed new rules that would require disclosure for material cybersecurity incidents as well as management oversight and governance issues related to material climate impacts, greenhouse gas emissions, transition plans and reduction targets. Proposals related to human capital management and board diversity are expected in 2023. Beyond these developments, U.S. disclosures with respect to ESG and sustainability-related matters have been primarily a function of private ordering, driven in large part by engagement with major institutional investors who have demanded increased transparency and more consistent disclosures so they can assess companies with respect to ESG and sustainability-related matters. This has led to companies taking a range of approaches with respect to reporting and transparency, with the largest U.S. companies usually incorporating, on a voluntary basis, disclosures consistent in whole or in part with one or more third-party standards such as the Global Reporting Initiative (GRI), the Sustainability Accounting Standards Board (SASB), the Task Force on Climate-related Financial Disclosures (TCFD), and the Stakeholder Capitalism Metrics framework recently announced by the International Business Council of the World Economic Forum (WEF) and the four major accounting firms, while also highlighting the extent to which corporate actions are aligned with the United Nations Sustainable Development Goals (the SDGs).

However, many if not most U.S. companies are in earlier stages with respect to reporting and transparency on such matters, and while companies have for years been subject to general requirements to disclose certain "material" information in their annual reports, such mandatory disclosures have not consistently resulted in comprehensive ESG-related reporting by all public companies, and the content of standalone sustainability reports varies significantly. The SEC has required some initially more expansive discussion of human capital-related objectives, measures and matters by public companies where material, and in 2021, the SEC and other U.S. regulators began to indicate publicly that they would be pivoting to more of a leadership posture with respect to mandatory reporting. In this regard, the SEC is in the process of moving forward with comprehensive rulemakings that would address expanded disclosures concerning climate change and greenhouse gas emissions, human capital management, board diversity, cybersecurity and certain other matters

that relate to ESG-related topics, including enhanced regulation of ESG marketing by institutional investors and regulated funds. The proposed rules on these topics have attracted substantial comment and input, and the specifics of the final rules calling for any such mandated disclosures, how they will affect corporate governance and board oversight, and the applicability of any phase-in periods and provisions regarding third-party attestations, remains to be seen.

On the stock exchange front, NASDAQ has implemented board diversity-related rules that would require listed companies to provide disclosure concerning the diversity of the board and have, or explain why they do not have, at least two diverse directors (as defined by the NASDAQ rules). See question 5.1 above.

Sabastian V. Niles is a Partner at Wachtell, Lipton, Rosen & Katz where he focuses on: rapid response shareholder and stakeholder activism, engagement and preparedness; takeover defense and corporate governance; risk oversight, including ESG, cybersecurity and crisis situations; U.S. and cross-border mergers, acquisitions, buyouts, investments, divestitures, and strategic partnerships; and other corporate and securities law matters and special situations.

Sabastian advises worldwide and across industries, including technology, financial institutions, media, energy and natural resources, healthcare and pharmaceuticals, construction and manufacturing, real estate/REITs and consumer goods and retail.

In addition to serving as Consulting Editor for the New York Stock Exchange's *Corporate Governance Guide*, Sabastian writes frequently on corporate law matters and has been a featured speaker at corporate strategy and investor forums. His speaking engagements have addressed topics such as: The Board's Role in ESG; Shareholder Activism; The New Paradigm of Corporate Governance; Hostile Takeovers; Strategic Transactions and Governance; M&A Trends; Board-Shareholder Engagement; Confidentiality Agreements in M&A Transactions; Negotiating Strategic Alliances with U.S. Companies; Current Issues in Technology M&A; Corporate Governance: Ethics, Transparency and Accountability; and Developments in Cross-Border Deals.

Wachtell, Lipton, Rosen & Katz
51 W 52nd Street
New York, NY 10019
USA

Tel: +1 212 403 1000
Fax: +1 212 403 2000
Email: svniles@wlrk.com
URL: www.wlrk.com

Wachtell, Lipton, Rosen & Katz is one of the most prominent business law firms in the United States. The firm's preeminence in the fields of mergers and acquisitions, takeovers and takeover defense, shareholder activism, strategic investments, corporate and securities law, and corporate governance means that it regularly handles some of the largest, most complex and demanding transactions in the United States and around the world. It features consistently in the top rank of legal advisors. The firm also focuses on sensitive investigation and litigation matters and corporate restructurings, and in counselling boards of directors and senior management in the most sensitive situations. Its attorneys are also recognised thought leaders, frequently teaching, speaking and writing in their areas of expertise.

www.wlrk.com

WACHTELL, LIPTON, ROSEN & KATZ

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Technology Sourcing
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

The International Comparative Legal Guides are published by: glg global legal group