Wachtell, Lipton, Rosen & Katz

Nominating and Corporate Governance Committee Guide

2025

About This Guide

This Nominating and Corporate Governance Committee Guide (this "Guide") provides an overview of the key rules applicable to nominating and corporate governance committees of listed U.S. companies and practices that nominating and corporate governance committees should consider in the current environment. This Guide outlines a nominating and corporate governance committee member's responsibilities, reviews the composition and procedures of the nominating and corporate governance committee and considers important legal standards and regulations that govern nominating and corporate governance committees and their members. This Guide also discusses some of the important matters that nominating and corporate governance committees may be called upon to decide or recommend an approach. Although generally geared toward directors who are members of a public company nominating and corporate governance committee, this Guide is also relevant to members of a nominating and corporate governance committee of a private company, especially if the private company may at some point consider accessing the public capital markets.

A few necessary caveats are in order. This Guide is not intended as legal advice, cannot take into account particular facts and circumstances and generally does not address individual state corporation laws. That said, we believe that this Guide will offer directors sound guidance on general rules, practices and considerations relevant to the nominating and corporate governance committee.

The annexes to this Guide include sample committee charters and other policies and procedures. They are included because we believe them to be potentially useful to the nominating and corporate governance committee in performing its functions. However, it would be a mistake to simply copy published models. The creation of charters, policies and procedures requires experience and careful thought, taking into account a company's specific circumstances and needs. It is not necessary that a company have every guideline and procedure that another company has in order to be "state of the art" in its governance practices. When taken too far, an overly broad committee charter can be counterproductive. Each company should tailor its nominating and corporate governance committee charter and other written policies and procedures to what is necessary and practical for the company.

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INTRODUCTION

The nominating and corporate governance committee goes by different names: the Securities and Exchange Commission (the "SEC") refers to the "nominating committee," the New York Stock Exchange (the "NYSE") to the "nominating/corporate governance committee," and Nasdaq to the "nominations committee."[1] Although traditionally known simply as the nominating committee, the increasing incidence of "corporate governance" in the title reflects the wider scope of responsibilities this committee has assumed in recent years. Once focused almost exclusively on identifying and selecting candidates for the board of directors, the nominating and corporate governance committee now typically assumes a leading role in a broad array of corporate governance matters, including the development and implementation of corporate governance guidelines, establishment of director criteria and review of candidates, evaluation of the performance of the board itself and its committees, board succession planning, consideration of shareholder proposals and, in some cases, management succession planning. Sometimes determination of non-employee director compensation is handled by the nominating and corporate governance committee as well, although in many cases this responsibility falls within the purview of the compensation committee.

The nominating and corporate governance committee is one of three standing board committees, along with the audit committee and the compensation committee, required by the NYSE and Nasdaq (subject to certain limited exceptions) to be composed entirely of independent directors. Until relatively recently, considerable public attention had been paid to the audit committee in the wake of the financial scandals of the early 2000s, and then to the compensation committee in light of the options backdating and other controversies regarding executive compensation. Because it is less regulated and had received less attention than those committees, the nominating and corporate governance committee had sometimes been thought of as the "third" of the three standing committees. But this dynamic has shifted. With the heightened focus on corporate governance, and a steady push by activists and proxy advisory services to enhance "shareholder rights" and conform to "best practices," the role of the nominating and corporate governance committee has become far more prominent in recent years, and we expect it will continue to play a central role in the years to come.

In recent years, the role of corporations in society, and in particular the degree to which companies should focus on environmental, social and governance ("ESG") factors and the implications of such factors on their businesses has been the subject of dramatically increased attention and debate. The growth of ESG has further elevated the importance of the nominating and corporate governance committee, which is of course central to the "G" component of ESG and often plays a leading role in the "E" and "S" components as well. Nominating and corporate governance committees are often tasked with overseeing ESG at the board level. Although the term "ESG" has faded from the investor and corporate lexicon over the past several years as an anti-ESG movement has gained steam and related issues have become deeply politicized, the

need for boards to understand and oversee the environmental, social and governance risks that may materially impact long-term performance and value creation remain as relevant as ever.

In simplest terms, just as the audit committee has primary responsibility to ensure that the company's financial policies and practices are appropriate, and the compensation committee has primary responsibility to ensure that the company's compensation policies and practices are appropriate, so too the nominating and corporate governance committee has primary responsibility to ensure that the company's corporate governance policies and practices are appropriate for the company.

The standards governing the composition and operations of the nominating and corporate governance committee are in many respects not as specific or as rigorous as those applicable to the audit and the compensation committees. While SEC rules apply to all listed companies, most of the standards relevant to the nominating and corporate governance committee are to be found in the applicable stock exchange listing standards. Listing standards applicable to the nominating and corporate governance committee are different for the NYSE and Nasdaq, subtly or significantly, depending on the issue.

The landscape within which the nominating and corporate governance committee operates is always changing. The panoply of positions taken and policies adopted by the proxy advisory service firms, large institutional investor groups and, to a lesser degree, other shareholder rights activists are constantly evolving. Members of nominating and corporate governance committees should be familiar with these policies and positions, which, while not binding on companies, have a significant impact on corporate governance practices.

This Guide is organized into three parts. Part I focuses on the "corporate governance" function of the nominating and corporate governance committee; Part II turns to its "nominating" role; and Part III addresses the committee's organization and procedures.

PART ONE:

NOMINATING AND CORPORATE GOVERNANCE COMMITTEE ORGANIZATION AND PROCEDURES[

I. Key Responsibilities of the Nominating and Corporate Governance Committee

The nominating and corporate governance committee is a standing committee of the board to which the board delegates primary responsibilities for reviewing and recommending to the board director nominees and the formulation, recommendation and implementation, if appropriate, of corporate governance policies and practices.

A. Existence and Composition

1. NYSE Requirements

The NYSE requires its listed companies to have a nominating and corporate governance committee composed entirely of independent directors.[2] Independence, for purposes of serving on the nominating and corporate governance committee, is determined by the same standards generally applicable to directors.[3] So long as the committee members ultimately decide any matters within the sole province of the committee, the NYSE's independence requirement does not prohibit officers or non-committee member directors from attending a committee meeting, making a recommendation to the committee or requesting that a matter be addressed by the full board.

2. Nasdaq Requirements

Companies listed with Nasdaq may perform nominating and corporate governance tasks through a committee of independent directors.[4] Alternatively, Nasdaq allows director nominees to be selected or recommended by a majority of the board's independent directors so long as only independent directors participate in the vote.[5] The stated purpose of this rule is to provide companies with the flexibility to choose an appropriate board structure and reduce resource burdens, while ensuring that independent directors approve all nominations.[6]

Additionally, Nasdaq provides a limited exception to the requirement for complete committee-member independence. If the nominating and corporate governance committee is composed of at least three members, a non-independent director who is not currently an executive officer or employee or a family member of an executive officer may serve on the committee if the board, under exceptional and limited circumstances, determines that it is required by the best interests of the company and its shareholders.[7] A member appointed under this exception may serve no longer than two years.[8] As with the NYSE, Nasdaq's rules regarding committee member independence do not prohibit non-committee members or non-committee member directors from attending meetings or otherwise contributing to the work of the committee.

3. SEC Requirements

The SEC does not establish mandatory standards regarding the existence and composition of the nominating and corporate governance committee but instead specifies certain disclosure obligations. A listed company must state whether or not it has a standing nominating and corporate governance committee (or another committee performing a similar function).[9] A company with a nominating and corporate governance committee must identify each committee

member, state the number of meetings held by the committee during the last fiscal year and describe briefly the functions performed by the committee.[10] A company without such a committee must identify each director who participates in the consideration of director nominees and must state the basis for the view of the company's board that it is appropriate not to have such a committee.[11]

The SEC requires a company to identify each member of its nominating and corporate governance committee who is not independent under applicable independence standards.[12] A listed company may use its own definition of independence, provided that the definition complies with the independence standards of the exchange on which the company is listed.[13] In the absence of company-defined independence standards for a committee, the applicable standard is the one used by its exchange.[14] A company that relies on an exemption from the independence requirements of the exchange on which it is listed must identify the exemption and explain its basis for reliance.[15]

B. Nominating and Corporate Governance Committee Charter and Responsibilities

A NYSE-listed company must have a written nominating and corporate governance committee charter vesting the committee with certain responsibilities.[16] By contrast, a Nasdaq-listed company need not have a formal nominating and corporate governance committee at all, and therefore need not have a formal committee charter. Nasdaq requires only that each company certify that it has adopted either a written charter or board resolution addressing the process by which directors are selected for nomination.[17] Further, unlike a NYSE-listed company, a Nasdaq-listed company is not required to task a specific committee with formulating its corporate governance standards. Nonetheless, it has become typical for Nasdaq-listed companies, especially large-cap companies, to have a formal nominating and corporate governance committee.[18] An example of a nominating and corporate governance committee charter is attached as Annex C.

As a matter of good corporate governance, it is recommended that a company review its nominating and corporate governance charter (or equivalent standards if a company does not have a formal committee) at least annually, and more frequently if circumstances warrant. The nominating and corporate governance committee should lead this review, making sure that corporate governance guidelines adequately address key topics such as director elections, related-party transactions and conflicts of interest. As part of any review, a nominating and corporate governance committee should ensure that the company's charter, bylaws, corporate governance guidelines, procedures and committee charters do not set inconsistent standards.

1. NYSE Requirements

As noted, the nominating and corporate governance committee of a NYSE-listed company must have a written charter that describes the committee's purpose and responsibilities. Because the charter is originally adopted by the board and is subject to amendment by the board, the authority and procedures of the committee can be altered as long as the committee retains the responsibilities required under the NYSE rules. The responsibilities that the charter must provide for include:

- identification of individuals qualified to become board members who meet the criteria for board membership approved by the board;[19]

- selection, or recommendation to the board, of director nominees to be presented at the next annual meeting of shareholders;[20]

- development and recommendation to the board of corporate governance guidelines applicable to the corporation;[21]

- oversight of the evaluation of the board and management;[22] and

- annual evaluation of the committee's performance.[23]

Commentary to the NYSE rules instructs that the charter should also address a number of topics concerning the committee itself, including:

- committee member qualifications;

- the process for committee member appointment and removal;

- committee structure and operations (including authority to delegate to subcommittees); and

- committee reporting to the board.[24]

The commentary also states that the charter should give the nominating and corporate governance committee sole authority to retain and terminate a search firm to assist in identifying director candidates, including sole authority to approve the search firm's fees and other retention terms.[25] Boards may allocate the responsibilities of the nominating and corporate governance committee to committees of their own denomination, provided that any such committee has a committee charter and is composed entirely of independent directors.

The NYSE listing standards also instruct that the nominating and corporate governance committee is responsible for taking a leadership role in shaping a company's corporate governance.[26] As noted above, the NYSE-listed companies are required to adopt a nominating and corporate governance committee charter giving the committee responsibility for the development and recommendation to the board of a set of corporate governance guidelines applicable to the company. These corporate governance guidelines must address the following subjects:

- director qualification standards (which must reflect, at a minimum, the NYSE independence requirements, but may also address other substantive qualification requirements, such as policies limiting the number of boards on which a director may sit, and director tenure, retirement, and succession);

- director responsibilities (which should clearly articulate what is expected from a director, including basic duties and responsibilities with respect to attendance at board meetings and advance review of meeting materials);

- director access to management and, as necessary and appropriate, independent advisors;

- director compensation (which should include general principles for determining the form and amount, and for reviewing those principles, as appropriate);

- director orientation and continuing education;

- management succession (which should include policies and principles for CEO selection and performance review, as well as policies regarding succession in the event of an emergency or the retirement of the CEO); and

- annual performance evaluation of the board (which should provide for board self-evaluation at least annually to determine whether it and its committees are functioning effectively).[27]

This charter[28] and corporate governance guidelines[29] must be made available on or through the company's website.

2. Nasdaq Requirements

Nasdaq is again more flexible in its charter requirements than the NYSE, and differs from the NYSE in two notable respects. First, whereas the NYSE lists a number of responsibilities that must be entrusted to the nominating and corporate governance committee, and also lists with greater specificity the topics that should be addressed in the committee charter, Nasdaq requires only that the charter or board resolution outline a company's director nomination process and any related matters as may be required by federal securities laws. Second, while the NYSE requires a company to make its committee charter available online, Nasdaq requires only that a company certify that it has adopted a committee charter or board resolution.[30]

Although Nasdaq's requirements offer greater flexibility, it is still typical for Nasdaq-listed companies to have a formal nominating and corporate governance committee that takes a leading role in gorming and implementing the company's corporate governance policy.

3. SEC Requirements

The SEC requires a company to disclose whether its nominating committee has a charter.[31] If it does, the company must disclose whether a current copy of the charter is available on its website and, if it is, the website address. If a copy is not available on the company's website, one must be included in the company's proxy or information statement once every three fiscal years and every year that the charter has been materially amended. If the company relies on a prior year's filing to fulfill this requirement, the company must identify the prior year.[32]

II. The Membership and Functioning of the Nominating and Corporate Governance Committee

A. Membership

1. Size and Composition of the Committee

Neither federal law nor stock exchange listing requirements prescribe a minimum or maximum number of members for a nominating and corporate governance committee.[33] The appropriate number of members will vary depending on such factors as the composition of the board as a whole, the size and complexity of the company and the breadth of responsibilities tasked to the committee. The size of the nominating and corporate governance committee varies, although a committee of three or four members is fairly common. As part of its annual review, the committee and the board should consider the attributes of the committee members to ensure that the committee is appropriately constituted to effectively perform its tasks.

A company must be mindful of the director independence requirements imposed by its stock exchange and other sources when selecting directors to serve on the nominating and corporate governance committee. The NYSE requires a nominating and corporate governance committee to be composed of independent directors and sets standards governing who can qualify as an independent director.[34] While Nasdaq does not require a formal nominating and corporate governance committee, it does require that a company's independent directors perform the nominating function generally assigned to a nominating and corporate governance committee.[35] Unlike members of the audit and compensation committees, who face additional independence requirements, the independence of members of the nominating and corporate governance committee is judged by the same standards the NYSE and Nasdaq employ to determine director independence generally.

2. Chairperson

While the effectiveness of the nominating and corporate governance committee ultimately depends upon the contributions of each of its members, the chairperson has a particularly important role to play. He or she establishes the agenda for committee meetings and leads committee discussions to ensure that meetings are conducted regularly and efficiently and that each item receives appropriate attention. Moreover, the chairperson is typically the voice of the committee in its interactions with outside advisors, senior management and the full board. Many committee chairs rotate every few years, and that rotation can serve to enhance the experience and effectiveness of directors. It is not unusual for the chair of the nominating and corporate governance committee to also serve as lead director when the chief executive of the company also chairs the board. Although this is by no means necessarily the right choice for any given company, the role that the nominating and corporate governance committee plays in establishing appropriate corporate governance policies and practices for the company positions its chair well to perform the lead director role (which is described in Section VI.F).

3. Term of Service

There are no rules that prescribe a particular length or term of service for members of a nominating and corporate governance committee. Consequently, a board is free to fashion policies it determines are appropriate. As a general matter, the board should strike a balance between experience and stability on the one hand, and facilitating the exchange of fresh ideas and perspectives on the other. High turnover on the committee may reduce cohesion, lead to inefficiency and make it harder to develop and implement long-term plans, such as board development plans, corporate governance evolution, and management succession planning. Conversely, having little or no turnover risks depriving the committee of the benefit of fresh ideas and perspectives. In striking this balance, a board should consider periodically rotating its qualified directors onto the committee.

B. Meetings

1. Regular Meetings

Apart from the requirement that the nominating and corporate governance committee conduct an annual self-evaluation and oversee the annual self-evaluation of the board, neither the SEC nor the major securities exchanges mandate the frequency of committee meetings. A nominating and corporate governance committee should meet with sufficient regularity to properly carry out its duties. The appropriate frequency will depend on various factors, including the scope of the committee's responsibilities, the size of the company and whether any circumstances, such as an anticipated leadership transition or unusual shareholder activism, require extraordinary committee attention. In addition to other meetings throughout the year, the committee should meet in advance of the board's annual nomination of directors.

As with a meeting of the board, a meeting of the nominating and corporate governance committee should provide adequate time for the discussion and consideration of each agenda item. To help ensure productive discussion, the committee should devote sufficient attention to planning the meeting's timing, agenda and attendees.

2. Minutes

Nominating and corporate governance committees ordinarily prepare minutes of their regular meetings but not of their executive sessions. These minutes should identify the topics discussed, but it is neither necessary nor prudent to attempt to create a transcript of meetings. Rather, minutes should be sufficiently detailed to document that the committee requested, received, reviewed and discussed the information it deemed relevant in light of the facts and circumstances as they were known at the time. Courts and regulators reviewing a committee's actions often regard minutes as the most reliable contemporaneous evidence of what transpired at a meeting. In litigation concerning director-level conduct and decision-making, board and committee minutes are regularly used as evidence and can provide a guide to opposing counsel as to which directors to depose and what topics to cover in such depositions. It is therefore of vital importance that minutes be thoughtfully drafted to reflect the topics discussed at meetings and the substance of the committee's discussion to avoid creating an ambiguous record that may later be used against the directors in litigation. As part of this effort, and because directors today

are often engaged in work with one another for their companies outside of formal meetings, committees should consider including in the minutes reference to any discussion that occurred among the members prior to or after the meeting.

Minutes should also reflect which members of the committee were present and whether any non-committee members attended (and for what portions of the meeting they were in attendance). It is good practice for directors who do not serve on the committee to have the opportunity to ask the committee questions, and the committee should consider providing the full board with a report or copy of the minutes for each committee meeting. Drafts of minutes should be prepared and circulated to each committee member reasonably promptly after each meeting to help ensure accuracy. Where possible, the minutes should also be circulated sufficiently in advance of a future (ideally, the next) committee meeting to allow each committee member a full opportunity to review them before approval.

3. Rights of Inspection

The danger of improvidently drafted minutes is especially acute because state law often provides shareholders a right to inspect the books and records of the company, including committee meeting minutes.[36] For example, any stockholder of a Delaware company may make a written demand to inspect board of director and committee meeting minutes.[37] Although such inspection rights are limited to situations where stockholders have a "proper purpose" for their requested inspections, courts throughout the country have encouraged stockholders seeking to bring derivative litigation to take pre-suit discovery via these statutory inspection rights.

In 2025, the Delaware legislature codified the courts' interpretation of "proper purpose" and added a new subsection to Section 220 of the DGCL, which provides that a stockholder may inspect a Delaware company's books and records only if all of the following apply: (a) the stockholder's demand is made in good faith and for a proper purpose; (b) the stockholder's demand describes with "reasonable particularity" the stockholder's purpose and the documents sought; and (c) the documents sought are "specifically related" to that purpose.[38] Further, the amendment's codification of a Delaware company's ability to impose reasonable confidentiality or use restrictions on produced documents, to redact information not specifically related to the purpose of the demand, and to require that any document production be incorporated by reference into any later-filed complaint[39] marks an evolution from Delaware's prior stance that there is no "presumption of confidentiality" for documents produced in response to a Section 220 demand.[40]

4. Third-Party Advisors

The NYSE requires listed companies to grant the nominating and corporate governance committee sole authority to retain and terminate any search firm to assist it in identifying director candidates, including sole authority to approve the search firm's fees and other retention terms.[41] Nasdaq imposes no such requirement, but boards of companies listed on Nasdaq may also want to consider vesting the nominating and corporate governance committee with this power. If a nominee approved by the nominating committee for inclusion on a company's proxy card (other than nominees who are executive officers or who are directors standing for reelection) was

recommended by a third-party search firm, federal securities laws require the company to disclose this fact in its proxy statement.[42]

If the committee is granted this authority, it should bear in mind that there is no legal obligation to engage third-party advisors to assist in identifying director candidates. Third-party advisors will, in some instances, bring valuable capabilities that a firm may not possess internally. Directors should have full access to any consultants, and engaging and questioning advisors is often an important part of the process by which the board reaches a judgment after careful and informed deliberation. It is also important for the nominating and corporate governance committee to understand the nature and scope of any other services provided to the company by the third-party advisor in order to detect any actual or perceived conflicts of interest. Of course, a consultant's judgment should not be viewed as a substitute for the independent judgment of the committee and ultimately the board.

III. Fiduciary Duties of Nominating and Corporate Governance Committee Members

A. The Business Judgment Rule

The decisions of the nominating and corporate governance committee ordinarily will be afforded the protection of the business judgment rule. The business judgment rule is a presumption that, in making a business decision, independent directors have acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.[43] A conscious decision to refrain from acting can also be an exercise of business judgment.[44] Unless a plaintiff can show that directors failed to act with loyalty or due care, the courts will generally defer to the business judgment of the board or committee. If a plaintiff is able to establish that the directors in question were conflicted or did not act with reasonable care, then the burden may shift to the director defendants to demonstrate that the challenged act or transaction was entirely fair to the company and its shareholders.[45]

The business judgment rule focuses on process and is deferential to the substantive decisions reached by informed and disinterested directors. This deference reflects a fundamental principle of Delaware corporate law—that the business and affairs of a company are to be managed under the direction of the board of directors, rather than the courts.[46] The corporation laws of other states are generally at least as deferential to the decisions of informed and disinterested directors as those of Delaware, and in many cases more so; many states have constituency statutes that allow directors to consider the interests of all corporate stakeholders in making decisions, not only those of shareholders.

B. Fiduciary Duties Generally

Members of the nominating and corporate governance committee owe the company the same fiduciary duties in the performance of their committee assignments as they do in the performance of their activities as directors: a duty of care and a duty of loyalty.

1. The Duty of Care

The essence of a director's duty of care is the obligation to exercise informed business judgment. A business judgment is informed if, prior to making a decision, the director apprised himself or herself of all material information reasonably available,[47] including potential alternatives.[48] This process would generally include consultation with management and, in many cases, expert advisors, as well as receipt and review of such corporate records and information that the directors consider necessary and appropriate to make the decision in question.[49] A plaintiff alleging a breach of the duty of care must establish that the director's actions were grossly negligent.[50] Delaware Courts define gross negligence in this context as reckless indifference to, or a deliberate disregard of, the whole body of shareholders, or actions that are outside the bounds of reason.[51] Thus, a court will not find a breach of the duty of care simply because the directors' decisions were not flawless. In the landmark *Disney* case, the Delaware courts reaffirmed that informed directors acting in good faith will not be held liable for failure to comply with "the aspirational ideal of best practices" by "a reviewing court using perfect hindsight."[52]

2. The Duty of Loyalty

The duty of loyalty requires a director to consider the interests of the company and its shareholders rather than his or her personal interests or the interests of other persons or entities. The Delaware Supreme Court has explained that "[e]ssentially, the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the shareholders generally."[53] Subsumed within the duty of loyalty is the duty to act in good faith.[54] A director fails to act in good faith if he or she acts with a purpose other than that of advancing the best interests of the corporation, acts with the intent to violate applicable positive law or fails to act in the face of a known duty to act, demonstrating a conscious disregard for his or her duties.[55]

C. Reliance on Experts

Under Delaware law, directors and committee members are protected in relying in good faith upon the company's records and the information, opinions, reports or statements of the company's officers, employees or committees, or any other person as to matters the director reasonably believes are within such other person's professional or expert competence and who has been selected by or on behalf of the company with reasonable care.[56] This protection is available even with respect to matters in which the directors themselves have expertise.[57] Thus, while consultation with experts will not always be necessary or appropriate, it is often an important component of satisfying directors' duty of care and protecting decisions against judicial second-guessing.

PART TWO:

THE "CORPORATE GOVERNANCE" FUNCTION OF THE NOMINATING AND CORPORATE GOVERNANCE COMMITTEE

IV. The Purpose of Corporate Governance

The term "corporate governance" encompasses a broad range of legal and non-legal principles and practices that, in combination, establish the rights, powers and obligations of the various stakeholders of a company. Although corporate governance principles and practices most directly regulate the relationships among a company's shareholders, board of directors and management, they also affect all of a company's stakeholders, including employees, customers, suppliers and creditors. Corporate governance can be seen as a means to facilitate the balance of power and the division of responsibility among the company's stakeholders: the company's shareholders provide capital, elect the board of directors and approve certain major decisions and transactions; the board of directors is elected by shareholders to oversee management and guide the direction of the company; senior managers are responsible for the day-to-day operations of the company; and the board of directors and senior managers collectively assess and balance the interests of a company's other key stakeholders.

At its core, the proper goal of corporate governance is creating sustainable long-term value. Although the governance landscape has been heavily influenced by shareholder activists, who are sometimes driven by short-term incentives, a "new paradigm" has emerged over the past decade which aims to recalibrate the relationship between corporations and investors to resist short-termism and facilitate long-term investment and sustainable value creation. The governance structure and policies that will best achieve this goal are as varied as are companies themselves. A board should tailor its corporate governance decisions to the company it serves, bearing in mind factors such as the unique circumstances of the company and the culture and dynamics among the principal stakeholders. Most decisions regarding corporate governance are ideally determined by a company's directors, who have the best information to evaluate these factors, who best understand the company holistically and who have fiduciary duties to the company and its shareholders.

In this respect, it is important for the nominating and corporate governance committee to resist pressure simply to equate "shareholder-friendly" corporate governance policies with "good" corporate governance policies or to substitute the judgment of proxy advisory firms or activist investors for its own. For many years, institutional investors, hedge funds and activist investors made considerable strides in taking the shareholder-centric model of corporate governance from the fringe to the mainstream, advocating the uniform adoption of so-called "best practices." However, such "best practices" may not be best for all companies and shareholders. Different types of shareholders have very different objectives and time horizons. Some shareholders, including many activist investors and hedge funds, are looking to maximize their returns over a short period, while others, such as institutional investors and index funds, generally have longer-term horizons and objectives. Yet others, such as union pension funds, may have special interests not shared by the general body of shareholders. Institutional investors are themselves intermediaries for the ultimate beneficial owners of shares, and the interests of the decision-makers at those institutions may not always be entirely aligned with the interests of those ultimate beneficiaries or shareholders at large. Moreover, it has always been well understood that corporations exist within a complex ecosystem of mutual dependency with many stakeholders, including employees, suppliers, customers, partners and the broader communities

in which they operate, who make necessary contributions to the success of the enterprise and being dependent on that success in turn.

Empowering shareholders at the expense of the board will not guarantee better performance and more efficient management of corporations, and the optimal corporate governance structure for one company may not be the optimal corporate governance structure for another company. The nominating and corporate governance committee must therefore remind itself of the fundamental goal of corporate governance and make its own determination as to the proper corporate governance for the company.

Directors must exercise this judgment in a changing corporate governance landscape defined by increasing public and private shareholder engagement and the frequent receipt by companies of shareholder proposals. Companies and institutional investors speak more regularly on corporate governance and strategic matters than they have ever done before, with many companies developing formal shareholder engagement programs to solicit input from shareholders. Many "best practices" long advocated by shareholder groups—including say-on-pay, the dismantling of certain takeover defenses, majority voting in director elections and the declassification of boards—have been codified in rules and regulations or voluntarily adopted by a majority of S&P 500 companies. As institutional shareholders and activists advocate new "best practices" and utilize new approaches in engaging companies, directors must strive to continue to act steadfastly in the best interests of the company and all of its shareholders. Under the emerging new paradigm for corporate governance, which emphasizes the responsibility and accountability of asset managers to their beneficiaries, many of whom are long-term holders (such as individual investors whose retirement and long-term savings are managed by such funds), leading institutional investors have said that they will support long-term investment and value creation by participating in more active engagement and reducing the degree to which they outsource their corporate governance decisions to proxy advisory firms like Institutional Shareholder Services Inc. ("ISS") and Glass Lewis & Co. ("Glass Lewis"). In fact, a number of these institutional investors have significantly expanded their governance departments to facilitate the in-house evaluation of companies' governance and strategy.

As this new paradigm has gained acceptance, efforts have increased to crystalize and memorialize its key tenets, resulting in the publication of *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth* published by the World Economic Forum's International Business Council,[58] the *Commonsense Principles of Corporate Governance 2.0* released by a group of 21 executives of leading companies and institutional investors,[59] the Business Roundtable's *Principles of Corporate Governance*,[60] the Investor Stewardship Group's *Stewardship Principles*,[61] the British Academy's *Principles for Purposeful Business*,[62] and the World Economic Forum's *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*.[63] In August 2019, the Business Roundtable embraced the "new paradigm" in a statement signed by 181 CEOs, including some of the largest U.S. public companies, in which the signatories disavowed the principles of "shareholder primacy" in favor of a "modern standard for corporate responsibility" under which companies are led for the benefit of all stakeholders—customers, employees, suppliers, communities and shareholders.[64] The new paradigm makes ever more important the role of the nominating and corporate governance committee and, relatedly, a well-functioning board of directors. For example, a

cornerstone of the new paradigm is its emphasis on active board participation in strategic planning and companies' transparent articulation of those long-term strategies.[65] Other crucial elements that the nominating and corporate governance committee should help the board to consider include: directly engaging with management on issues and concerns that affect long-term value, and developing a thoughtful and well-articulated approach to corporate governance.

As the landscape continues to evolve, the nominating and corporate governance committee will play an important role in helping the board and management stay ahead of the curve and enabling the company to navigate nuanced issues appropriately.

V. Sources of Corporate Governance Rules and Policies

The main sources of substantive corporate governance rules are state law and stock exchange listing standards. Within these parameters, a company has a fair amount of flexibility in implementing a corporate governance framework and memorializing that framework in its organizational documents and corporate governance guidelines. The SEC's rules generally focus on ensuring adequate disclosure rather than compelling any particular governance practice (although of course, requiring disclosure may in itself nudge corporate governance practices in one direction or another). Additionally, corporate governance decisions are increasingly the result of the substantial influence of proxy advisory firms, policies developed by large institutional investor groups and pressure from shareholder activists, rather than any black-letter legal requirements.

A. State Law and Governance Documents

The corporate governance framework of each company is principally defined by the laws of its state of incorporation and by its organizational documents. State corporate statutes provide some limits on how companies can structure their affairs, many of which are so ingrained that it is difficult to imagine corporate governance in any other way. For example, under Delaware law, each director of a corporation must be a natural person, regardless of what a corporation's organizational documents might say about the matter.[66] However, a significant portion of state corporate statutes simply provide default rules in the absence of any provision in a corporation's organizational documents to the contrary. Delaware in particular prides itself on its enabling statute, which provides few mandatory elements and allows a high degree of private ordering. A number of provisions in the Delaware General Corporation Law (the "DGCL") are prefaced by "unless the certificate of incorporation provides otherwise" or similar phraseology.[67] This leaves the tailoring of a particular corporate governance regime to each individual company in its organizational documents.

Some corporate governance features (*e.g.* in Delaware, classification of the board) must be effected through the company's certificate of incorporation (also known as its charter). This means that shareholder approval is required to adopt such a provision—or to eliminate or amend such a provision. Other corporate governance matters are commonly fleshed out in a company's bylaws, and boards are typically granted the authority to make, amend or repeal bylaws without shareholder approval. Shareholders generally have the right to amend, adopt or repeal bylaws as well. Other corporate governance policies, especially those that state the company's current position with respect to a governance issue but preserve flexibility to deviate from it in appropriate circumstances, are often best reserved for a company's corporate governance guidelines. These guidelines are typically adopted by the board and can be amended or supplemented at any time without shareholder approval.

B. SEC Requirements

The SEC regulates corporate governance principally by imposing disclosure requirements, although it does impose some substantive requirements, such as those defining "independence" for purposes of audit committee membership in the Sarbanes-Oxley Act of 2002

("Sarbanes-Oxley"),[68] and SEC Rule 10A-3 (*see* Section XIV.B.1 for a further discussion of these audit committee requirements). Regulation 14A and the accompanying Schedule 14A, which govern the solicitation of proxies at shareholder meetings, are the SEC's primary mechanisms for requiring corporate governance disclosures. Regulation 14A specifies what information must be presented to shareholders regarding director candidates and other matters to be brought before the shareholders and the format in which it must be presented, and requires disclosure of corporate governance matters, such as board and committee composition, director and committee member independence, attendance at and frequency of board and committee meetings and governance and related-party transaction policies, to name just a few. Rule 14a-8 also provides rules governing the inclusion and presentation of shareholder proposals in a company's proxy materials.[69]

The SEC also requires certain corporate governance disclosures under Sarbanes-Oxley, which set new or enhanced standards for public company boards and management in the aftermath of prominent corporate accounting scandals, and the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"),[70] the financial regulation passed after the financial crisis of 2008. Notably, the SEC requires shareholders to vote on compensation plans at least every three years[71] under its say-on-pay regime and also to vote on "golden parachute" payments, which are payments to an executive upon an executive's termination in connection with a change in control transaction, such as a merger.[72] Additionally, companies (except for emerging growth companies) must disclose the compensation of their named executive officers (the CEO, CFO and the three other highest-paid executive officers) in securities filings.[73]

Section 16 of the Securities Exchange Act of 1934 (the "Exchange Act")[74] also requires all directors, certain executives and shareholders who own 10 percent or more of a company's securities to report transactions in the company's securities. This provision aims to prevent insider trading by corporate insiders via promoting transparency and deterring short-swing trading through disclosure.

A Schedule 13D is required to be filed by any person that acquires more than 5% of a voting class of a company's shares, unless such person is a passive institutional investor, in order to alert the market to potential changes of control of the company. Passive institutional investors that acquire more than 5% may file a more abbreviated Schedule 13G in lieu of a Schedule 13D. These filings, particularly Schedule 13D filings, are closely monitored by companies in an effort to anticipate and respond to activism. In October 2023, the SEC adopted long-awaited amendments to Regulation 13D-G. The new rules, which took effect on February 5, 2024, modernize the beneficial ownership reporting requirements by shortening the Schedule 13D filing deadline from 10 calendar days to five business days. On February 11, 2025, the SEC published guidance clarifying the circumstances in which investors that engage with a company on certain topics can remain "passive" and file a Schedule 13G instead of a Schedule 13D.

Finally, it is worth noting that the Current Report on Form 8-K operates to notify shareholders of certain changes in a corporation's corporate governance, such as material modifications to rights of shareholders, the election and appointment or departure of directors and certain officers, compensatory arrangements with certain officers, changes in control of the company, amendments to the charter or bylaws, amendments to a company's code of ethics or

waiver of a provision of a code of ethics, results of shareholder votes and nominations of directors by shareholders.[75]

With respect to board composition, the SEC requires that all members of the audit committee be independent.[76] Under SEC rules, an audit committee member is considered independent if he or she has not: (1) accepted any consulting, advisory or other compensatory fee from the issuer, or (2) been an affiliate of the issuer or any of its subsidiaries.[77] The SEC also provides that national stock exchanges, which must ensure that listed companies have independent audit committee members, must consider the same factors in assessing the independence of compensation committee members as the SEC uses to assess audit committee member independence.[78] Although many of the SEC rules regarding corporate governance are generally "disclosure-based," the substantive rules that the SEC does impose, as well as the potential impact of disclosure-based rules on actual corporate governance practices, appear to be generally growing over time (although this trend has not been linear under all administrations).[79]

C. Stock Exchange Requirements

Both the NYSE and Nasdaq have adopted corporate governance standards that, with limited exceptions discussed below, apply to all companies listing common equity securities on the exchanges. These governance standards generally do not apply to companies listing only preferred or debt securities. The discussion in this Section V.C provides a brief summary of the corporate governance standards at both exchanges. Please *see* Annex A for a more detailed comparison.

1. Independence

The rules of the exchanges require that a listed company's board comprise a majority of independent directors.[80] The standards of both exchanges for determining director independence are discussed in Section X.C.1.

2. Committees

The stock exchanges require listed companies to have an audit committee and a compensation committee, each of which must be composed entirely of independent directors.[81] Each of these committees must have a charter vesting the committee with certain responsibilities and providing for an annual evaluation of the committee.[82] Under NYSE rules, members of the audit and compensation committees must satisfy more stringent independence criteria than other directors. Additionally, the NYSE requires that listed companies have a nominating and corporate governance committee, with a charter, composed entirely of independent directors.[83] Nasdaq does not require listed companies to have a nominations and corporate governance committee, but it does require that listed companies have a formal charter or written resolutions addressing the nominations process and that director nominees be selected by independent directors.[84]

3. Corporate Governance Guidelines and Codes of Conduct

Both stock exchanges require listed companies to adopt and disclose a code of business conduct and ethics for directors, officers and employees.[85] The required contents of the codes of

conduct for the two exchanges differ somewhat, but they generally must include standards that address honesty and ethical conduct. Companies must promptly disclose any waivers of the code for directors or executive officers. Each code of business conduct must also contain compliance standards or enforcement mechanisms. As discussed in Section I.B.1, NYSE-listed companies are also required to adopt and disclose corporate governance guidelines that must address director qualification standards, director responsibilities and other director and corporate governance matters. The Nasdaq listing standards do not require corporate governance guidelines, although many Nasdaq-listed companies choose to have corporate governance guidelines anyway.

4. Executive Sessions

The NYSE requires that non-management directors (even if not independent) meet in executive sessions without management directors or other members of management at "regularly scheduled" meetings and that independent directors meet in executive sessions without non-independent directors or members of management at least once a year.[86] Nasdaq requires that independent directors meet in executive sessions without non-independent directors or members of management,[87] with commentary to Nasdaq rules instructing that such executive sessions should occur at least twice a year, and perhaps more frequently, in conjunction with regularly scheduled board meetings.[88]

5. Shareholder Approval of Certain Matters

Both exchanges require shareholder approval in certain instances.

- Share Issuances in Transactions: Both the NYSE and Nasdaq require shareholder approval prior to the issuance of securities in connection with any transaction or series of related transactions if the common stock to be issued is or will be equal to or greater than 20 percent of the voting power or number of shares of common stock outstanding before the issuance (subject to certain exceptions).[89]

- Changes in Control: Shareholder approval is also required under the rules of both exchanges prior to an issuance that will result in a change of control of a listed company.[90]

- Insider Transactions: Under certain circumstances, shareholder approval is required by both exchanges prior to the issuance of common stock to a director, officer or substantial security holder, or any of their affiliates.[91]

- Equity Compensation: Under the rules of both exchanges, subject to certain exceptions, shareholders must be given the opportunity to vote on the establishment or material amendment of equity-compensation plans.[92]

6. Exemptions for Controlled Companies, Certain Corporate Forms and Private Issuers

Both exchanges provide exemptions from their rules to certain companies under certain circumstances. Nasdaq-listed cooperatives, registered management investment companies and controlled companies (defined as a company in which more than 50 percent of the voting power for director elections is held by an individual, group or another company) are not required to have a majority-independent board, compensation committee or independent director oversight of nominations.[93] Nasdaq also exempts limited partnerships from its general corporate governance requirements, but imposes certain partnership-specific governance requirements on such entities.[94] Similarly, NYSE-listed limited partnerships, companies in bankruptcy and controlled companies are not required to have majority-independent boards, compensation committees or nominating and corporate governance committees,[95] and the NYSE exempts registered management investment companies and certain passive issuers from most of its corporate governance requirements.[96] All of these companies are, however, subject to the remaining corporate governance standards of each exchange.

Generally, foreign private issuers listed on an exchange are permitted to follow home country practice in lieu of the exchange's corporate governance standards, with the exception of the governance standards regarding audit committees, certification of compliance, and, for Nasdaq only, the prohibition on certain alterations to common stock voting rights.[97] Foreign private issuers listed on the NYSE must disclose any significant ways in which their corporate governance practices differ from listing standards, and those listed on the Nasdaq must report each requirement that they do not follow and describe the home country practice they follow in lieu of that requirement.[98] Additionally, a Nasdaq-listed foreign private issuer that follows a home country practice in lieu of having an independent compensation committee must disclose the reasons why it elected not to have such an independent committee.[99]

7. Phase-In Exceptions

Both exchanges provide that companies in various categories may phase into corporate governance requirements. For example, both exchanges allow companies listed in conjunction with an Initial Public Offering (an "IPO"), and those ceasing to qualify as controlled companies, up to a year from the listing date or the date on which the company ceased to qualify as a controlled company, as applicable, to establish a majority-independent board.[100] Subject to certain distinctions, both exchanges also allow the companies in these two categories and companies listing upon emergence from bankruptcy to phase in the number of independent directors that serve as members of exchange-required committees: committees must comprise a majority of independent directors within 90 days and all independent directors within one year of listing or status change.[101]

8. Noncompliance

Both exchanges require that a company promptly notify them in writing after the company becomes aware of any noncompliance with the corporate governance standards.[102] The NYSE additionally requires that the CEO must certify to the NYSE each year that he or she is

not aware of any violation by the company of the NYSE corporate governance standards, qualifying the certification to the extent necessary.[103]

D. Proxy Advisory Services and Institutional Investors

Large institutional investors commonly hold stock in hundreds of companies and thus are called upon to vote at hundreds of shareholder meetings per year. While institutional investors often have corporate governance and stewardship departments to inform their voting decisions, most institutional investors deal with this volume either by outsourcing voting decisions to proxy advisory services or by using the recommendations of the proxy advisory services to guide their decisions. Proxy advisory services provide voting recommendations on topics, including director elections, say-on-pay, shareholder proposals and mergers. In addition to providing company-specific voting recommendations, proxy advisory services publish voting guidelines setting forth their policies on various issues. The two largest proxy advisory firms—ISS and Glass Lewis—enjoy an effective duopoly in the field, with over 97 percent share of the industry.[104]

Both ISS and Glass Lewis are privately owned for-profit enterprises. The U.S. private equity firm Genstar Capital completed its sale of an 80 percent stake in ISS to Deutsche Börse in February 2021.[105] Glass Lewis was acquired by private parties from the Ontario Teachers' Pension Plan Board and the Alberta Investment Management Corporation in 2021.[106]

In the last two decades, the influence of proxy advisory firms increased substantially, and their recommendations became a powerful (and often decisive) force in influencing corporate governance and voting results. This influence is partly the result of the SEC's creation in 2003 of an effective safe harbor from a 1988 Department of Labor determination that institutional investors owed their clients a fiduciary duty when voting their shares. The SEC safe harbor provided that fund managers could insulate themselves from fiduciary duty claims by, in accordance with a predetermined policy, relying upon the proxy voting recommendations of a third party.[107] The SEC staff interpretation letters that created this safe harbor were subsequently withdrawn in September 2018.[108] The influence of proxy advisory firms was also greatly increased by the move by many companies from plurality to majority voting standards beginning in 2004, as that gave more weight to their policies of recommending "withhold" votes for directors who did not implement shareholder preferences as reflected in precatory resolutions. It is generally understood that an ISS and/or Glass Lewis recommendation has a material impact on the approval rate of a shareholder proposal.[109]

In the last few years, the largest institutional money managers have invested significantly in building out their own stewardship teams, enabling them to make their own decisions that sometimes take into account the proxy advisors' recommendations but do not simply outsource or defer to them. For this reason, it is believed that the influence of the proxy advisors has begun to taper, although it is still very strong and may again increase as passive institutional investors expand their pass-through voting platforms which permit investors to vote their shares in accordance with policies issued by ISS and Glass Lewis. Both legislators and regulators have also questioned the influence of proxy advisory firms and expressed the need to regulate these firms for conflicts of interest and other issues. For example, the House of Representatives Financial Services Committee held a hearing in April 2025 titled, "Exposing the Proxy Advisory

Cartel: How ISS & Glass Lewis Influence Markets," followed by a House of Representatives Judiciary Committee hearing in June 2025 titled "The Proxy Advisor Duopoly's Anticompetitive Conduct."[110] Also in 2025, the Attorneys General of Florida, Missouri, and Texas announced investigations into ISS and Glass Lewis regarding alleged misleading representations about their consideration of ESG factors and potential consumer protection law violations.[111] In any case, in the current corporate governance environment, companies must remain cognizant of the positions of both major institutional shareholders and the proxy advisory firms and their likely reactions to corporate governance initiatives.

Voting Guidelines

Proxy advisory firms convey their recommendations through voting guidelines, typically published on an annual basis, and position papers. While proxy advisory guidelines, especially those published by ISS, have historically tended to provide a generalized recommendation for each type of proposal without regard to companies' specific circumstances, recent updates to ISS policies on a number of issues represent a welcome, more company-specific approach to corporate governance practices and reflect a move, however limited, away from one-size-fits-all policies and recommendations. Even when applying a "case-by-case" approach, proxy advisory firm methodologies tend towards "scoreboards," checklists, formulae and tabulations, which, by their nature, cannot do justice to the complexities of corporate governance at individual companies. For example, ISS's "Equity Plan Scorecard" bases recommendations with respect to equity plan proposals on a combination of factors in an analysis where positive factors may counterbalance negative factors, and vice versa.[112] While this more nuanced approach is preferable to the rigid test it replaced, any evaluations using scorecards run the risk of becoming mechanical and do not permit the appropriate exercise of judgment and flexibility to consider the situation of each particular company in this complex area.

On October 15, 2025, Glass Lewis announced that beginning in 2027, the firm would no longer publish or provide research and voting recommendations based on its benchmark policy guidelines. Instead, Glass Lewis plans to offer a suite of different policy choices for investor clients to select from, allowing them to create personalized voting frameworks that reflect their individual investment beliefs and priorities. Similarly, in October 2025, ISS introduced governance research services that do not include voting recommendations and instead provide customizable data, analysis and recommendations to its clients. Both announcements followed mounting legislative and regulatory pressure on proxy advisory and underscore the continual shift on the part of both proxy advisors and investors to move away from a one-size-fits-all approach to corporate governance.[113]

VI. Key Corporate Governance Topics

Whether periodically reviewing corporate governance policies or considering the appropriate response to a particular shareholder proposal, a nominating and corporate governance committee will benefit from a solid understanding of the fundamental building blocks of corporate governance and an ongoing effort to keep apprised of legal, economic and social changes that steer the ever-evolving thinking on corporate governance matters. By better appreciating the considerations underlying a decision to adopt—or not to adopt—a particular corporate governance feature, a nominating and corporate governance committee will be better equipped to develop and defend sound, cohesive and comprehensive corporate governance policies and procedures that enable directors and management to best perform their duties, do not unduly dampen or encourage risk-taking, promote long-term value creation and are conducive to good corporate citizenship and social responsibility.

A. Director Tenure and Board Refreshment

As discussed in further detail in Section XIII.B, the related topics of director tenure and board refreshment have remained top of mind among investors in recent years. Institutional investors typically express concern about prolonged director tenure. This sentiment has been tempered by recent global events that have demonstrated the importance of having a balance of deep institutional knowledge alongside newer perspectives on the board. According to ISS, such concerns stem primarily from investors' perception that a stale board risks becoming complacent and is more likely to suffer from a lack of independence, new perspectives and diversity.[114] Institutional investors in their proxy voting policies have also continued to focus on boards with excessive tenure and the absence of meaningful board refreshment, combined with other governance features such as a classified board that could facilitate director entrenchment.

While we believe that the composition of a board of directors should reflect a range of tenures and experiences, we do not think that a one-size-fits-all approach to board refreshment is appropriate. Rather, in deciding whether to implement measures such as a mandatory retirement age or term limits, directors should recognize that age and experience can bring wisdom, judgment, institutional knowledge and—in some cases—greater independence from management. Substantive director evaluation and renomination decisions tailored to the unique circumstances of the company will serve better than arbitrary policies.

B. Classified Boards

Until recently, shareholder proposals to remove classified boards were among the most prevalent and hard-fought governance issues. The pressure over the last decade-and-a-half to declassify boards has achieved significant results. The percentage of S&P 500 companies with a classified board has plummeted from roughly 36 percent in 2007 to just over 10 percent as of April 2025.[115] As a result of this success, shareholder proposals with regard to declassifying boards have declined sharply in recent years.

Under a classified, or staggered, board, directors are divided into classes (typically three) with only one class up for election at each annual meeting. Thus, directors on a classified board are essentially elected to multi year (typically three-year) terms. In addition to promoting board

stability and enabling directors to think on a longer time frame, a classified board provides an important structural defense against hostile takeovers. Whereas a hostile acquiror can seize control of a company board that is annually elected through a single successful proxy contest, obtaining a majority of a classified board typically requires two elections. Classified boards attract particularly great scrutiny due to the convergence of the interests of governance activists and economic activists: governance activists see classified boards as a barrier to board responsiveness, while economic activists see them as an impediment to forcing a sale or other short-term event.

Although shareholder activists see board declassification as "improving" governance arrangements, the benefits and drawbacks of classified boards are hotly contested. There is no persuasive evidence that declassifying boards enhances shareholder value over the long term, and the absence of a classified board makes it more difficult for a public company to fend off an inadequate, opportunistic takeover bid or to focus on long-term value creation. Supporting this proposition, a study by Citigroup Global Markets found that between 2001 and 2009, initial takeover bids were 28.7 percent higher for firms with a classified board in place and that classified boards contributed an additional 13.5 percent in premium in subsequent negotiations, resulting in an aggregate 42.2 percent increase in takeover premiums.[116] One example illustrates the point clearly. In late 2015, Airgas, which had successfully resisted an opportunistic hostile takeover bid from Air Products about six years earlier, agreed to be sold to Air Liquide for more than double the final Air Products offer, even before considering substantial dividends paid in the intervening years, vindicating the Airgas board's judgment. Airgas would not have been able to defend itself without a classified board, which would have cost its shareholders billions of dollars in upside value.[117] A number of academic studies have also shown that classified boards are associated with an increase in firm value (as measured by Tobin's Q or, roughly, the ratio of market value of assets to book value of assets), while declassified boards are associated with a decrease.[118] The authors concluded that there is "no support" for the view that entrenched boards decrease firm value,[119] and recommended policy changes to increase the hurdles required for a public company to effect board declassification.[120] Though there has been some pushback against these significant findings,[121] the proponents have critiqued such pushback for relying on statistically flawed and economically insignificant results.[122]

Unfortunately, this debate is now largely academic, at least for large companies, most of which now have declassified boards. Unlike a rights plan, which the board can implement quickly as the need arises, a declassified board is a defense that, once removed, cannot be reinstated whenever a takeover threat materializes. Companies that still have classified boards are likely to continue facing pressure to remove them. Nominating and governance committees faced with this issue will have to react on a case-by-case basis, but should be cautious of implementing changes with far-reaching implications that cannot be easily reversed.

C. Majority Voting

The corporate law of most states, including Delaware, provides that directors are to be elected by plurality voting, unless otherwise provided in the company's certificate of incorporation or bylaws.[123] Under this default, if the nominees endorsed in the company's proxy statement run unopposed, they are assured of election regardless of the number of votes

"against" or "withheld." Under a majority voting standard, however, a director is not elected unless he or she receives at least a majority of the votes cast.

Historically, directors of virtually all companies were elected under a plurality standard. Beginning in 2004, activists began calling for majority voting standards. Some form of majority voting is now used by around 91 percent of S&P 500 companies and is well on its way to becoming universal among large companies.[124] ISS and Glass Lewis generally advise shareholders to vote to adopt the majority voting standard.[125]

Under some state laws designed to ensure that there are always directors in place, a director who receives less than a majority of the votes cast in a majority voting election would not be elected but would continue to serve as a "holdover" director until his or her successor is elected and qualified. Many companies with majority voting address the matter of holdover directors by establishing a resignation policy for directors receiving less than a majority vote. In some cases, these policies call for directors to deliver resignation letters in advance, which are triggered automatically if a director receives less than a majority vote (thereby avoiding the need to attempt to compel a sitting director to tender a resignation after failing to receive the requisite vote). An example of such a resignation policy is attached as Annex B. The unconflicted members of the board (or perhaps of the nominating and corporate governance committee) would then deliberate over whether or not to accept the director's resignation. Delaware courts have confirmed that a board of directors is not required to accept the resignation of a director for failure to obtain majority support.[126] However, nominating and corporate governance committee members should understand that shareholders likely would not appreciate having a director they had rejected reinstated, absent special circumstances. (Indeed, activists have coined a colorful but unflattering description of such holdover directors, who are sometimes called "zombie directors.")

A company that adopts majority voting should draft its bylaws carefully (so that abstentions do not count as votes "against" the incumbent director) and, where possible, provide that once the determination is made that an election is "contested," the plurality standard remains in place, even if there is no competing slate at the time of the shareholders' meeting. The perils of not doing so were demonstrated in a proxy contest in 2008, in which a dissident dropped its proxy contest and contended that the vote standard therefore reverted to majority, enabling them to launch a "withhold" vote campaign intended to result in directors failing to be elected.[127]

D. Shareholder Rights Plans

Shareholder rights plans, popularly known as "poison pills," became highly relevant again in 2020, due to the dramatic declines in stock prices across the board as a result of the Covid-19 pandemic. More rights plans were adopted in March and the first two weeks of April 2020 than in the whole of 2019 or 2018. However, the trend has since reversed, with the adoption of poison pills declining from 106 in 2020 to 55 in 2024. A shareholder rights plan is a mechanism that can be employed by board action that, while in place, effectively deters individuals or groups from acquiring more than a specified percentage of the company's stock. Rights plans do not interfere with negotiated transactions and do not preclude unsolicited takeover offers. Instead, they combat abusive takeover tactics by preventing an acquiror from gaining a controlling stake in a company without negotiating with the company's board to

provide an adequate premium. Also, if a tender or exchange offer is launched, the rights plan will give the board and the shareholders time to properly evaluate the bid and potentially to pursue more attractive options that might not otherwise be available under the time pressure of a tender offer. Despite these salutary effects, shareholder rights plans have been the subject of intense debate since they were first used in the 1980s. Critics contend that shareholder rights plans discourage deal activity and entrench boards by limiting shareholders' ability to approve the sale of the company.

Because a rights plan (especially when coupled with a classified board) is the single most effective defense against a hostile takeover bid, until about 15 years ago most large companies had standing rights plans in place, typically with 10-year terms. In response to sustained criticism from activists that rights plans discourage deal activity and entrench boards by limiting shareholders' ability to approve a sale, most companies have allowed their rights plans to expire, preferring to hold in reserve the ability to adopt a rights plan in response to a takeover bid if one is made (referred to as having a rights plan "on the shelf"). Indeed, the percentage of S&P 500 companies with a rights plan in place has decreased from about 50 percent in 2005 to roughly one percent as of April 2025.[128]

Under pressure from activists, some companies have agreed not to implement a rights plan absent shareholder approval or ratification within some period of time, most commonly one year. Activist institutional investors, such as TIAA-CREF, have sponsored precatory shareholder proposals to adopt a policy requiring that rights plans be submitted for shareholder approval. Due, in part, to proxy advisory voting guidelines, such proposals routinely garner wide support, even at companies that do not have a rights plan in place. For those companies that have not adopted a policy that restricts the board's ability to adopt a rights plan, they retain the ability to maintain an "on-the-shelf" rights plan that can be adopted quickly by the board should a specific threat arise. Unlike some other takeover defenses that, once removed, cannot practically be regained, such as a classified board, an "on-the-shelf" rights plan provides a company the flexibility to respond to changing circumstances. A board may therefore conclude that it would be prudent to avoid the scrutiny that accompanies adopting a rights plan by waiting until it is needed to fend off a particular threat. A board should be wary, however, of policies or situations that would curtail its ability to employ this crucial component of effective takeover defense.

E. Advance Notice Bylaws

The advance notice bylaw is an important corporate housekeeping tool with the primary purpose of helping to ensure orderly business at shareholder meetings. It requires a shareholder to submit "advance notice" of his or her intention to introduce business at a shareholder meeting, such as the nomination of director candidates or the introduction of a shareholder proposal. An advance notice bylaw serves three significant functions: first, to inform a company of nominations or shareholder business to be brought at the meeting an adequate time in advance of the meeting; second, to provide an opportunity for all shareholders to be fully informed of such matters an adequate time in advance of the meeting; and third, to enable a company's board to make informed recommendations or present alternatives to shareholders regarding such matters. As a result, such advance notice bylaws typically require not only notice of nominations or shareholder business but also the information necessary to determine that a shareholder-

nominated director candidate is qualified to be elected, as well as other important information, such as records demonstrating that the person introducing business is actually a shareholder of the company. A common formulation of the time frame in which proposals or nominations must be submitted is no later than 90 days and no earlier than 120 days prior to the anniversary of the prior year's annual meeting. However, some companies provide for different windows.

Although the validity of advance notice bylaws has been long-established in many court decisions, such provisions are not immune from legal challenge. For example, recent decisions by the Delaware Court of Chancery in *Paragon Technologies, Inc.* v. *Cryan* and *Kellner* v. *AIM Immunotech Inc.* have provided further guidance on the validity of advance notice bylaws. In *Paragon*, the Court questioned the reasonableness of a requirement to disclose "events, occurrences, and/or circumstances involving or relating to the Proposed Nominee that could impact, impede, and/or delay" a candidate's ability to obtain security clearance, while also taking issue at evidence that the board continued to find deficiencies in the nomination notice, some of which the Court found to be "suspect."[129] In *Kellner*, the Chancery Court initially invalidated four provisions in an advance notice bylaw because they were adopted on a "cloudy day" (*i.e.*, during an ongoing proxy contest), which demands a higher level of scrutiny.[130] On appeal, the Delaware Supreme Court clarified that there are two standards of review potentially applicable to adoption of advance notice bylaws: (i) review of a facial challenge, in which bylaws are presumed to be valid unless a plaintiff can show "that the bylaw cannot operate lawfully under any set of circumstances,"[131] and (ii) an enhanced scrutiny standard to be applied when the bylaws are adopted, amended or enforced on a "cloudy day."[132] The cloudy-day standard, as established in *Coster v. UIP Companies, Inc.*, requires that the company show that it (a) "faced a threat to an important corporate interest" and (b) responded in a way that was not "preclusive or coercive to the stockholder franchise" and "reasonable in relation to the threat posted."[133] The Court determined that only one provision, which was a "1,099-word single sentence" and "indecipherable," was facially invalid; the other three were facially valid, but based upon the facts, were adopted by the board for an improper purpose. Nevertheless, the Court upheld the company's rejection of the dissident nomination notice for failing to comply with other advance notice bylaws.[134]

The upshot is that Delaware courts will generally uphold the right of a company responding to a shareholder proposal or nomination to insist on strict adherence to unambiguously stated requirements in advance notice bylaws that reasonably serve to provide the company and shareholders relevant information and were adopted on a clear day.

Accordingly, nominating and corporate governance committee members should understand and assess whether their companies' advance notice bylaws properly address the risk posed by the nominee placeholder tactic and other similar maneuvers, while also making sure that such bylaws are sensibly tailored and do not impose overly onerous requirements on shareholder nominees or impede the stockholder franchise. Well-drafted advance notice bylaws ensure that the board has all of the information it needs to make an informed recommendation to stockholders, and that investors are apprised of the eligibility and suitability of dissident candidates, benefiting the company and all shareholders.

F. Separation of Chair and CEO Roles

As in many other corporate governance areas, the prevalence of the same individual serving as both Chair and CEO has seen a dramatic change in the last decade. Nearly 60 percent of S&P 500 boards now separate the Chair and CEO roles, compared with only 40 percent in 2010. This trend has been driven, in large part, by corporate governance activists who consider separation of the roles to be "best practice." Much more important than the form of board structure, however, is whether it works in practice for a particular company.

The traditional model of a combined Chair and CEO generally offers a number of advantages. The CEO's thorough familiarity with the company, expertise in the industry and leadership skills may uniquely position him or her to have the credibility with constituencies that is essential to effectively chair the board. The CEO's leadership as Chair may also help avoid the balkanization that may arise if directors split between those aligning with the CEO and those aligning with the Chair. Further, combining the roles of CEO and Chair avoids confusion over the scope of the Chair's and CEO's respective responsibilities, thus potentially enhancing CEO accountability. A CEO's service as Chair may also foster effective communication between management and the board.

Advocates for separation of the Chair and CEO positions typically contend that separation strengthens the board's independence and ability to oversee and evaluate management—the CEO in particular—by reducing the CEO's control over the board agenda. Another common rationale is that separating the roles will allow for greater focus and an effective division of labor, with the CEO concentrating on running the company's business and the Chair on leading the board. However, the validity of these arguments will vary depending on a company's specific circumstances and the dynamic of its leadership structure. Although the SEC requires a company to disclose its board leadership structure and, if the CEO and Chair roles are combined, whether the company has a lead independent director and his or her specific role,[135] it should be noted that these are simply disclosure requirements. They are not a mandate for separation of the CEO and Chair roles, and they are not an endorsement by the SEC of activists' view that separation of the roles is in all cases a "best practice."

A company choosing to separate the Chair and CEO positions should ensure that the respective roles of the two positions are clearly delineated to avoid duplication or neglect of certain responsibilities or damage to the cohesion of the board. Because of the risks to board cohesion arising from separating the positions if they are currently held by the same person, succession is a common way for a Chair/CEO split to be implemented. A split may be desirable if the incoming CEO is less familiar with the board and the company than was his or her predecessor. Occasionally, companies that separate the Chair and CEO role during a CEO transitional period will later recombine the roles once the CEO has gained experience with the company.

A company with a combined Chair and CEO should have a lead independent director (also sometimes called a presiding director). From a board-effectiveness perspective, it is not necessary to separate the roles of Chair and CEO so long as there is an effective lead independent director with robust responsibilities in place. The responsibilities of a lead director

should be clearly delineated and will include many of the responsibilities that would otherwise be assumed by an independent Chair.

G. Ability of Shareholders to Act by Written Consent

Under Delaware law, unless a corporation's charter provides otherwise, any action that may be taken by shareholders at a meeting may instead be taken by written consent at the same approval threshold as would be required to take such action at a meeting of shareholders.[136] Approximately 70 percent of S&P 500 companies have charter provisions prohibiting action by written consent or permit action by written consent only if such consent is unanimous (which, for broadly held public companies, is effectively equivalent to a prohibition).[137]

For a company that allows shareholders to call special meetings in between annual meetings, action by written consent offers no benefit. What it does do is render a company particularly vulnerable to a hostile takeover bid. A raider's ability to conduct a consent solicitation and effectively "ambush" a target with little or no warning may limit a target company's ability to mount an effective defense or fully explore alternative transactions. Naturally, the smaller the market capitalization of the company, the greater the threat becomes.

Unfortunately for companies today, it is unlikely that shareholders would support a charter amendment to prohibit action by written consent, and many companies are being pressured by their shareholders and the proxy advisors to give up that protection if they have it. A company with a charter provision permitting shareholders to act by written consent may limit its vulnerability by adopting a bylaw that enables the board to set the record date for a shareholder's solicitation of written consents.[138] To best position itself if this approach is challenged, a company adopting such a bylaw should build as strong a record as possible as to why the restriction is necessary and appropriate.

H. Ability of Shareholders to Call a Special Meeting

The right to call special shareholder meetings in between annual meetings is another activist investor hot button issue. From the company's perspective, it is better to have a predictable window of vulnerability around the annual meeting. The right to call special meetings—particularly when combined with a declassified board—has the potential to seriously inhibit the ability of a board to defend against an opportunistic takeover bid that undervalues the company. It also has the potential to be disruptive to the operation of the company's business if shareholders call special meetings for non-urgent issues, since holding a shareholder meeting requires the board and management's time and attention. Shareholder rights activists, however, consider the right to call special meetings an important element of "shareholder democracy" because, if shareholders are permitted to call a special meeting, they do not have to wait for an annual meeting to seek to effect change, but instead can act throughout the year, including to submit shareholder proposals or seek removal of directors. Under activist pressure, roughly 78 percent of S&P 500 companies now permit shareholders to call special meetings in between annual meetings.[139] Among the companies that permit shareholders to call special meetings, the minimum threshold required to call a special meeting varies. Many shareholder rights activists consider 10 percent the gold standard and will initiate shareholder proposals even at companies that already permit shareholders to call special meetings at higher percentages.

I. Removal of Directors

As a general rule, directors may be removed, with or without cause, by the holders of at least a majority of the shares entitled to vote.[140] As a notable exception, Delaware corporate law provides that, unless the charter provides otherwise, directors of a corporation with a classified board may be removed only for cause.[141] Following a 2015 Delaware case confirming that corporations without classified boards or cumulative voting could not restrict stockholders' ability to remove directors without cause,[142] the Delaware Court of Chancery ruled that bylaws requiring supermajority stockholder approval for the removal of directors are invalid.[143] Neither case, however, spoke directly to the question of supermajority removal provisions in charters, which have a much stronger basis under the Delaware statute.

Indeed, some companies' charters still have supermajority vote requirements to remove directors without cause. However, these supermajority provisions are generally disfavored by shareholder activists and other institutional investor groups. Supermajority vote requirements have themselves often been the subject of precatory proposals and tend to receive substantial shareholder support, leading to their elimination to avoid a vote against recommendation by ISS for a director nominee, given ISS's definition of any supermajority vote requirement as a "problematic provision" when evaluating board accountability and oversight.[144] As the number of companies with classified boards and supermajority vote requirements decreases, directors become more vulnerable to removal at any time, and companies become more vulnerable to takeovers.

J. Exclusive Forum Provisions in Organizational Documents

The volume of duplicative, costly and often frivolous shareholder litigation that was being brought simultaneously in multiple courts in multiple states led many companies to adopt an "exclusive forum" provision. These provisions, which can be included either in a company's charter or bylaws, typically designate specific courts in the state of incorporation (Delaware for many public companies) to serve as the exclusive venues for particular types of shareholder and intra-corporate litigation, most commonly: (1) derivative lawsuits; (2) actions asserting breaches of fiduciary duty; (3) actions arising pursuant to any provision of the corporate statute of the state of jurisdiction (the DGCL for many public companies); and (4) actions asserting claims governed by the internal affairs doctrine. These provisions serve multiple objectives, including preventing the waste that inevitably occurs when duplicative lawsuits asserting the same claims on behalf of the same constituencies seeking the same relief are commenced at the same time by multiple shareholders in multiple courts and ensuring that fiduciary duty and internal affairs claims are adjudicated by the courts most familiar with the underlying corporate law and capable of authoritatively interpreting the law. These provisions also allow companies to better plan and manage the litigation landscape by imposing order and consistency before litigation begins.

K. The Universal Proxy and Proxy Access

In November 2021, the SEC adopted rules (first proposed in 2016) requiring "universal" proxy cards in contested director elections for shareholder meetings taking place after August 31, 2022.[145] Voting shareholders now receive a single "universal" proxy card presenting both the company's and the dissident's nominees, thereby enabling shareholders to "mix and match" from

the two (or possibly more) slates, in contrast to the former proxy rules, under which shareholders voting by proxy received separate sets of proxy cards and could only vote for either the company's or the dissident's slate.[146]

The universal proxy has reduced the relevance of "proxy access," which is the term (or rather the slogan) that stood for the right of shareholders to put their own director candidates on the company's proxy card and in the company's proxy statement, rather than having to use their own proxy card and statement. Proxy access was a fertile area for activism, discussion, rule-making and litigation over the past two decades.[147] Pressure to adopt proxy access prompted many companies to adopt the practice voluntarily or after some outside pressure, notably from the Office of the New York City Comptroller's Boardroom Accountability Project. Currently, approximately 84 percent of S&P 500 companies have some form of proxy access bylaw.[148] In light of the new universal proxy rules, the proxy access bylaws will likely remain relatively unused in practice, as the universal proxy provides a duplicate path for ensuring that shareholders may vote for dissident nominees on the company's proxy card and the most prolific activists are sufficiently well-capitalized to bear the expenses of filing their own proxy and soliciting holders. Proxy access bylaws' main remaining advantage ——if only theoretically — is to enable relatively less capitalized proponents to avoid proxy-related expenses, as they do not need to file a proxy statement nor engage in any holder solicitation.

That said, the rule change has not been transformational in all regards. Whereas many anticipated that the universal proxy would precipitously reduce dissidents' cost of running a campaign, the observed trends thus far demonstrate otherwise. The universal proxy did not reduce the cost to run a dissident campaign, as activists still prefer to run full-fledged campaigns, including sending their own proxy material to shareholders.[149] Further, while the universal proxy might have improved the odds for a well-positioned dissident nominee, it has not materially improved overall campaign success for activists.

VII. Shareholder Proposals

Given its corporate governance expertise and familiarity with the company's corporate governance rules and policies, the nominating and corporate governance committee is often called upon to consider the appropriate responses to shareholder proposals. In fulfilling this function, the nominating and corporate governance committee must not only understand the substance of the specific proposal but also the procedural and technical requirements applicable to shareholder proposals, the consequences of proxy advisory voting policies and the prevailing trends in shareholder sentiment.

A. Shareholder Proposals Under Federal Law

Under SEC Rule 14a-8, shareholder proposals must be included in a company's proxy statement and submitted to a shareholder vote unless they fail to meet eligibility and procedural requirements of Rule 14a-8 or the proposal falls within one of 13 subject matter exclusions under the rule. If a company intends to exclude a shareholder proposal under Rule 14a-8, the company must submit its reasons for doing so to the SEC.

1. Eligibility and Procedural Requirements

To be eligible to submit a proposal, a shareholder must have continuously held at least $2,000 in market value, or one percent of the company's securities entitled to vote (under pre-amendment Rule 14a-8) for at least one year at the time of the proposal and must continue to hold those securities through the meeting date. A proposal must not exceed 500 words, and each shareholder may submit only one proposal per meeting. Also, a proposal may be excluded if in the past two calendar years the shareholder submitted a proposal but failed to appear and present such proposal at a meeting or failed to maintain the required stock ownership through the date of a meeting. Rule 14a-8(b) provides that a shareholder can satisfy any of three alternative thresholds to be eligible to submit a proposal: (i) continuous ownership of at least $2,000 of the company's securities for at least three years, (ii) continuous ownership of at least $15,000 of the company's securities for at least two years, or (iii) continuous ownership of at least $25,000 of the company's securities for at least one year.[150] Rule 14a-8 also imposes notice requirements. For a regularly scheduled annual meeting, a proposal must be submitted at least 120 calendar days before the date on which the company released its proxy statement for the previous year's annual meeting. However, if the company did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting, then the deadline is a reasonable time before the company begins to print and send its proxy materials. Likewise, for a meeting other than a regularly scheduled annual meeting, the deadline is a reasonable time before the company begins to print and send its proxy materials. Very little guidance or precedent is available to clarify the meaning of "reasonable time" in this context.

2. Substantive Requirements

In addition to eligibility and procedural requirements, Rule 14a-8 provides 13 substantive bases for exclusion:

(1) *Improper under state law*: If the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization;

(2) *Violation of law*: If the proposal would, if implemented, cause the company to violate any state, federal or foreign law to which it is subject;

(3) *Violation of proxy rules*: If the proposal or supporting statement is contrary to any of the SEC's proxy rules, including the rule prohibiting materially false or misleading statements in proxy soliciting materials;

(4) *Personal grievance; special interest*: If the proposal relates to the redress of a personal claim or grievance against the company or any other person, or if it is designed to result in a benefit to the submitting shareholder, or to further a personal interest, which is not shared by the other shareholders at large;

(5) *Relevance*: If the proposal relates to operations that account for less than five percent of the company's total assets at the end of its most recent fiscal year, and for less than five percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business;

(6) *Absence of power/authority*: If the company would lack the power or authority to implement the proposal;

(7) *Management functions*: If the proposal deals with a matter relating to the company's ordinary business operations;

(8) *Director elections*: If the proposal: (i) would disqualify a nominee who is standing for election; (ii) would remove a director from office before his or her term expired; (iii) questions the competence, business judgment or character of one or more nominees or directors; (iv) seeks to include a specific individual in the company's proxy materials for election to the board of directors; or (v) otherwise could affect the outcome of the upcoming election of directors;

(9) *Conflicts with company's proposal*: If the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting (although as discussed below, the SEC is currently reviewing its position on this basis for exclusion);

(10) *Substantially implemented*: If the company has already substantially implemented the proposal;

(11) *Duplication*: If the proposal substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the company's proxy materials for the same meeting;

(12) *Resubmissions*: If the proposal deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials within the preceding five calendar years, a company may exclude it from its proxy materials for any meeting held within three calendar years of the last time it was included if the proposal received: (i) less than five percent of the vote if proposed once within the preceding five calendar years; (ii) less than 15 percent of the vote on its last submission to shareholders if proposed twice previously within the preceding five calendar years; or (iii) less than 25 percent of the vote on its last submission to shareholders if proposed three times or more previously within the preceding five calendar years;[151] and

(13) *Specific amount of dividends*: If the proposal relates to specific amounts of cash or stock dividends.

3. Curable and Non-Curable Deficiencies

A deficiency may either be curable or non-curable. For example, an untimely submission is not curable because the deadline has passed, whereas an overly wordy proposal is curable through revision and resubmission. Similarly, a proposal that is improper under state law because it mandates a particular action may be cured by reformulating it as a precatory proposal. If a deficiency is curable, a company is required to notify the proponent within 14 calendar days of receiving the proposal of any procedural or eligibility deficiencies, as well as of the time frame for responding. The proponent's response must be postmarked no later than 14 days from the date of receipt of the company's notification. If a deficiency is non-curable, a company need not provide the proponent notice.

4. No-Action Requests

If a company wishes to exclude a proposal from its proxy materials, it must seek a no-action letter by filing its reasons with the SEC no later than 80 calendar days before it files its definitive proxy statement and form of proxy, although this requirement may be waived for good cause. No-action letters issued by the SEC in response to these requests provide useful guidance both to shareholders submitting proposals and to nominating and corporate governance committees in determining their response to shareholder proposals.

On November 17, 2025, the SEC Staff announced that, for the proxy season that runs from October 1, 2025, through September 30, 2026, it will not provide a substantive response to no-action requests from companies seeking to exclude proposals from their definitive proxy materials under Rule 14a-8, other than no-action requests related to Rule 14a-8(i)(1). Companies

that intend to exclude a proposal from their proxy materials must notify the SEC and proponents no later than 80 calendar days before filing a definitive proxy statement. The notification requirement is informational only, and no response from the SEC Staff is required to exclude a proposal.[152]

5. Including Proposal in Proxy Materials

A company may include in its proxy materials a statement of reasons why it believes that shareholders should vote against a proposal. The company's response or "opposition statement" is not subject to the 500-word limit for shareholder proposals. The company must provide a copy of this statement to the proponent no later than 30 calendar days before it files definitive copies of its proxy statement and form of proxy, or, if the SEC's no-action response requires the proponent to make revisions to the proposal as a condition of its inclusion, the company must provide the proponent with a copy of its opposition statements no later than five calendar days after the company receives a copy of the revised proposal.

B. Responding to Shareholder Proposals

The appropriate response to receipt of a proposal will vary depending on the facts and circumstances. If a Rule 14a-8 shareholder proposal does not comply with certain procedural and substantive requirements, it may be excludable under SEC rules. If a state law (that is, a non-Rule 14a-8) proposal does not comply with the company's bylaws, then it generally may be excluded under the bylaws from being raised at the meeting. In other cases, the company may engage in a dialogue with the shareholder to find a mutually acceptable compromise. In still other cases, it may make sense to implement the proposal, or to formulate an alternative proposal that will achieve largely the same effect. In responding to voted-upon shareholder proposals, boards should be cognizant that their actions will likely be closely monitored by proxy advisory services and activist investors. A board that declines to implement a broadly supported shareholder proposal may find itself subject to scrutiny and perhaps even election challenges or withhold-the-vote campaigns. Increasingly in these situations, proxy advisory services are recommending "no" votes for members of the nominating and corporate governance committee. While directors cannot be dismissive of the influence of proxy advisory services and large shareholders, directors also should not blindly succumb to their mandates. Care should be taken to consider shareholder concerns and articulate the board's reasoning, but ultimately corporate governance is a core function of the board, and directors must bear in mind that they are best positioned to select the most appropriate policies for the company.

1. Deciding whether to Implement a Precatory Shareholder Proposal

Neither federal nor state law imposes any legal obligation on the board to act upon precatory shareholder proposals that receive majority support. To the contrary, it is the board's responsibility to carefully evaluate such proposals and implement them only if it believes doing so is in the best interests of the company. Provided that the board has deliberated with care and acted to further the company's best interests, any determination should be protected by the deferential business judgment rule in most courts, including those in Delaware.

Although the board's decision not to implement a shareholder proposal will not be vulnerable to legal challenge, there may be other consequences. A board that declines to implement a shareholder proposal that garnered substantial support may find itself subject to criticism and perhaps even election challenges or withhold-the-vote campaigns from proxy advisory services or institutional investors. This can be particularly significant if the company's directors are elected by majority voting (as most directors now are).

2. Proxy Advisory Policies Regarding Response to Shareholder Proposals

ISS recommends voting on a case-by-case basis on individual directors, committee members or the entire board if the board failed to act on a shareholder proposal that received the support of a majority of votes cast the previous year.[153] Among the factors ISS will consider are the subject matter and level of support of the proposal, the actions taken by the board in response and its disclosed engagement with shareholders after the vote and the rationale provided in the company's proxy statement for the level of implementation.[154] Glass Lewis indicates that "clear action is warranted" when a shareholder proposal receives support from a majority of votes cast (excluding abstentions and broker non-votes).[155] This may include "fully implementing the request of the shareholder proposal and/or engaging with shareholders on the issue and providing sufficient disclosures to address shareholder concerns."[156] These ISS and Glass Lewis positions are more moderate than ISS's former position that it would automatically recommend that shareholders withhold votes from directors who declined to implement expressed shareholder desires. ISS's withhold policy, coupled with the shift to majority voting, were strong contributors to the erosion of takeover protections, such as shareholder rights plans and classified boards, over the past decade.

VIII. Shareholder Activism and Proxy Contests

Shareholder activism continues to be a key area of concern for most companies. Shareholder activism can be broadly separated into two categories. The first is corporate governance-related activism, which focuses on issues such as board structure, executive compensation, and takeover defenses. The second is economically motivated activism, which seeks to alter the strategic direction of the company—typically with the intent of causing a near-term event, such as prompting a sale of part or all of the company or the return of capital to shareholders. In addition, there continue to be a significant number of short activism attacks, in which an activist attempts to profit by taking a short position in a company (that is, betting that its stock price will fall) and then actively trying to drive its stock price down by publicizing perceived flaws in the company, such as accounting questions or allegations of fraudulent behavior.[157] Short activist attacks are typically conducted by firms specializing in short activism, but large activist funds have also made short attacks.[158] Activists may also leverage concerns regarding environmental and social matters to drive a wedge between the company and its institutional investors.

Although they are very different, the two types of activism are mutually supportive and sometimes used in tandem. Corporate governance shifts serve as leverage to force economic or strategic changes, and a battle with economic activists may leave a company more vulnerable to corporate governance activism. Additionally, economic activists often cloak themselves with a corporate governance platform in hopes of gaining the support of proxy advisory services and institutional investors. Economic activists will often advocate for the replacement of directors or senior managers, both as leverage to settle proxy contests in favor of their economic agendas and as a strategy to influence board decisions through board representation after a proxy fight is completed. Over the last few years, companies have been under increased pressure from activist investors to return "excess" capital to shareholders, put into place new capital allocation plans, sell or spin off assets, increase merger consideration in an upcoming sale, replace executives and/or directors, and reform compensation structures, among other actions.

The extent to which activist pressures will continue to influence companies is likely to depend, to some extent, on macroeconomic market trends. In recent years, some of the largest and most important institutional investors have encouraged companies to resist short-term activism and instead to focus on engagement with their long-term shareholders to enlist their support for the company's long-term strategy because, as one investor noted, "index investors are the ultimate long-term investors."[159] It is likely, however, that activists will remain a key force driving both the governance "best practices" and the economic strategies of public companies.

The main tool activists use to press their agendas at companies is to run, or to threaten to run, proxy fights. In a proxy contest, a shareholder solicits the proxies of other shareholders to support a matter up for shareholder vote in opposition to company management and the board. Most proxy fights concern the election of directors, but a dissident can also contest other issues, such as governance changes or a precatory proposal to sell or break up the company. Proxy fights also often accompany hostile takeover bids, as the raider needs to replace the board to eliminate a shareholder rights plan, or poison pill, to complete the acquisition. A proxy fight that

is part of a takeover bid is not typically handled by the nominating and corporate governance committee, but instead by the full board. The nominating and corporate governance committee may, however, play a significant role in a stand-alone proxy fight (such as considering the qualifications of the dissident's candidates so that it can make a recommendation to the full board).

Because the aim of a proxy contest is typically to replace a company's leadership and fundamentally alter the company's direction, the stakes are very high. A dissident may nominate a full slate, in which it proposes a candidate for each board seat, or a partial slate (a "short slate"), in which it nominates fewer candidates than there are available board seats, often stopping short of seeking to take control of the board. A dissident may run a partial slate because it has concluded that it could not garner support to replace the entire board or seize control, but may be able to elect a minority of directors to act as a catalyst for change in the boardroom. Under the universal proxy card rules, discussed in Section VI.K, both dissident and company nominees will appear on all proxy cards.

Although they play an important role in corporate governance and are in some cases justified, proxy contests are expensive and distracting. All companies should have state-of-the-art advance notice bylaws to limit their period of vulnerability and improve predictability.[160] In addition to establishing the time period in which a shareholder may submit nominations or other business, the bylaws may also specify reasonable qualification requirements and solicit the disclosure of important information (such as information about potential conflicts) in a director nomination questionnaire.

Depending on the issue at stake, a proxy fight may well command the attention of the board and the highest echelons of management. It is most important that a company facing a proxy fight have a qualified and experienced team of advisors, including lawyers, bankers, public relations and investor relations professionals and proxy solicitors. Proxy fights involve many strategic decisions in a fast-changing environment. They can also be emotionally draining, given the high stakes and the fact that some shareholder activists specialize in personal attacks. A company faced with a proxy contest may wish to consider settling prior to the actual vote. A settlement may require considerable concessions from both the company and proponent, but may also offer a better alternative to pursuing the fight all the way to the vote. Most campaigns in 2024 ended with announced settlements with activist hedge funds, and only a handful "went the distance" all the way to the annual meeting.

There are many negotiable elements that may be part of a settlement. A company may agree to expand its board size and to support some or all of the proponent's nominees for election at the annual meeting or to increase the number of independent board members. A proponent who is running a slate after having expressed the desire for economic changes may agree to withdraw the slate in exchange for the implementation of these economic changes (or a promise to consider them). A company may, in turn, require that the proponent agree to a "standstill" provision that prohibits the proponent from engaging in proxy contests, submitting proposals or proposing various transactions, such as additional stock purchases or tender offers, for a specified period of time. In evaluating whether to settle or fight in a given proxy contest, a company may consider the actual costs and distractions of conducting a protracted contest against the likelihood of success, as well as the ability of the existing members of a company's

management and directors to productively engage with the dissident's proposed nominees. A company may also evaluate the likely terms or parameters of a potential settlement and the impact on the company's ongoing business of engaging in an extended fight.[161]

IX. Shareholder Engagement

Among the many changes the corporate governance landscape has seen in recent years, one of the most fundamental is companies', and particularly directors', relations with their shareholders. In addition to the other escalating demands of board service, directors are increasingly called upon—and shareholders increasingly expect directors—to meet with shareholders on corporate governance and other matters. Shareholder engagement has grown increasingly important as institutionalization of share ownership has increased. Today, retail shareholders account for a minority of the float of most public companies and, of those shares they own, they vote only a small percentage of them. By contrast, the majority of public company stock is in the hands of institutional investors, who are themselves intermediaries representing the interests of the ultimate beneficial owners, and whose voting participation rate was 78 to 85 percent from 2020 to 2024 (as compared to 20 to 31 percent for retail investors over the same time period).[162] In recognition of the relatively small number of institutional investors that together control U.S. public companies, the new paradigm highlights the critical need for collaborative and ongoing interaction between companies and investors toward a shared goal of sustainable long-term value creation.

While a director's primary focus must remain on partnering with and overseeing management to enhance the long-term value of the company, the board must adjust to this new corporate governance landscape and be sensitive to shareholder demands. Shareholder concerns should be listened to and addressed in a constructive manner, and the nominating and corporate governance committee should ensure that the company maintains a shareholder relations program that clearly articulates the reasons for the company's strategies and governance policies and engenders support from the company's major shareholders. Ordinarily, management should serve as the primary point of contact for shareholder outreach. However, the nominating and corporate governance committee may sometimes find it appropriate and beneficial for this outreach to include direct communication between directors and shareholders, and it is becoming increasingly common for non-executive board members to engage with investors.

PART THREE:

THE "NOMINATING" FUNCTION OF THE NOMINATING AND CORPORATE GOVERNANCE COMMITTEE

X. Building an Effective Board

Traditionally, identification and recommendation of board candidates constituted the primary role of the nominating committee. Although, as discussed, this committee has now assumed a much greater role in formulating appropriate governance mechanisms and policies, its role in populating the board is still a core and vitally important function. Before the nominating and corporate governance committee undertakes the work of identifying individual director candidates or formulating specific corporate governance policies, it should first have a strong understanding of the role of the board of directors.

A. The Role and Responsibilities of the Board of Directors

1. The Dual Role of the Board

The board of directors serves as both a monitor and a partner of the management team it selects to run the day-to-day affairs of the company. To be effective, a board must find the right balance between its monitoring and advising functions; and between engaging in a "hands-on" approach to oversight and giving management the latitude necessary to operate the business. To properly oversee management, directors must maintain a thorough understanding of the company by asking the right questions and cultivating dialogue, transparency and robust information-sharing between the board and management. At the same time, the board must take care that this oversight does not encroach into areas better reserved for the company's management.

While boards have always played the dual role of monitor and partner, increased political and regulatory pressure in recent years for enhanced risk management together with an ongoing shift towards a more shareholder-centric model of corporate governance has tilted the balance in favor of monitoring. Specifically, many companies have reacted to those changes by more heavily emphasizing the board's monitoring function at the expense of the board's equally important advisory role. Although the board must diligently oversee management and be prepared to step in when necessary, most often a company is best served when directors and management work together to set and achieve the company's goals. So long as directors exercise their independent judgment, it is not only perfectly appropriate for directors and management to develop relationships of mutual trust and friendship, it is vital. Such relationships enable management to draw on the insights and judgment of directors and facilitate the board's oversight and partnership functions by fostering greater communication, thereby allowing the board to provide more meaningful input into key decisions. The need for a strong working relationship between the board and management is particularly important in the context of risk management where boards will need to lean on management to provide timely updates, share relevant expertise, gather data, solicit stakeholder input, execute on long-term strategies, track progress and performance and lead engagement and disclosure efforts.

2. Tone at the Top

Setting the right tone at the top is one of the most critical functions of an effective board. The board's culture and priorities, if properly instilled and communicated, will ripple through the company and its interactions with its various constituencies. The board should work with senior management to cultivate a corporate culture of integrity, compliance and professionalism.

Transparency and communication are key to the board's ability to set the right tone at the top. Even the most involved boards will find that they are unable to micromanage conformance to the company's standards. Rather, the board should focus on setting the right tone and ensuring that monitoring programs are in place and regularly re-evaluated. The company's code of conduct and ethics should not be a mere formality; the code must be an ethos that is ingrained in the company's strategy and operations. As the unprecedented challenges resulting from the Covid-19 pandemic have shown, it is vital for the board to set the right tone during times of crisis, including an emphasis on the health and well-being of employees and all other stakeholders, a diligent focus on addressing the risks facing the company, and (hopefully, assuming warranted) a resolute confidence that the challenges to the enterprise arising from the crisis will be overcome.

3. Risk Management

In addition to its many other corrosive effects, a failure to instill the right corporate culture creates the risk of serious reputational, financial, regulatory and/or legal consequences. This has been underscored in recent years. Disasters and crises such as the Covid-19 pandemic and the last financial crisis have resulted in tens of billions of dollars in liabilities and brought an unprecedentedly bright spotlight on the board's role in overseeing risk management.[163] Furthermore, examples of executive misconduct, more serious illegal behavior and shortcomings in corporate culture have resulted in material damage to company reputations and shareholder value and resulted in costly shareholder litigation and regulatory enforcement actions. The Covid-19 pandemic has also pressure-tested companies' risk management systems and practices. With the pandemic in the rear view, boards now have the opportunity to reflect on which risk management strategies proved most effective in helping their companies weather the pandemic. New corporate risks arising from societal tensions, geopolitical fragmentation and conflicts, environmental degradation and significant labor market dislocation also continue to present new challenges to risk management processes, and boards will need to reexamine how risk management strategies should adapt to the changing operating context. Given the number of "Black Swan" events that have occurred over the past four years, it should be clear that management, with oversight from boards, should endeavor to anticipate possible contingencies and be ready to respond quickly and nimbly when the unexpected occurs.

Corporate culture and executive and employee oversight is therefore an important focus for the board in its risk management role. The board's supervision of material risks has become a key metric to assess overall board effectiveness, as shareholder, regulatory, and societal expectations continue to evolve.[164] SEC rules require disclosure of the extent of the board's role in risk oversight of the company.[165] Among many other changes targeting risk management, Dodd-Frank requires each publicly traded bank holding company with $50 billion or more in total consolidated assets to establish a stand-alone, board-level risk committee.[166] While these crises and their backlash demonstrate the need for vigilant oversight, they do not change the fundamental principle of corporate governance that the proper role of the board in managing the company's risk is one of *oversight* rather than direct implementation (which is the role of management). Through proper oversight and setting the right tone at the top, the board can ensure that the company has an appropriate risk profile and that its officers and employees view risk management not as an impediment but as an important part of the company's success. In fulfilling its oversight duty, the roles and responsibilities of different board committees in

overseeing specific categories of risk should be reviewed to ensure that, taken as a whole, the board's oversight function is coordinated and comprehensive.

Further, the board's focus on risk management continues to be a top priority of institutional investors. Major institutional investors such as BlackRock, State Street and Vanguard have been outspoken in their belief that strong risk oversight practices are key to enhancing long-term, sustainable value creation, and this view is reflected in both the ISS and Glass Lewis proxy voting guidelines.[167]

In addition to industry- and company-specific risks, climate, cybersecurity, artificial intelligence ("AI"), supply chain, human capital and geopolitical risks and risks associated with corporate culture and non-financial criminal activity among directors and management have emerged as requiring board attention.[168]

4. Crisis Management

Closely related to its role in risk management, the board must also be prepared to meet effectively any crisis that may confront the company. Examples of possible crises include an unexpected departure of the CEO or other key members of management, rapid deterioration of business conditions or liquidity, risk management or product failures,[169] government investigations and major disasters or pandemics, including geopolitical crises. Crises are typically unexpected, as illustrated by the war in Ukraine and the Middle East. That said, a board can prepare itself by thoroughly understanding the company's business and industry, with an eye towards anticipating what challenges the company is most likely to face.[170] When a crisis does strike, the CEO generally should lead the company's response, with guidance and input from the board. However, if the CEO has been compromised, the board must be ready to take a more active role in navigating the company through the crisis. Effective risk and crisis management needs to be dynamic, forward-looking, comprehensive and nimble, and that it should extend to the health and wellbeing of employees and the preservation of customer and supplier relationships and business reputation.[171]

Moreover, companies are increasingly being put in a position where they are under pressure from stakeholders, particularly employees, to speak out on issues of national or global importance. The decision whether to speak out on certain issues (or to remain silent) can have significant reputational, legal and financial costs, particularly as the anti-ESG backlash sweeps across certain parts of the country. The board has to guide, support and oversee management in navigating through these sensitive, high-impact events.[172]

B. Board Composition

The most important factors in determining the effectiveness of a board are the quality of the people who serve as directors and their ability to work together. These factors make the nominating and corporate governance committee's role in identifying director nominees critical to a company's success. Directors must possess integrity, character, commitment, judgment, energy, competence and professionalism, and the right mix of industry savvy and financial expertise, objectivity and diversity of perspectives and business backgrounds, among other qualities. Almost as crucial as the caliber of the directors as individuals is how well they

function as a group. Although a director's qualifications may be discerned easily from a resume or profile, the dynamics of a board can only be understood by those directors and officers (and advisors) who actually participate in its meetings. A collegial board with mutual trust and complementary skill sets can add value to the corporate enterprise that is greater than the sum of its parts, while a balkanized board will usually be ineffective regardless of the quality of its individual directors. Unfortunately, board culture and cohesiveness are not easily captured and categorized on paper. The result is that such values are often underappreciated, especially in this age of one-size-fits-all "best practices."

The ever-increasing pressure from shareholder proxy advisory services, institutional investor groups, activist shareholders and other commentators for companies to conform to continuously evolving and escalating standards for so-called "best practices" has made the task of assembling a well-rounded board even more difficult in recent years. With the advent of the universal proxy, the process of designing and building a balanced and effective board will become that much more complicated and scrutiny on each director's contributions to the board will likely become more intense. One aspect of these "best practice" standards involves an intense, arguably even excessive, focus on director independence at the expense of other skills and qualifications. The combination of attributes, experiences and personalities that constitute an effective board is intrinsically difficult, if not impossible, to boil down to bright-line checklists or off-the-shelf mandates. Undeniably, these mandates, oversimplified governance grades and "best practices" are increasingly difficult to resist. Ultimately, however, directors serving on the nominating and corporate governance committee must be prepared to explain to shareholders that it is more important to have directors and governance policies that will best serve the company than to blindly conform to one-size-fits-all mandates.

1. Director Qualifications

The nominating and corporate governance committee's search for nominees naturally begins with an analysis of the qualities that the committee seeks in a candidate. This analysis should consist of both an assessment of the skills and experiences possessed by current board members and a vision of the ideal mix of director skills and experiences, given the company's circumstances. By comparing the skills and experiences already represented on the board with the ideal complement of skills and experiences, the nominating and corporate governance committee will be well positioned to create a candidate profile and to assess how well current board members fit the company's needs.

All directors should possess certain qualities, such as integrity, sound judgment and a commitment to representing all shareholders. In light of the new universal proxy rules, increased emphasis has been placed on individual director qualifications. However, in composing a board, the nominating and corporate governance committee still faces the challenge of finding the right complement of abilities and experiences among the directors that best serves the company. This requires a thorough understanding of the company, its business, its competitive landscape and its strategy. Attributes and experiences typically sought by a nominating and corporate governance committee include financial or risk assessment expertise, background in the company's industry, familiarity with the company, gender and racial diversity, legal or regulatory compliance knowledge, valuable international or local connections, experience in academia or government and service as an executive officer or director of a public company.[173] Among other sources of

data, committee members can consider previous board and committee reviews and director self-evaluations as indicators of skills, experiences and other traits that may be desired on the board.

Although it is more common today for the CEO to be the only member of management on the board, the nominating and corporate governance committee may consider adding a second member to ensure that the board includes directors intimately familiar with the company and to provide an additional source of direct input on the company's operations to the rest of the board. The nominating and corporate governance committee should continually evaluate the composition of the board to ensure that its combination of attributes fits the company's strategy and direction. For example, a company suddenly finding itself with financial or competitive difficulties may seek to add a turnaround expert, while a company confronted with a scandal or government investigation may benefit from additional expertise in compliance, government or public relations. The importance of frequently reassessing the alignment of the board's composition with the company's needs is underscored by the remarkable pace of economic, technological and regulatory changes in recent years.

2. Skills Matrices

One increasingly popular tool for analyzing board composition against previously established criteria is the skills matrix. In the wake of universal proxies which will allow shareholders to "mix and match" director slates, director skills matrices have become even more important for showcasing the skill sets of individual directors. A skills matrix is a chart with one axis listing each director or nominee and the other axis listing the attributes that the nominating and corporate governance committee desires to be represented on the board. These may include attributes that every director should possess as well as attributes that should be represented by some subset of the board. Examples of the latter include financial or risk assessment expertise, background in the company's industry, and legal or regulatory compliance knowledge.

A skills matrix can serve as a visual, straightforward way of understanding the strengths of the board and identifying any areas in which it may need improvement. It may also assist the nominating and corporate governance committee both in analyzing the areas in which current directors could benefit from additional training or exposure and also in evaluating which new candidate would best complement the board's current composition. However, when using a skills matrix, the nominating and corporate governance committee should be mindful of the less tangible characteristics of directors, like individual personalities, that may not be easily represented in the matrix but are nonetheless crucial in achieving a healthy board dynamic.

Including a skills matrix in the company's proxy statement can be helpful in preempting or responding to pressures for board refreshment and providing greater objectivity and transparency to the nomination process. Whether or not a nominating and corporate governance committee chooses to utilize or disclose a skills matrix, the focus remains the same: the committee should identify nominees who will best contribute to the formation of a well-rounded and effective board.

3. Regulatory Requirements

As part of the process of forming the right mix of directors, the nominating and corporate governance committee must be mindful of all applicable regulatory requirements. For example, the SEC requires disclosure of any specific minimum qualifications that a company's nominating and corporate governance committee believes must be met by a nominee and any specific qualities or skills that the committee believes are necessary for one or more of the company's directors to possess.[174] The SEC also requires disclosure of the specific experience, qualifications, attributes or skills that led to the conclusion that the nominee should serve as a director in light of the company's business and structure.[175] Combined, these two disclosures enable shareholders to compare a nominee's qualifications to the company's previously identified criteria. Additionally, SEC rules require companies to disclose whether their audit committee includes at least one qualified "financial expert" and, if the committee does not include at least one "financial expert," to provide an explanation.[176]

In addition to SEC requirements, the securities exchanges may have additional requirements. For instance, both the NYSE and Nasdaq require that all members of the audit committee be financially literate[177] and provide additional rules for independent director oversight of executive compensation and the director nomination process.[178] The NYSE requires its listed companies to include in their corporate governance guidelines director qualification standards that, at a minimum, reflect the NYSE's independence requirements.[179] These standards may address other substantive qualification requirements, including limitations on the number of boards on which a director may sit and director tenure, retirement and succession standards.[180] However, neither listing requirements nor state or federal law impose substantive standards that must be applied in the search for and selection of candidates, leaving the nominating and corporate governance committee to exercise its independent judgment in setting candidate criteria. An exercise of this judgment may include the decision not to adopt specific or rigid policies regarding director qualifications. While a nominating and corporate governance committee should carefully consider the qualifications and attributes it seeks in a candidate, the committee will often find it advisable to maintain the flexibility to adjust to the company's changing circumstances by avoiding rigid qualification requirements. Such an approach allows the committee to nominate the candidate it feels will best serve the company, even if the candidate does not fit neatly into a previously identified category.

C. Director Independence

In assessing a director's independence, the nominating and corporate governance committee should take into account a number of sources. Securities markets impose mandatory requirements regarding director independence and the SEC focuses on disclosures relating to director independence. State law, while not legally requiring independent directors, will sometimes view with heightened scrutiny the decisions of directors who are not independent. In addition to these regulatory considerations, the nominating and corporate governance committee should also be mindful of the independence views of proxy advisory services which contain nuanced differences to the securities exchange rules and which influence proxy voting recommendations. These independence requirements are discussed below for general board positions, but nominating and corporate governance committee members should remain aware of heightened independence requirements for members of audit and compensation committees.

1. Securities Markets Independence Requirements

Director independence is, by far, the most significant regulatory requirement that the nominating and corporate governance committee must consider with respect to board composition. Subject to limited exceptions, both the NYSE and Nasdaq require boards to consist of a majority of independent directors and to have adopted specific rules as to who can qualify as an independent director. Both markets require the board of any listed company to make an affirmative determination, which must be publicly disclosed (along with the basis for such determination), that each director designated as "independent" has no material relationship with the company that would impair his or her independence.[181] Such disqualifying relationships can include commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships, among others. However, ownership of a significant amount of stock, or affiliation with a major shareholder, should not, in and of itself, preclude a board from determining that an individual is independent.[182] As a general matter, these independence rules ask whether the director is a non-management director free of any material business relationships with the company and its management in the past three years (other than owning stock and serving as a director). Even if a director satisfies each listed requirement, the board must still determine whether the director could exercise independent judgment given all the facts and circumstances.

(a) The NYSE *Per Se* Bars to Independence

A director is not independent under the NYSE rules if:

- in the last three years, the director has been an employee of the listed company or an immediate family member[183] has been an executive officer of the listed company;[184]

- in any 12-month period in the last three years, the director or an immediate family member has received more than $120,000 in direct compensation from the listed company, other than as director, or committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service);[185]

- the director is a current partner or employee of the company's auditor, an immediate family member is a current partner of the company's auditor or an employee who personally works on the listed company's audit or within the past three years the director or an immediate family member personally worked on the listed company's audit;[186]

- in the last three years, the director or an immediate family member has been employed as an executive officer of another company where any of the listed company's present executive officers at the same time serves or served on that company's compensation committee;[187] or

- the director is a current employee, or an immediate family member is a current executive officer, of a company that has made payments to, or received payments from, the listed company for property or services in an amount that,

in any of the last three fiscal years, exceeded the greater of $1 million, or two percent of such other company's consolidated gross revenues.[188]

(b) Nasdaq *Per Se* Bars to Independence

A director of a company that is not an investment company is not independent under Nasdaq rules if:

- in the last three years, the director has been employed by the listed company or was a family member[189] of an executive of the listed company;[190]

- in any 12-month period in the last three years, the director or a family member has accepted more than $120,000 in any compensation from the company during any period of 12 consecutive months, other than as director or committee compensation or compensation paid to a family member who is an employee of the company or benefits under a tax-qualified retirement plan or non-discretionary compensation;[191]

- the director or a family member is a partner in, or a controlling shareholder or an executive officer of, any organization to which the listed company made, or from which the listed company received, payments that in any of the past three fiscal years exceeded the greater of $200,000 or five percent of the recipient's consolidated gross revenue for that year;[192]

- the director or a family member is employed as an executive officer of another entity where at any time in the last three years any of the company's executive officers served on that entity's compensation committee;[193] or

- the director or a family member is a current partner of the company's outside auditor, or was a partner or employee of the company's outside auditor who worked on the company's audit in the last three years.[194]

2. SEC Disclosure Requirements

The SEC requires disclosure of the following information relating to director independence in either a company's Form 10-K or its proxy statement:

- Whether each director is independent under the company's independence standards. Listed companies should use the independence standards of the applicable securities exchange. If the company is not a listed issuer, it should use a definition of independence used by one of the exchanges and disclose which definition it has selected. If such company relies on an exemption from a national securities exchange requirement for independence of a majority of the board, the company must disclose the exemption and explain the basis for its conclusion that the exemption is applicable. If the company has adopted its own set of independence standards, the company must either state that the standards are posted on its website (and provide its website address) or

include a copy of these independence standards as an appendix to its proxy statement once every three years.[195]

- For each independent director, the types of transactions and relationships that the board considered in making its determination that the director was independent.[196]

3. State Law

The board of directors should also be cognizant of the criteria for independence in its company's state of incorporation when selecting directors and committee members. Courts apply heightened scrutiny when reviewing actions taken by directors with perceived conflicts of interest; accordingly, a company should strive to select its nominating and corporate governance committee in a way that will avoid judicial second-guessing. Consideration of independence when selecting committee members is particularly important because certain decisions are sometimes delegated to a committee precisely because the board as a whole may be viewed as tainted by a conflict of interest.

States ordinarily determine a director's independence based on his or her economic and familial relationships. Thus, a director who qualifies as independent under the NYSE or Nasdaq standards will typically also be considered independent under state corporate law. However, boards should consider all of the facts and circumstances surrounding a director's relationship to the company and management, appreciating that non-economic relationships may sometimes be found relevant.

4. Balancing Independence Against Expertise

The financial crisis revealed that boards sometimes lack the industry expertise and intricate knowledge of their companies that is necessary to properly oversee businesses of tremendous complexity.[197] This realization, in part, prompted the SEC in 2009 to adopt disclosure rules requiring companies to discuss the specific experience, qualifications and skills that led to a director's nomination.[198] However, these disclosure requirements have far from solved the problems that are created by mandatory independence requirements and undue focus on board refreshment as an end in and of itself. While some individuals with expertise will satisfy the exchanges' stringent independence standards, these standards do preclude selection of insiders—those with the most intimate day-to-day knowledge of the company—and often limit the ability to include industry experts who over their careers have developed networks and affiliations in the company's sector.[199] As stated in a 2009 study published by Professor Jay W. Lorsch and other members of the Harvard Business School's Corporate Governance Initiative, "[a]s a practical matter it is difficult, if not impossible, to find directors who possess deep knowledge of a company's process, products and industries but who can also be considered independent."[200] All boards can and should gain insight into the company's business through regular communication with management. Yet a board may find that even the most robust communications are an imperfect substitute for actual membership of those best positioned to understand the company. This was acknowledged in a report issued by the NYSE's Commission on Corporate Governance, which noted that "a minority of directors who possess in-depth knowledge of the company and its industry could be helpful for the board as it assesses the

company's strategy, risk profile, competition and alternative courses of action" and reminded companies that "a properly functioning board can include more than one non-independent director."[201]

XI. Director Selection

A. Identifying and Recruiting Directors

Recruiting a balanced board of highly qualified directors is the central challenge for the nominating and corporate governance committee. Achieving this balanced, high-quality board is complicated by a number of factors. First, as noted above, the emphasis on exacting standards of independence often comes at the expense of relevant experience and knowledge of the company's business and industry. Stock exchange standards and governance activists' "best practices" limit considerably the nominating and corporate governance committee's flexibility in managing this tradeoff. Second, the workload and time commitment required for board service has never been greater and investors are increasingly scrutinizing whether directors have adequate time to devote to their board duties. Third, highly qualified individuals who manage to clear the independence hurdle and are willing and able to shoulder the substantial time commitment of board service may nevertheless be dissuaded by the potential for withhold-the-vote campaigns, sensationalist publicity over executive compensation, shareholder litigation and other reputational risks. In the current corporate governance environment, even directors of impeccable reputation at highly successful companies sometimes find themselves under attack from shareholder activists. All of these factors pose a very real danger that companies will struggle to fill board seats with the experienced and highly capable types of directors that have been such an essential element of the phenomenal success of the American corporation.

This reality makes all the more critical the nominating and corporate governance committee's ability to effectively identify and recruit actual candidates once it has developed a target profile. Identifying and recruiting candidates should be an ongoing process that takes into account both the immediate needs of the board and its anticipated longer-term needs based on expected director turnover. This will allow the nominating and corporate governance committee to prepare for the departure of key directors by either grooming internal replacements for leadership positions or recruiting new directors before a critical skills gap appears.

1. Networking

At many companies, new directors are sourced primarily from individuals already known to members of the nominating and corporate governance committee, the chair, other directors or the CEO, or are recommended by internal or external advisors. This approach can be particularly effective if the members of the nominating and corporate governance committee have extensive experience in the company's industry or on other company boards. Personal familiarity with a candidate enables the nominating and corporate governance committee to assess more quickly and accurately the candidate's fit with the board's culture, which is especially important when there is a need to expedite a search process. Drawbacks of reliance on networking include the possible limiting of the nominating and corporate governance committee's range of candidates, the vulnerability to accusations of cronyism or a failure to value new viewpoints and a potentially less diverse candidate set.

2. Third-Party Search Firms

To limit the downsides of relying on directors' networks, to cast a wider net and to add an outside and arguably broader perspective, companies often engage third-party search firms to assist them in identifying director candidates, although there is no requirement to seek outside advice. Ordinarily, the nominating and corporate governance committee will be charged with engaging such advisors, and NYSE-listed companies are required to vest the committee with sole authority to retain, terminate and approve the fees of any firm used in the search process.[202] A third-party search firm can help identify a wider range of candidates and bring greater, more specialized resources to bear than the company possesses internally, which can be especially useful when searching for director candidates with particular attributes or specialized skills. Use of a third party may also have a benefit in terms of public perception in that it helps to confirm that the process is being driven by the nominating and corporate governance committee rather than by management. The nominating and corporate governance committee should consider the needs and capacities of the company and make an independent determination as to whether retention of an outside advisor is appropriate. If a third-party advisor is retained, the nominating and corporate governance committee should be as specific as possible about its precise role and the relevant search parameters. For example, the third party may simply provide a list of prospects that meet specified criteria and have been checked for conflicts, or may actually interview candidates on behalf of the nominating and corporate governance committee. At minimum, a nominating and corporate governance committee would be well advised to engage a third party to perform background and reference checks of candidates before formally nominating them. The SEC requires disclosure of any fees paid to third parties to assist in identifying or evaluating potential nominees, as well as the function they performed.[203]

3. Input from Within the Company

While the nominating and corporate governance committee should lead the search process, it should seek the input of others inside the company. Nothing in the requirement that a nominating and corporate governance committee consist entirely of independent directors precludes nonmembers from contributing to the committee's work. The NYSE rules provide that the nominating and corporate governance committee is to select director nominees "consistent with criteria approved by the board," which of course includes the CEO and any other non-independent directors.[204] In most cases, the committee would struggle to perform effectively without the participation of senior management, particularly the CEO, who is uniquely positioned in his or her understanding of the company, its strategy and its challenges. Thus, unless unusual circumstances suggest otherwise, the nominating and corporate governance committee would be well advised to work closely with the CEO when identifying, vetting, interviewing and selecting candidates. *Ultimately*, however, the CEO's input should only be one factor in the committee's process of reaching an informed and independent judgment. The nominating and corporate governance committee should conduct regular executive sessions to avoid any perception that the CEO has unduly controlled the nomination process.

Among other negative consequences, such a misperception can result in a backlash from proxy advisory services. For example, several years ago, ISS recommended a "no" vote for the members of Hewlett Packard's nominating and corporate governance committee based on ISS's view that the committee's search for new directors was tainted by the CEO's involvement.

While remaining cognizant of the policies of proxy advisory services, it is important that the nominating committee conduct its search in the way it deems most effective. And, absent unusual circumstances, a nominating and corporate governance committee is unlikely to find effective a search process that excludes the views of a director—particularly one uniquely positioned to understand the company's needs.

4. SEC Requirements

For each nominee approved by the committee for inclusion on the company's proxy card (other than executive officers and directors standing for reelection), the SEC requires companies to identify whether the nominee was recommended by a security holder, a non-management director, the CEO, another executive officer, a third-party search firm or another specified source.[205]

B. Shareholder Nominations and Universal Proxy Rules

As a general matter, the right of shareholders to nominate candidates to be considered for election to the board of directors is well established in state law. In Delaware, for example, then-Vice Chancellor Strine stated: "Put simply, Delaware law recognizes that the 'right of shareholders to participate in the voting process includes the right to nominate an opposing slate . . . the unadorned right to cast a ballot in a contest for [corporate] office . . . is meaningless without the right to participate in selecting the contestants. As the nominating process circumscribes the range of choice to be made, it is a fundamental and outcome-determinative step in the election of officeholders. To allow for voting while maintaining a closed selection process thus renders the former an empty exercise.'"[206]

As the body with primary responsibility for reviewing candidates for nomination to be elected as directors, and for making a recommendation to the full board, the nominating and corporate governance committee is the logical and appropriate forum for consideration of director candidates recommended by shareholders. As a general rule, shareholder nominees should be considered on the basis of the same criteria as are used to evaluate board nominees. It is good practice to thoroughly and fairly evaluate these candidates.

1. SEC Disclosure Requirements

The SEC requires companies to disclose whether they have a policy regarding the consideration of director candidates recommended by shareholders.[207] If the company does have such a policy, it must describe the material elements of its policy, including whether it will consider shareholder nominations and, if so, the procedures that shareholders must follow to submit nominations.[208] If a company's nominating committee does not have a policy regarding shareholder recommendations for director, the company must state that fact and the basis for the view of its board of directors that it is appropriate for the company not to have such a policy.[209] The company must disclose whether, and, if so, how, the nominating and corporate governance committee evaluates recommendations submitted by shareholders differently than it evaluates recommendations from other sources.[210]

2. Universal Proxy Rules

Previously, dissidents needed to rely on the company's advance notice bylaws to nominate directors for election and only proxy access bylaws permitted dissidents to nominate directors on the company's proxy card. However, the SEC's "universal" proxy rules that came into force on September 1, 2022 now require that in contested elections, voting shareholders receive a single proxy card presenting both the company's and the dissident's nominees, largely diminishing the relevance of proxy access bylaws (whose main remaining advantage is to allow dissidents to avoid proxy-related expenses).[211]

Under the new universal proxy rules, all candidates are required to be listed on both the company and dissident proxy cards, subject to compliance with requirements of Rule 14a-19 of the Exchange Act. In particular, nominating shareholders will be required to:

- provide the company notice of the nominating shareholder's intent to solicit proxies and the names of dissident nominees no later than 60 calendar days[212] prior to the anniversary of the previous year's annual meeting;

- represent that it intends to solicit shareholders representing at least 67 percent of the voting power of the shares entitled to vote on the election of directors;

- file a definitive proxy statement by the later of (i) 25 calendar days prior to the meeting date or (ii) five calendar days after the date the company files its definitive proxy statement;

The company must also notify the nominating shareholder of the names of the company's nominees no later than 50 calendar days before the anniversary of the previous year's annual meeting. Companies would be well advised to review the advance notice provisions in their bylaws and consider including reasonable requirements for dissidents to comply with the universal proxy rules.

The universal proxy rules replace the "short slate rule" that set forth requirements as to when and how dissidents can solicit support for nominees that would comprise a minority of the board. In addition, the bona fide nominee rule has been amended to require all nominees to consent to being named in the proxy statement of their side of the contest.

XII. Director Orientation and Continuing Education

A. Orientation

The nominating and corporate governance committee should ensure that new directors are provided with a thorough orientation that will accelerate their adjustment to the board. If the board takes an annual retreat, the retreat may offer an opportunity to satisfy a large portion of this orientation. The content of director orientation should focus on enabling new directors to quickly gain a full understanding of the company's business and risk profile. If the director is to serve on a board committee or otherwise perform a specialized role, his or her orientation program should be customized to reflect those added responsibilities. Orientation programs should be regularly reviewed and modified to ensure that they are tailored to address the most important issues facing the company. As part of their orientation, new directors should be provided with the company's corporate governance documents, including committee charters, policies and ethics codes, biographies of the company's directors and executive officers, selected public documents of the company, including proxy statements and annual and quarterly reports, minutes of the board and its committees' recent meetings, and a calendar of upcoming meetings and key dates for the company. New directors should also meet with their fellow directors and with executive officers. If a physical inspection of one or more facilities or sites would aid in the new director's understanding of a company, the nominating and corporate governance committee should consider including a tour as part of its orientation program. A selection of key analyst reports by third-party analysts covering the company may also enhance a new director's appreciation for the company and how it is perceived.

Especially if it is the new director's first time serving on a public company board, orientation should also include a thorough briefing on applicable laws, including securities laws and a director's fiduciary duties. Director orientation must strike the right balance by providing substantive information that will allow a new director to "hit the ground running" without overwhelming him or her with a barrage of documents. Striking this balance requires an ongoing focus on, and reassessment of, the company's priorities by the nominating and corporate governance committee.

The importance of director orientation is greater now than ever before. Directors today not only serve in an environment of unprecedented complexity and time demands, but a large number of them are serving without any considerable experience with either the company or public company boards generally. And, as discussed at length in Section X.C.4, the outsized emphasis placed on director independence by advocates of one-size-fits-all corporate governance "best practices" often precludes adding to the board the most experienced individuals with the strongest grasp of the company. First-time directors are, on average, younger and are more likely than new directors with previous board experience to be current or former division leaders, subsidiary leaders or functional leaders, but less likely to be CEOs, chairs, presidents or chief operating officers.[213] However, to a certain extent, nominating and corporate governance committees must accept that this has become a part of the corporate governance landscape and ensure that orientation programs are as robust as possible to get new directors up to speed.

B. Continuing Education

Director education should not end once a new director is brought up to speed. While there is no legal requirement for directors to receive ongoing education to satisfy their fiduciary obligations, such education can be very useful, particularly as boards continue to face heightened expectations on oversight of matters relating to cybersecurity, AI, climate and human capital. Indeed, the complexity of the many financial, risk management and other issues facing companies today that was highlighted by the financial crisis and the Covid-19 pandemic has led to a renewed focus on the information and education programs provided to directors. In a constantly changing competitive and regulatory environment, continuing education is vital to ensure that directors remain aware of the challenges and opportunities the company faces and develop a comprehensive understanding of environmental, social and governance issues that may materially impact the business. Even a long-serving director with an intimate familiarity with the company's industry and strategy will be unable to perform effectively if he or she does not stay abreast of many regulatory and other developments. To the extent that directors lack the knowledge required to maintain a strong grasp of current industry- and company-specific developments and specialized issues, the nominating and corporate governance committee should consider periodic tutorials as a supplement to board and committee meetings.

Training and tutorials may consist of outside programs, training in the boardroom through management and advisor presentations or some combination of the two and should be tailored to the issues most relevant and important to the company and its business. Outside experts, while not required, may be helpful for certain training and tutorials, although in many cases the company's own experts are better positioned than outsiders to explain the particular issues facing the company.

C. Information Received by Directors

The ability of the board or a committee to perform its oversight role is, to a large extent, dependent upon the relationship and the flow of information between the directors, senior management and the risk managers in the company. In this vein, the board and management should together determine, and periodically reassess, the information the directors should receive so that the board can effectively perform its oversight function. As a starting point, the board should receive financial information that makes readily accessible the company's results of operations, variations from budgeted expenditures, trends in the industry and the company's performance relative to its peers, as well as copies of media and analyst reports on the company. However, for the board to properly fulfill its oversight role, companies should work to ensure that the board is receiving information about all aspects of the company's operations, including information relating to material environmental, social and governance matters. If directors do not believe that they are receiving sufficient information, including information regarding the external and internal risk environment, the specific material risk exposures affecting the company, how these risks are assessed and prioritized, risk response strategies, implementation of risk management procedures and infrastructure and the strengths and weaknesses of the company's overall risk management system, then they should be proactive in asking for more.

Obtaining this information will not only aid directors in guiding the company but will also avoid the possibility of directors being accused of failing to be aware of discoverable facts

that they should have known. The nominating and corporate governance committee should also promote lines of communication between the board, its committees and senior management that foster open and frank discussion of developments and concerns. As with director orientation, the key is to provide useful and timely information without overloading the board with, for example, the volume of information that the CEO and senior management receive.

XIII. Restrictions on Director Service

A. Other Directorships and "Overboarding"

The workload and time commitment required for board service has escalated dramatically in recent years. As the time commitment of board service increases, so does the importance of ensuring that directors are able to shoulder this commitment. Therefore, the nominating and corporate governance committee should consider adopting a policy regarding additional directorships. The nominating and corporate governance committee may similarly choose to limit the directorships of the company's officers.[214] Restrictions on additional directorships may apply across the board or only to a subset of directors, such as those serving on the audit committee or those fully employed by the company or another public company. For example, the NYSE requires that if an audit committee member simultaneously serves on the audit committee of more than three public companies, the board must disclose its determination that this would not impair the member's ability to serve effectively on the company's audit committee.[215] Most companies that have set a numerical limit for additional directorships that applies to all directors have set the cap at three or four. Among those companies without established numerical limits, nearly all require directors to provide the company notice before accepting another directorship and/or encourage directors to reasonably limit their additional board service.

As with many other issues confronting the nominating and corporate governance committee, the committee should be wary of establishing hard and fast rules regarding other directorships that limit its flexibility to exercise its best judgment based on particular circumstances. One approach is to eschew a numerical limit but require a director to seek approval of the nominating and corporate governance committee before accepting another directorship. Another approach is to adopt a numerical limit but provide that the nominating and corporate governance committee may waive this limit if it determines that the additional directorship will not impair the director's ability to carry out his or her duties, or that his or her unique contributions to the board would be difficult to replace.

At a minimum, the nominating and corporate governance committee would be well advised to adopt a policy of prior notification regarding other directorships or employment. Such a policy can be included in the governance guidelines or in individual director-level agreements. Some companies also require their board members seeking to serve on other boards to obtain prior approval to do so. This is important not only to ensure that the director remains able to shoulder capably the responsibilities of board service but also to check for any conflicts or other impacts on the company, including publicity considerations. In particular, antitrust laws prohibit simultaneous service as a director or officer of two competing corporations, subject to certain *de minimis* exceptions.[216] Companies should carefully weigh the costs and benefits of having directors who are affiliated with competitors, as this may become a lightning rod for activist criticism, even if the overlap falls well within the legal safe harbors. To prevent being caught off guard when officers or directors join an activist slate at a different company, companies are also advised to consider revising director governance guidelines to require notice to the company before a director or officer agrees to be nominated as a candidate for another board.[217] Such requirements should be carefully phrased to ensure they include in their scope a

director agreeing to be nominated or otherwise serve (or be submitted to serve) on a slate of candidates for the particular company, whether as a board candidate or a shareholder candidate (*e.g.*, on a dissident slate), rather than being triggered only by such director's actual election to the board. Consideration should also be given to the company's policies for understanding other commitments that a director may take on, such as joining advisory boards of, or becoming consultants to, shareholders or funds that may have positions in the company's competitors or business partners.

Since February 2017, ISS has tightened its "overboarding" policy, recommending an "against" or "withhold" vote for "overboarded directors," now defined as those sitting on more than five public company boards, rather than six. Additionally, ISS recommends an "against" or "withhold" vote against CEOs sitting on more than two public company boards besides their own (although ISS recommends a "withhold" only with respect to the CEO's outside boards).[218] Glass Lewis recommends voting "against" directors who serve on more than five public company boards, who serve as an executive chair of any public company while serving on more than two other public company boards, and who serve as an executive officer of any public company while serving on more than one other public company board.[219] In their proxy voting guidelines, several institutional investors have also developed policies on "overboarding." The Council of Institutional Investors suggests that companies should establish guidelines on how many other boards their directors may serve and states that, except in unusual circumstances, directors with full-time jobs should not serve on more than two other for-profit boards and that all other directors should serve on no more than four for-profit company boards.[220]

The Antitrust Division of the Department of Justice (the "DOJ") has stepped up focus on enforcement of Section 8 of the Clayton Act, a statute prohibiting officers and directors from simultaneously serving with competing companies. Section 8 prohibits competing companies from sharing officers and directors. The statute is intended to foreclose opportunities for competitors to collude illegally. There are certain *de minimis* safe harbors for interlocked companies whose competing sales are less than $5,138,000 (as of 2025) or where the competing sales make up only a minimal percentage of total sales, as well as a one-year "grace" period to resolve a violation created by changed circumstances. No damages have ever been awarded under the statute, and there are no fines or penalties. Removal of the interlock typically remedies the situation, and director resignations from one board seem to have resolved the matters in DOJ's release.

In addition to the risk of overboarding and antitrust complications, companies sometimes face the risk that their directors could find themselves embroiled in a controversial situation that could be a detriment to the company as a result of other boards they sit on or stand for. For example, a director of a company may be invited by an activist to be on a slate for a proxy contest it is running against another company. While this may not pose a direct conflict, it may be unhelpful or embarrassing for the company on which board that person sits. It would be prudent for companies to require at a minimum prior notification before any director agrees to be part of a slate of director candidates.

B. Term Limits and Mandatory Retirement Ages

The question of appropriate director age and tenure has become a hot topic in recent years. Corporate governance activists are increasingly calling for director term limits and mandatory retirement ages, both as a means of promoting "board refreshment" and because of a growing view that serving on a board for an extended period of time affects a director's independence.

As in all matters, we do not believe that a one-size-fits-all rule is an appropriate method for making this determination. In some cases it may be appropriate for a particular director to leave after an extended period on the board, and it is certainly advisable to periodically bring new directors on to a board so that it can benefit from fresh (and more diverse) perspectives and ideas. However, directors who have served on a board for a long time have an intimate familiarity with the company and its business, history and values that cannot be easily or quickly replicated by a new candidate. Long-term directors provide continuity, cultural stability and institutional knowledge that can prove invaluable. We are also skeptical of the depiction of long-serving directors as categorically less independent, given that such directors are more likely to have preceded the current CEO (and thus not to have been chosen by him or her) and to have the deep knowledge of the company necessary to make independent judgments.

Term limits and mandatory retirement ages are indeed one way to bring fresh perspectives and skills to the board. They may also in some cases relieve the nominating and corporate governance committee from the often difficult decision to recommend against a directors' renomination. However, given the many potential negative consequences of such policies, these blunt instruments are a poor substitute for the considered judgment of the nominating and corporate governance committee. Increased turnover may needlessly disrupt the cohesion of an effectively functioning board. A board, like any organization, depends heavily on the trust and familiarity of its members. This cautions against adopting rigid policies, such as term limits, that make it more difficult to develop and maintain these relationships. Moreover, long-serving directors that have grown knowledgeable about the company and its industry are often the most valuable contributors to a board. A policy requiring such a director to depart after a certain number of years risks depriving the company of a valuable director who still has much to offer. An across-the-board rule may strike some as more expedient, but ultimately the company will best be served by the nominating and corporate governance committee making a determination based on the facts and circumstances of each situation.

ISS currently recommends voting against shareholder proposals seeking to impose age limits, but on a case-by-case basis on shareholder proposals seeking to impose director term or tenure limits, considering the "scope of the shareholder proposal" and "evidence of problematic issues at the company combined with, or exacerbated by, a lack of board refreshment."[221] Under ISS's QualityScore governance ranking, the proportion of non-executive directors that have been on the board for less than six years has been added as a weighted factor to the "Board Structure" pillar, but ISS will not deduct credit from this factor unless more than one-third of directors exceed the lengthy tenure definition.[222]

Many institutional investors have their own views on these matters. While most favor board refreshment generally, institutional investors have taken varied positions on whether—and

when—mandatory term limits or retirement ages are appropriate mechanisms for achieving such refreshment. The Council of Institutional Investors has urged boards "to consider carefully whether a seasoned director should no longer be considered independent,"[223] and, in 2016, CalPERS's adopted a bright-line rule for how it views the impact of director tenure on independence: "[CalPERS] believe[s] director independence can be compromised at 12 years of service—in these situations a company should carry out rigorous evaluations to either classify the director as non-independent or provide a detailed annual explanation of why the director can continue to be classified as independent."[224] In contrast, BlackRock generally defers to the board's determination in setting age or term limits for "ensuring periodic board refreshment."[225] In terms of confidence in the board's existing refreshment process, disclosure and transparency go a long way to alleviating potential concerns, particularly as the new universal proxy rules increase scrutiny on individual director attributes and their contributions to the board.

XIV. The Functioning of the Board

A. Executive Sessions

Whether or not a board has an independent chair, its non-management directors should meet regularly outside the presence of management in executive sessions. Executive sessions allow for frank review of certain issues, such as management performance and succession planning, that at times may be better discussed outside the presence of management. They can also serve as a safety valve to address problems that directors may hesitate to bring up before the full board. However, boards should be careful that the use of executive sessions does not have a corrosive effect on board collegiality and its relations with the CEO. To guard against this danger, boards should not use executive sessions as a forum for revisiting matters already considered by the full board or to usurp functions that properly fall within the province of the full board. Board minute books should reflect when executive sessions of the board were held and who was in attendance, but it is not necessary, and in some cases may be inappropriate, to have detailed minutes of those sessions. Of course, there may also be times when, for reasons of confidentiality or sensitivity, it is preferable for the independent directors to meet informally.

The NYSE requires listed companies to hold regular executive sessions of either non-management directors or independent directors and, if those executive sessions include directors who do not qualify as independent under the NYSE standards, the NYSE recommends that companies also schedule an executive session of independent directors at least once a year. A non-management director should preside over each such executive session. However, pursuant to the NYSE listing standards, the same independent director is not required to preside over each executive session, but if one director is chosen to preside at all executive sessions, his or her name must be disclosed on the website or in the proxy statement.[226]

Nasdaq requires regular executive sessions, contemplated to mean at least twice a year.[227] While many "best practices" proponents recommend holding an executive session along with every regularly scheduled board meeting, the board should tailor the frequency of, and agenda for, executive sessions to the particular needs of its company, rather than reflexively following the latest trend. Each executive session should have a presiding director, although it need not be the same director each time.

B. Committees

A large proportion of the "heavy lifting" of board service is performed on the board's committees. In addition to the standing audit, compensation, and nominating and corporate governance committees that companies are required or expected to have, boards may choose to create other committees, either as standing committees or on an ad hoc basis, to deal with specific issues that arise. Board committees have whatever powers and authorities the board chooses to vest in them (subject to modest legal requirements; for example, a committee generally cannot agree to a merger or to sell the company). Their function is to enable the board to perform its many functions more efficiently and effectively.

We direct readers to our separate guides on the Audit Committee and the Compensation Committee, but provide a brief description of the requirements for those committees below because ensuring that the board is properly populated so that each of the committees will be able to meet all requirements and perform its work well is central to the mission of the nominating and corporate governance committee.

1. Audit Committee

(a) Purpose and Responsibilities

The audit committee is generally responsible for (i) assisting board oversight of the integrity of the company's financial statements, company's compliance with legal and regulatory requirements, independent auditor's qualifications and independence, and performance of company's internal audit function and independent auditors; (ii) preparing required disclosure relating to audit committee report to be included in annual proxy statement; and (iii) other responsibilities required by Exchange Act Rule 10A-3.

(b) Independence

In addition to qualifying as independent under the listing standards of the securities market(s) on which a company's securities are traded, audit committee members also must satisfy the more stringent definition of audit committee independence set forth in Sarbanes-Oxley and SEC Rule 10A-3. Both the NYSE and Nasdaq explicitly require compliance with those independence requirements.[228]

Audit committee members may not, directly or indirectly, receive any compensation from the company—such as consulting, advisory or similar fees—other than their director fees, and may not be affiliates of the company. The affiliate disqualification covers any individual that, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the company. The prohibition on acceptance of compensatory fees precludes audit committee service if the company makes any such payments either directly to the director, or indirectly to an immediate family member, or to law firms, accounting firms, consulting firms, investment banks or financial advisory firms in which the director is a partner, member, managing director, executive officer or holds a similar position.

The NYSE also requires that audit committee members serve on no more than two other public company audit committees (unless the board of directors determines that such simultaneous service would not impair the ability of such director to effectively serve on the audit committee).

(c) Financial Literacy

The major securities markets require that each member of an audit committee be able to read and understand fundamental financial statements. Under the NYSE listing standards, it is the board's duty to determine, in its business judgment, whether each member of the audit committee is financially literate.[229] While Nasdaq requires that each member be financially literate upon joining the audit committee, the NYSE permits members to become financially literate within a reasonable period of time after joining.[230]

(d) Financial Expertise

The NYSE requires that at least one member of the audit committee have accounting or related financial management expertise as determined by the board in its business judgment.[231] The expertise requirement generally is fulfilled by a background in finance that permits a board to conclude, in good faith, that the director is capable of understanding the most complex issues of accounting and finance that are likely to be encountered in the course of a company's business. The NYSE permits a board to presume that an individual who is an "audit committee financial expert" within the meaning of the SEC's rules (described below) has the requisite "accounting or related financial management expertise" to satisfy the NYSE's listing standards.[232]

Under Nasdaq rules, at least one member of an audit committee must have past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background that results in the individual's financial sophistication, including being or having been a CEO, CFO or other senior officer with financial oversight responsibilities. An individual who is an "audit committee financial expert" within the meaning of the SEC's rules is deemed to fulfill this latter requirement.[233]

(e) Audit Committee Financial Expert

Under the direction of Sarbanes-Oxley, the SEC issued rules requiring a public company to disclose in its annual reports (or annual proxy statements) whether any member of its audit committee qualifies as an audit committee financial expert, as determined by the board.[234] The SEC regulations define an "audit committee financial expert" as an individual who has *all* of the following attributes:

- an understanding of GAAP and financial statements;
- the ability to assess the general application of GAAP in connection with accounting for estimates, accruals and reserves;
- experience in preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that can reasonably be expected to be raised by the company's financial statements, or experience actively supervising persons engaged in such activities;
- an understanding of internal controls and procedures for financial reporting; and
- an understanding of audit committee functions.[235]

An individual must have acquired the foregoing five audit committee financial expert attributes through any one or more of the following:

- education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor, or experience in one or more positions that involve the performance of similar functions;

- experience in actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;

- experience in overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or

- other relevant experience.[236]

2. Compensation Committee

The compensation committee responsibilities generally include determining compensation for the CEO and other executive officers, reviewing the executive compensation philosophy, programs, and levels, ensuring development of formal holistic incentive compensation policies, determining compensation for non-employee directors, fulfilling duties delegated to the Board for retirement plans, and producing the reports required by the SEC and other agencies, among other responsibilities.

Both the NYSE and Nasdaq impose additional independence requirements on directors that serve on a compensation committee.

The NYSE rules require that, when evaluating the independence of any director who will serve on the compensation committee, a board consider all relevant factors that could impair independent judgments about executive compensation including, but not limited to: (a) the source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the company, and (b) whether the director is affiliated with the company or one of its subsidiaries or affiliates.[237]

Nasdaq rules prohibit compensation committee members from accepting any consulting, advisory or other compensatory fees from the company or its subsidiaries (other than directors' fees). Under Nasdaq listing standards adopted in response to Dodd-Frank as reflected in SEC Rule 10C-1, Nasdaq-listed companies are now required to have a compensation committee consisting of at least two independent directors. Nasdaq provides, however, that, if a compensation committee is composed of at least three members, then, under exceptional and limited circumstances and if certain conditions are met, one director who is not independent under its rules may be appointed to the compensation committee without disqualifying the compensation committee from considering the compensation matters that would ordinarily be entrusted to it had it been fully independent.[238] Additionally, a compensation committee or a company's independent directors must approve equity compensation arrangements that are exempted from the Nasdaq shareholder approval requirement as a prerequisite to taking advantage of such exemption.[239]

3. Risk Management Committee

The growing complexity of companies and the fallout from the financial crisis have led to an increased focus on how boards oversee the management of their companies' risk. The NYSE

rules require a company's audit committee to "discuss guidelines and policies to govern the process by which risk assessment and management is undertaken." Accordingly, the audit committee often takes the lead in risk management oversight. However, the NYSE rules permit a company to create a separate committee or subcommittee to be charged with the primary risk oversight function, as long as the audit committee reviews the separate committee's work in a general manner and continues to discuss policies regarding risk assessment and management. Given the audit committee's various other responsibilities, the scope and complexity of a company's business risks may make a separate risk committee desirable. Such a committee is mandated for some companies. For example, Dodd-Frank requires each publicly traded bank holding company with $50 billion or greater of total consolidated assets to establish a stand-alone, board-level risk committee.[240]

There is, however, no one-size-fits-all approach to risk management. Many boards choose not to create a separate risk committee, instead charging the audit committee with risk oversight, coupled with periodic review by the full board. When this is the case, the audit committee must be sure to devote adequate time and attention to its risk oversight function, outside the context of its review of financial statements and accounting compliance. A board may also choose to allocate different areas of risk management among multiple existing committees, which may result in a more balanced workload and a wider appreciation of the company's risks. Moreover, specialized committees may be tasked with specific areas of risk exposure. Banks, for instance, often maintain credit or finance committees, while some energy companies have public policy committees largely devoted to environmental and safety issues. As cybersecurity is becoming a greater and better understood source of risk, boards are having to spend more time managing cyber-risk. Cybersecurity and AI board committees are still rare, but it is a trend that may grow as the threat increases. AI is also increasingly seen as a potential risk to be monitored at the board level. For example, a growing number of boards have a standalone science and technology committee (which may also go by different names): 17% compared with 10% five years ago.[241] If responsibility for risk oversight is divided among multiple committees, however, care must be taken to coordinate the committees' work and to share information appropriately with each committee and with the full board. The board and the nominating and corporate governance committee should carefully consider what approach makes the most sense for its particular company and ensure that risk management is treated as a priority throughout the organization.

Ultimately, any committee charged with risk oversight should hold sessions in which it meets directly with key executives primarily responsible for risk management. It may also be appropriate for the committee(s) to meet in executive session both alone and together with other independent directors to discuss the company's risk culture, the board's risk oversight function, and key risks faced by the company. In addition, senior risk managers and senior executives should understand they are empowered to inform the board or committee of extraordinary risk issues and developments that require immediate board attention outside the regular reporting procedures.

4. Special Committees

A company may want to form a special committee of the board of directors in the face of certain corporate situations. Generally, a special committee will be needed in situations where

the majority of the directors on a board has, or could reasonably appear to have, a conflict of interest in a transaction or matter. In such situations, a special committee comprised of independent, disinterested members of the board can provide a way to assure shareholders that a corporate decision is fair and not the result of any undue influence by potentially conflicted directors. Directors may be considered interested to the extent that they may have an interest or potential interest on both sides of a transaction, or could otherwise gain an economic benefit above and beyond that of the company generally. Specific examples of transactions that may lead to the formation of a special committee include management buyouts and controlling shareholder transactions, in each case where members of the board represent or are influenced by the conflicted party. If formed, in addition to requiring all members of the special committee to be independent with respect to the potential conflict, the special committee may also engage independent legal and financial advisors. The terms and breadth of the board resolution establishing the special committee are extremely important and may be analyzed by courts in determining the level of judicial scrutiny warranted in a conflict situation. In many cases, the special committee should be given the power to act on behalf of the company as the independent negotiator for the transaction as necessary, with the full ability to take any requisite actions to come to a fair, independent and informed determination.

A company may also want to form a special committee in the face of shareholder derivative litigation. Special litigation committees may be formed to determine whether certain shareholder derivative claims should be pursued, settled or dismissed, but since a majority of directors will often be interested as defendants in the face of litigation, the standard by which independence is evaluated may be more stringent than in the context of a corporate transaction. As the Delaware Supreme Court stated in *Beam ex rel. Martha Stewart Living Omnimedia, Inc.* v. *Stewart*, "[i]ndependence is a fact-specific determination made in the context of a particular case. The court must make that determination by answering the inquiries: independent from whom and independent for what purpose?"[242] In *Beam* v. *Stewart*, the Delaware Supreme Court determined that a personal friendship or outside business relationship, standing alone, is insufficient to raise a reasonable doubt about a director's independence in the context of pre-suit demand on the board.[243] However, by contrast, in *In re Oracle Corporation Derivative Litigation*, the Delaware Court of Chancery, in looking at the purpose for which the special committee was formed, found that the members of a special litigation committee formed to investigate alleged insider trading by other directors lacked the requisite level of independence because, like the investigated directors, the special committee members had personal and professional ties to Stanford University.[244]

5. Other Committees

Companies are not limited to the committees referenced above. For example, 72% of S&P 500 boards have more than the three NYSE-mandated committees (audit, compensation and nominating/governance).

Similarly, some companies form other committees to address their specific needs, which may be done on a permanent or ad hoc basis. Companies operating in industries subject to substantial environmental regulation and oversight, for example, may establish committees to address environmental matters. Exxon Mobil Corporation, for instance, established a Public Issues and Contributions Committee in 2014 that "reviews the effectiveness of the Corporation's

policies, programs, and practices with respect to safety, security, health, the environment, and social issues" and that later on became the Environment, Safety and Public Policy Committee.[245] BP p.l.c. formed a Gulf of Mexico committee in July 2010 to help the company monitor its response to the Deepwater Horizon accident and "to oversee the management and mitigation of legal and license-to-operate risks arising out of the Deepwater Horizon accident and oil spill." Companies may also establish ad hoc committees to evaluate strategic initiatives or other tasks for a limited time period and may subsequently dissolve any such committee upon completion of its specific task.

Committees are also often formed for short-term purposes of convenience, such as to give final approval to the terms of an agreement within parameters identified by the board, or to formally establish a meeting date. Sometimes this committee consists of just one director, often the CEO, when the formal action should be taken by the board rather than by officers.[246]

XV. Succession Planning

A. CEO Succession Planning

Arguably the single most important responsibility of the board is selecting the company's CEO and planning for his or her succession. The integrity, dedication and competence of the CEO are critical to the success of the company and the creation of long-term shareholder value. Management succession planning is, in addition to prudent practice, a requirement for NYSE-listed companies. The NYSE corporate governance guidelines state that succession planning should include formulating policies and principles for CEO selection and performance reviews, as well as policies regarding succession in the event of an emergency or the retirement of the CEO.[247] Nasdaq does not have such a requirement.

Historically, the nominating and corporate governance committee has led this process and recommended to the board the CEO's successor, and most boards continue to charge the committee with this responsibility.[248] As executive compensation has become a more central and scrutinized issue, boards have increasingly given their compensation committees a role in succession planning. Some boards involve both the nominating and corporate governance committee and the compensation committee in succession planning. If a board takes this approach, it is important that the responsibilities of the two committees be clearly delineated to avoid conflict, redundancy or parts of the process slipping through the cracks. Regardless of which committee is charged with leading the effort, a board must remember that it bears the ultimate responsibility for succession planning.

If a company is unprepared when a vacancy occurs—which could happen unexpectedly for a number of reasons—a leadership vacuum can arise that can shake confidence in the company, both internally and externally, make the company more vulnerable to takeover attempts or shareholder activism and render it unable to effectively seize opportunities or respond to challenges in the interim. The absence of a thorough, well-formulated plan upon an unexpected departure of the CEO will likely force the board to respond reactively and without an opportunity for calm deliberation.

Despite the obvious importance of succession planning, a number of factors may impede the board from giving this function the attention it warrants.[249] Succession planning can be a sensitive topic. Some boards may be hesitant to consider the replacement of the CEO when the company is thriving or to compound his or her concerns when the company is facing difficulties. Perhaps an even greater danger to effective succession planning is the natural tendency to focus on the more immediate challenges of running the company at the expense of long-term or contingency planning. This danger is especially acute when the board lacks a formalized structure and process for succession planning.

1. Long-Term and Contingency Planning

The nominating and corporate governance committee should ensure that the company is engaged in both long-term succession planning as well as contingency or emergency planning. Long-term planning should have an eye toward the expected timeline for the incumbent CEO's departure in the normal course and cultivating potential successors with that timeline in mind.

To do this effectively, the nominating and corporate governance committee should maintain an ongoing dialogue with the incumbent CEO regarding his or her future plans. The nominating and corporate governance committee should also assess the likelihood and timing of a change of CEO based on his or her performance and the direction of the company. This may be most efficiently done in conjunction with the board's annual review of the CEO.[250] Note that to do this may require a joint review with the compensation committee, as many companies delegate CEO performance review to that committee.

Contingency planning aims to keep the company prepared in the event that the company must fill an unexpected vacancy, which may occur due to a scandal or the death or departure of the CEO. The nature of contingency planning requires the nominating and corporate governance committee to adopt an "expect the unexpected" mindset. To avoid being caught flat-footed, the nominating and corporate governance committee should ensure that it has considered and developed internal candidates for both the long-term and in the event of an immediate and unexpected vacancy.

2. Approach

There are no prescribed procedures for effective succession planning, and each board and nominating and corporate governance committee should take the time to fashion a process appropriate for its particular company. However, while the process should be tailored to the unique circumstances of each company, there are certain guiding principles that all companies should follow. Most fundamentally, succession planning should be a proactive, comprehensive and ongoing process, rather than an ad hoc or check-the-box activity. This should include, at minimum, an annual comprehensive discussion of internal candidates and emergency plans, which is often combined with the board's annual evaluation of itself and management.[251]

Effective succession planning requires the board and the nominating and corporate governance committee to possess an in-depth knowledge of its company and its internal pipeline of candidates and, possibly, to monitor outside candidates as well. The board, and the nominating and corporate governance committee, if it has been tasked with leading the effort, must take a hands-on approach. It should not unduly defer to the current CEO, rely on résumés or otherwise outsource the process. The nominating and corporate governance committee should take the lead in ensuring that succession planning is regularly discussed at the board level and that a systematic process for succession planning is in place. As part of this systematic process, the board should regularly review its procedures and may find it helpful to formulate a list of qualities it seeks in a candidate. With the tremendous and ever-increasing demands on boards' time, a board that fails to make succession planning an institutionalized priority risks falling into the trap of ignoring the issue until an unforeseen crisis has occurred.

3. Creating a Candidate Profile

The search for a CEO should begin with identifying the challenges and opportunities that the company is expected to encounter in the applicable time frame. Once this has been done, the board and the nominating and corporate governance committee can identify the traits and qualities in a prospective CEO that would be most useful in leading the company going forward. The board and nominating and corporate governance committee should bear in mind that, as the

circumstances and strategic direction of the company change, these traits and qualities may not be the same ones that distinguished the incumbent CEO. For example, in recent years, boards are giving more weight to attributes that point to candidates' ability to stretch and respond to new challenges. These include systems thinkers who can make sense of the forces at play for the business, connectors who think more broadly about potential partners and ecosystems to expand opportunities, and agile operators with the skill and courage to act on the implications of these forces, the empathy to connect with diverse stakeholders, and the ability to cultivate and use an ecosystem of information and talent.[252] No matter which attributes are prioritized, the final set should be narrowed to a manageable number to facilitate the nominating and corporate governance committee's focus on the most essential areas.

After formulating a desired profile for the next CEO, the board and the nominating and corporate governance committee must establish a well-designed selection process to find candidates who meet these requirements. This will provide a roadmap to keep the search focused and will also provide a neutral, agreed-upon path to help avoid or resolve the differences of opinion that often arise during the selection process.

Once the selection process has winnowed down a short list of the potential candidates possessing the desired qualities, the nominating and corporate governance committee should consider two key corporate governance-related elements before reaching a final decision. First, the new CEO should be a good fit with the culture of the board and the company. Second, the new CEO's long-term vision for the company must align with the vision of the board. No matter the candidate's other qualifications, if these two elements are absent, the candidate is likely to end up a poor fit for the company. The importance of cultural compatibility and a shared strategic vision underscores the necessity of the board getting to know candidates personally, as these elements cannot be ascertained from reviewing résumés or soliciting recommendations from a search firm. It should be noted that both of these elements depend heavily on the ability of the CEO and the board to communicate and collaborate effectively. This, in turn, depends on a shared understanding of the respective roles of the CEO and the board. A CEO must understand that the board has the ultimate responsibility for overseeing the management of the company, while the board should appreciate that the day-to-day business of the company falls within the purview of management, led by the CEO. This understanding will enable the CEO and the board to sustain an ongoing cooperative relationship founded on mutual respect.

4. Internal and External Candidates

The most promising prospects for the next CEO often reside within the company. Indeed, promotion from within has often proven to be far more successful than hiring a CEO from the outside. CEOs promoted internally benefit from greater familiarity with the company and are typically less expensive (and their compensation less scrutinized) than CEOs recruited from the outside. Development of an internal talent pipeline is therefore a strategic imperative for any company, and the board has an important role to play in this process. The search team should actively identify promising leaders to keep a bench of qualified candidates at the ready. Boards use a variety of approaches to evaluate candidates. One useful step is to create opportunities for promising officers to interact with or appear before the board. This has the benefit of both familiarizing the board with potential candidates and developing the officers' ability to interact with the board. The succession planning team should also consider working

with the CEO to establish policies to evaluate internal candidates and to ensure that they are given opportunities to develop the skills and experience needed to possibly head the company in the future; for example, by rotating candidates through the company's key departments. While the CEO should exercise primary responsibility for building the company's management team, the board can also help develop its talent pipeline by seeing that appropriate recruiting and retention policies are in place at all levels of management.

Despite the importance of developing a talent pipeline and the benefits of internal promotion, a CEO succession plan should also include ongoing consideration of external candidates. This will enable the nominating and corporate governance committee to assess all of its options and will take on additional importance if the board determines that a change in strategic direction is in the company's best interest. In all cases, consideration of external candidates will help the board reach a more informed decision by having both a wider pool of candidates and an added ability to benchmark internal candidates.

5. Seeking the Input of Others

Succession planning should be a collaborative process that enables the nominating and corporate governance committee, and ultimately the board, to benefit from a number of perspectives and to utilize all of the company's resources. One such resource is the compensation committee, whose role has become increasingly important due to the centrality of executive compensation in attracting and retaining a qualified CEO, and because of the increased scrutiny generated by the topic in recent years. The nominating and corporate governance committee may also benefit from discussions with senior officers in the company's human resources department, who should have detailed knowledge about pipeline talent as well as a specialized understanding of what skills these promising candidates need to develop.

The nominating and corporate governance committee should consider engaging outside advisors to aid in the canvassing for, and assessment of, external candidates. While it is by no means necessary to engage an outside advisor to lead the CEO search process, the broader reach and perspective they can bring to bear can be invaluable in certain circumstances. It is true that the services of a top-flight recruiting agency can be expensive, but the board must keep in mind that this is one of the most important decisions they will make. A third party should, at a minimum, be retained to lead a thorough verification and background check so that the board can reasonably rely on this information when selecting a candidate.

6. Involvement of the Current CEO

When a company's CEO enjoys the full confidence of the board, he or she should play a prominent role in the succession planning process. In many circumstances, the board may want the CEO to manage the process, with the board or the nominating and corporate governance committee's oversight. This is because the incumbent CEO is uniquely positioned to understand the needs of the position and determine the successor best prepared to lead the company going forward. Absent special circumstances, any process not involving the CEO presents a number of disadvantages and will be a poor substitute. Without the insight of the CEO, the board may struggle to reach consensus on priorities or candidates. This reality has been exacerbated in the past decade by the tremendous emphasis placed on director independence, given the potential

challenges in finding candidates with special expertise and experience in the industry who also qualify as independent.

The incumbent CEO should keep the chair or lead director regularly involved in the process and coordinate his or her efforts with those of the nominating and corporate governance committee. The chair or lead director and the nominating and corporate governance committee should, in turn, update the rest of the board during the board's executive sessions. This will enable the other independent directors to express their views privately, while reinforcing an understanding that choosing the next CEO is ultimately the responsibility of the entire board.

In certain circumstances, such as when the board lacks full confidence in the incumbent CEO or when a crisis prevents use of the normal succession process, the nominating and corporate governance committee may need to take a larger role and minimize the CEO's involvement. Regardless of the circumstances, the committee must take an active role in the process and avoid even the perception that it is merely a rubber stamp for the incumbent CEO. Choosing the company's next CEO is one of the most difficult and consequential decisions a board must make. The nominating and corporate governance committee must work vigilantly to ensure that the board is well-prepared to make this decision when the time comes.

B. Director Succession Planning

As with CEO succession planning, nominating and corporate governance committees should take many of these same steps with respect to succession planning for the board. Of course, the risk of crisis is lower with respect to the board because there are many directors but only one CEO. Directors expressed satisfaction with the amount of attention that boards have dedicated to director succession planning in 2025, with 72 percent expressing their belief that their boards do not need to change their succession strategies.[253] The nominating and corporate governance committee should have both long-term and contingency plans in place to prepare for the departure of directors. This planning is particularly important for directors who occupy leadership positions on the board or possess important qualities, such as financial expertise. The nominating and corporate governance committee may find this planning most effectively done in conjunction with the annual evaluation of the board, its committees and directors.[254]

There are various ways to change the board's composition. Many boards have the authority under their company's charter to increase or decrease the size of the board through a resolution. This power can be used to proactively strengthen the board by adding an attractive candidate without waiting for a vacancy or replacing an incumbent director. Alternatively, there may be circumstances where decreasing the board size, at least temporarily, is the best option. Ordinary attrition of directors often provides an opportunity to update the board's skill set to better match the company's changing circumstances. Sometimes a nominating and corporate governance committee may determine that an incumbent director no longer fits the company's needs and recommend against that director's renomination. If the nominating and corporate governance committee holds this sort of view on a director, it must be prepared to recommend a change. However, it should resist attempts by corporate governance activists to disrupt a well-functioning team in the name of "board refreshment" as an end in itself. This newly popular phrase has been seized upon to promote various agendas, including diversity goals and director independence. However important those criteria may be, they only should be a part of the

nominating and corporate governance committee's holistic assessment and not simply an excuse to make changes.

As discussed in Section XIII.B, there is a growing view among shareholder activist groups and proxy advisory firms that long director tenure can affect a director's independence. As it plans for board succession, the nominating and corporate governance committee must be aware of that view and monitor its prevalence, but should always remember the benefits that flow from having experienced and long-term directors on the board in terms of familiarity with the company business, history, values and institutional knowledge.

Sometimes the regular succession planning process of a board is interrupted by an unexpected event. One such event that is occurring with increasing regularity (and that may escalate as the universal proxy is used) is the loss of key directors in a short-slate proxy contest. Such an event will require the nominating and corporate governance committee to reevaluate its available resources, in terms of qualifications and skill sets, to ensure that the board continues to be able to fulfill its many duties. Although not always the case, it has been our experience that dissident directors who are elected to boards as a result of proxy fights quite often go on to become valuable and productive members of the board. Understandably, however, nominating and corporate governance committees may be reluctant to assign newly elected dissident directors to particular committees or roles until they appreciate how they will affect the dynamic of the board and have a sense of their expected longevity on the board.

XVI. Director Compensation, Indemnification and Directors and Officers Insurance

A. Director Compensation

Director compensation is one of the more difficult issues on the corporate governance agenda and has been the subject of increased attention in recent years. On the one hand, more is expected of directors today in terms of time commitment, responsibility, exposure to public scrutiny and potential liability. On the other hand, the higher a director's pay, the greater the likelihood that such pay can be used against the director as evidence of a lack of true independence, or can be used to make claims of excessive director compensation.

1. Responsibility for Determining Director Compensation

The NYSE and Nasdaq rules do not specify that responsibility for director compensation must be assigned to any particular committee. However, it should be made the responsibility of either a committee of the board of directors or the full board of directors. Since director compensation is typically determined by either the Compensation Committee or the Nominating and Governance Committee, we have included this Chapter regarding the issues of publicly disclosed compensation at public companies generally.

When directors who would directly benefit from a proposed plan are delegated the responsibility of approving such a plan, a court will refuse the protection of the business judgment rule and scrutinize the overall fairness of the plan as it relates to the company's shareholders.[255] Care also should be taken that, under normal circumstances, the compensation and benefits of management are not increased at the same time as that of directors, lest doubt be cast on the validity of both actions.[256]

2. Considerations for Determining Director Compensation

In General. While directors are not employees and compensation is not the main motivating factor for public company directors, given the importance of board composition and the competition for the best candidates, it is important to evaluate whether director compensation programs are appropriate to the company's needs. Accordingly, as boards go through their self-evaluations, it is worthwhile to evaluate whether such programs are adequate to secure and retain best-in-class directors, or whether the programs need adjustment consistent with the increased demands of board service.

Meeting Fees and Retainers. Companies also should give careful thought to the mix between individual meeting fees and retainers. Business and regulatory demands have deepened director involvement and technology has changed the way directors meet. In view of these developments, many companies have de-emphasized per-meeting fees and instead increased retainers. Such an approach offers the dual benefits of simplifying director pay and avoiding issues that arise from electronic forms of communication and frequent, short telephonic meetings. As companies move away from per-meeting fees to retainer structures, they should consider whether additional retainer pay is appropriate for directors serving on committees that impose substantial extra demands. It is both legal and appropriate for basic directors' fees to be

supplemented by additional amounts to chairs of committees and to members of committees that meet more frequently or for longer periods of time. It is also appropriate to consider the level of time commitment required outside of meetings, including for members of audit and compensation committees who must frequently review substantial written material to be properly prepared for their meetings.

Additional Director Responsibilities. The increased responsibility imposed on directors generally is especially pronounced for non-executive board chairs, lead directors and committee chairs. Accordingly, particular attention should be paid to whether these individuals are being fairly compensated for their efforts and contributions. We expect the pay of non-executive board chairs and lead directors to increase as pay practices catch up to the demands of the responsibilities of these positions.

Determining Compensation. The board of directors, a nominating committee, a compensation committee or other responsible board of director committee, as applicable, should determine the form and amount of director compensation to be paid, with appropriate benchmarking of such compensation against that of peer companies. Additionally, as with executive officers, any perquisites or other forms of compensation that may be provided to directors should be carefully considered, especially in light of the positions taken by shareholder advisory firms, such as ISS, in certain circumstances. Boards of directors may also wish to consider including within the applicable equity incentive plan an annual limit on non-employee director equity-based awards or total compensation, to help avoid and defend against nuisance litigations that we have seen arise in the last few years.

In our experience, most compensation consultants can provide assistance in such benchmarking exercises, as well as in the design of director compensation programs. Survey data will prove useful in considering appropriate director compensation, in light of recent ISS guidelines regarding avoiding "excessive" director compensation.[257]

Finally, the committee tasked with determining director compensation should also consider the stock ownership guidelines applicable to the directors, both in terms of the number of shares and the period of time over which a new director is required to serve in order to achieve the guideline requirement. Compensation consultants can also be useful in providing survey data as to ownership requirements—both as to level, type and period of time required to meet these requirements—at peer companies.

In all instances, the importance of collegiality to the proper functioning of a board of directors must be kept in mind; director compensation should not promote factionalism on the board. Differences in compensation among directors should be fair and reasonable and reflect real differences in demands placed on particular directors.

Note on Disclosure. The SEC's compensation disclosure rules require tabular and narrative disclosure of all director compensation.[258] The required tabular disclosure is comparable to the Summary Compensation table that is required for named executive officer compensation (including disclosure with respect to perquisites, consulting fees and payments or promises in connection with director legacy and charitable award programs), except that only information concerning the last fiscal year needs to be disclosed. The narrative disclosure

requires a description of the company's processes and procedures for the consideration and determination of director compensation.

B. Exculpation and Indemnification; Directors and Officers Insurance

Delaware permits a company's certificate of incorporation to contain a provision eliminating or limiting the personal liability of a director for monetary damages for breaches of fiduciary duty, except liability for (1) breaches of the duty of loyalty, (2) acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law, (3) the unlawful payment of a dividend or unlawful stock purchase or redemption by the company and (4) any transaction from which the director derived an improper personal benefit.[259]

Delaware law also permits a company to indemnify a director (among other persons) for expenses incurred in any action by reason of his or her service as a director, so long as the director acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, so long as the director had no cause to believe his or her conduct was illegal.[260] A company may also advance expenses incurred in such an action and purchase indemnification insurance for its directors. Unlike an exculpation provision, an indemnification provision may be placed in a company's bylaws instead of its certificate of incorporation. Indemnification may also be negotiated in a separate agreement between the company and a director. Importantly, because a breach of the duty of loyalty involves an act of bad faith, such breaches are not eligible for exculpation or indemnification.

In August 2022, the Delaware legislature amended the DGCL to allow corporations to limit the personal liability of corporate officers for money damages for breaches of their fiduciary duty of care. Prior to this amendment, Delaware only allowed for such "exculpation clauses" (which must be set forth in the company's charter) for corporate directors. Accordingly, both directors and officers should be fully indemnified by the company to the fullest extent permitted by law and the company should purchase a reasonable amount of insurance to protect the directors against the risk of personal liability for their services to the company. Bylaws and indemnification agreements should be reviewed on a regular basis to ensure that they provide the fullest coverage permitted by law. Directors and officers also can continue to rely on their exculpation for personal liability for breaches of the duty of care under charter provisions put in place pursuant to state law.

Directors and Officers ("D&O") insurance coverage, of course, provides a key protection to directors. D&O policies are not strictly form documents; they can and should be negotiated. Careful attention should be paid to retentions, exclusions, and the scope of coverage. Care also should be given to the potential effect of a bankruptcy of the company on the availability of insurance, particularly the question of how rights are allocated between the company and the directors and officers who may be claiming entitlement to the same aggregate dollars of coverage. To avoid any ambiguity that might exist as to directors' and officers' rights to coverage and reimbursement of expenses in the case of a bankruptcy, companies should purchase separate supplemental insurance policies covering only directors and officers, but not the company (so-called Side-A coverage), in addition to the policies that cover both the company and the directors and officers individually.

Moreover, as the SEC has adopted new rules regarding the timing of equity awards in relation to the release of material nonpublic information. In particular, Item 402(x) of Regulation S-K requires companies to include in their 10-K or proxy statement narrative disclosure regarding their policies and practices on timing of awards of stock options and other similar option-like instruments in relation to disclosure of material nonpublic information. Companies will also be required to include tabular disclosure of awards made in the four business days before a periodic or current report filing that discloses material nonpublic information and ending one business day after the filing or furnishing of such report.[261]

XVII. Evaluations of the Board, Committees and Management

Boards of NYSE-listed companies are required to conduct annual performance evaluations of the board itself and board committees, and the nominating and corporate governance committee must be tasked with "oversee[ing] the evaluation of the board and management."[262] While not required by Nasdaq, the annual board evaluation is now a nearly universal practice, with 99 percent of S&P 500 boards engaging in some form of annual board evaluation/assessment process, with 47% undertaking some form of individual director evaluation.[263] The board and the nominating and corporate governance committee are not required by listing standards or other law to adopt any particular approach to conducting this evaluation, leaving flexibility to proceed in a way tailored to the company's and board's particular needs and culture.

A. The Board's Annual Governance Review

The board's annual self-evaluation provides an opportunity and forum for a comprehensive review of the company's performance, strategy, culture, corporate governance and responses to adversity during the previous year. The board should review its structure, processes and procedures to ensure that they are enabling the board to effectively carry out its responsibilities. This should include a review of the number and mix of directors; the role and functioning of the chair or lead director and executive board sessions; board agendas; board committee structure and composition; and the quality of information and professional and other resources made available to directors. The board should examine its role in overseeing corporate culture and developing and monitoring corporate strategy, and evaluate the effectiveness of the board and management in implementing this strategy. As part of this evaluation, directors should consider whether the board's structure, processes and proceedings afforded them sufficient opportunity to converse with the company's senior executives regarding the company's culture, strategy and performance. The board should also review corporate governance matters such as monitoring of corporate controls, management review, succession planning and executive compensation.

The board's annual evaluation should include a review of the company's corporate governance guidelines to make certain that they are clear and relevant and that they adequately address key topics such as related-party transactions and conflicts of interest. Corporate governance documents should be updated to reflect any applicable legal or regulatory changes. They should also be company-specific, rather than generic and overbroad. This will serve both to make the documents a more useful guide and also to avoid a failure to comply with a policy that may be considered in hindsight as indicative of a lack of due care. Conversely, keeping policies up to date and adhering to these procedures in good faith can be important factors in establishing the applicability of exculpatory charter provisions in any litigation that might arise challenging board actions. It is therefore important that the nominating and corporate governance committee implement and update corporate governance guidelines and measure the board's and its committees' performance against these guidelines.

If the company faced any crises during the year, the annual evaluation should include a review of how the crises came about and how they were handled. Any review should identify

the factors that caused or exacerbated the crises and examine the steps taken to correct any deficiencies. Directors should consider the effectiveness of the board's and management's response to the crises. As part of this inquiry, directors should ask whether they received adequate and timely information from management and whether closer contact with management could help avoid future crises. Directors should also evaluate the contributions of outside advisors, if any were retained, in responding to the crises. Similarly, the evaluation should examine the appropriateness of the board's and management's response to any whistleblower complaints or shareholder proposals made during the year. During the evaluation, the whole board should be briefed on the status and results of any investigations into whistleblower allegations. The board should also review the company's shareholder relations program and ensure that it is maintaining an appropriate level of interaction with key shareholders.

1. Methods of Evaluation

A questionnaire or survey of directors is the most common method of evaluating the full board, with group discussions and interviews of individual directors also widely used. Each of these methods has its advantages. For example, questionnaires and surveys are time-efficient, produce quantifiable results and may encourage directors to speak more freely, whereas interviews and group discussions allow for in-depth and interactive discussion. Additionally, many nominating and corporate governance committees seek management's perspective on the interaction between the board and management as part of the review. However, there is no single, established procedure for a board's annual review of its corporate governance. To effectively perform its oversight function, it is important for each nominating and corporate governance committee to develop a customized approach to its annual review using the combination of methods it determines is appropriate for its company's particular circumstances. The board should avoid an overemphasis on check-the-box paperwork and should instead substantively focus on the most critical issues facing its company. More important than the method employed is the result of facilitating an honest assessment of the board's performance and a meaningful discussion of areas for improvement.

While it is perfectly acceptable for a board to conduct its annual review during a board meeting without the engagement of third-party advisors, we offer to undertake the evaluation of the board in cooperation with or on behalf of our clients.[264] Outside advisors such as accountants, lawyers and consultants offer a plethora of agendas, checklists and forms to assist the board in its review. While these products can, in some instances, facilitate a productive and transparent review, boards must guard against the danger of sacrificing substance for the sake of form. The nominating and corporate governance committee should bear in mind that if a charter or checklist requires review or other action, the failure to take such action may be argued in hindsight to be evidence of lack of due care. Documents and minutes pertaining to the board's self-evaluation are not privileged; thus, a board should take care to avoid damaging the collegiality of the board or creating ambiguous records that may be used against the company or the board in litigation. The nominating and corporate governance committee need not create volumes of records to demonstrate that the directors have fulfilled their responsibilities with respect to the board's self-evaluation. As in other matters, a good-faith effort and a reasonable, tailored process will entitle directors to the protection of the business judgment rule.

2. Following Through

As important as the annual evaluation is, it should be seen as only one step in a continuous process to enhance corporate governance. First, the nominating and corporate governance committee must ensure that the board proactively addresses corporate governance challenges as they arise, rather than waiting for the next annual review. Second, it should be remembered that assessment is not an end in itself—the findings of the annual review must be translated into a plan of action, and the implementation of this plan should be monitored and reassessed on an ongoing basis. In particular, the independent Chair, Lead Independent Director or another designated board member should report back to the board at an appropriate time to discuss any issues that have arisen and plans for proposed solutions.

B. Committee Self-Evaluations

The NYSE requires that audit, compensation and nominating and corporate governance committees conduct annual self-evaluations.[265] Many of the same steps discussed above that should be taken by a board during its self-evaluation are also appropriate during committee self-evaluations. Committees should assess their effectiveness and consider whether they have an adequate structure and procedures to carry out their responsibilities, whether they have sufficient access to the full board and to management and the usefulness of any outside advisors. Committees should also review their charters for any desirable changes and measure their performance against their charters. Additionally, committees may choose to evaluate the contributions of individual members through group discussion or peer or self-evaluations.

Committees should pay particular attention to their relationships with the board as a whole. Committees are an essential element to an effective board because they allow for specialized and focused attention to important issues. This function is undermined, however, if the work of a committee is either duplicated or ignored by the whole board.[266] An annual evaluation of a committee should therefore ensure that the work of the committee is being efficiently integrated into the overall work of the board. The results of the committees' evaluations should be shared with the full board to further this integration.

C. Evaluation of the CEO

CEOs currently face unprecedented levels of scrutiny from investors (often including activist investors) and the general public, and boards have responded by engaging in more probing reviews of their CEOs. This increased scrutiny, and say-on-pay legislation in particular, has led to nearly universal annual reviews of CEO performance.[267]

1. Tasking the Responsibility

The NYSE listing standards require that the compensation committee be responsible for reviewing and approving corporate goals and objectives relevant to CEO compensation and for evaluating the CEO's performance in light of those goals. Alternatively, the board may allocate the responsibilities of the compensation committee to another committee composed entirely of independent directors. Given that the NYSE listing standards also require the nominating and corporate governance committee to oversee the evaluation of management,[268] the nominating and corporate governance committee is often involved in CEO evaluation as well.

2. Finding the Right Approach

CEO evaluations present challenges that do not arise in the board's self-evaluation. The board's self-evaluation is typically focused on the board as a group, whereas CEO evaluations necessarily focus on the individual. This difference increases the chance for acrimony or misunderstanding, making it imperative that the evaluation process be thoughtful. Each year, the board should set clear objectives for the CEO and maintain an ongoing dialogue with the CEO regarding progress towards those objectives. An ongoing dialogue will not only benefit the company by addressing problems as they arise, it will also avoid the surprise and confusion of a CEO discovering at an annual evaluation that the board has been dissatisfied with his or her performance.

3. Considering Replacing the CEO

As part of its annual review, a board may well determine that a change in management leadership—either immediately or in the near future—is in the company's best interests. Thus, evaluation of the current CEO and succession planning are closely intertwined. The decision to replace the CEO must be based on the directors' independent judgment of the best interests of the company. While replacing the CEO will sometimes be necessary, boards should carefully weigh the costs of replacement and also consider whether some measure short of removal may be appropriate.

D. Evaluation of Individual Directors

Nearly half of S&P 500 boards evaluate individual directors as part of their annual reviews, and this percentage may continue to grow in light of the universal proxy card rules, which place greater focus on individual director qualifications and weaknesses.[269] Despite the increase, however, the fact that a minority of companies evaluate directors individually is likely the result of boards' reluctance to single out individual directors and a recognition that the effectiveness of a board or committee cannot be easily disaggregated. It is also likely that, even if there is no official evaluation of directors individually, if there are any significant problems with individual directors, they will come to light as part of an overall board evaluation. While the board is certainly more than the sum of its parts, evaluation of individual directors may identify areas for improvement that an evaluation of the entire board does not. The nominating and corporate governance committee should weigh these considerations and determine whether individual evaluations are in the company's best interests.

1. Methods of Evaluation

If the nominating and corporate governance committee decides to conduct individual director evaluations, it should consider whether to conduct these assessments through self-evaluations or peer evaluations. These evaluations ask directors to rate themselves or their fellow directors in a number of categories, such as meeting attendance and contribution or grasp of the company and its industry. Both peer and self-evaluations can provide an opportunity for constructive assessment of the board, and the nominating and corporate governance committee may decide to use some combination of the two. Peer evaluations may in many cases prove more informative and objective than self-evaluations, but they also risk damaging the collegiality

that is vital to a well-functioning board. If peer evaluation is used, the aggregate results should be presented to each director privately. Alternatively, the nominating and corporate governance committee may decide that a group discussion is the most beneficial format. The nominating and corporate governance committee should also consider procedures to engage with directors who receive negative feedback in their evaluations.

2. Addressing Underperforming Directors

Addressing the problem of underperforming directors is one of the most sensitive tasks that a board faces. The ever-increasing responsibilities and time commitments that board service entails have raised the bar for board services. In some cases, additional training or a reduction in a director's other responsibilities may address the problem. In other cases, personality conflicts may lead to a balkanized board, stifling candid discussion and undermining the board's effectiveness. Although there is generally no easy way to convince an underperforming director to resign, the situation is typically best handled by the chair of the nominating and corporate governance committee or the lead independent director. Short of seeking a director's resignation, the nominating and corporate governance committee should consider ways to restructure the composition of the board and its committees.

The nominating and corporate governance committee is responsible for deciding whether to recommend incumbent directors for renomination. Whether or not the board engages in a formal review of individual directors, the board's annual review provides an opportunity for the nominating and corporate governance committee to assess whether the company's interests would be best served by the continued service of each director. While the importance of board continuity dictates that a decision to replace an incumbent director not be made lightly, renomination must not be seen as a given, especially in light of the potency that the new universal proxy card rules add to proxy contests. Rather, the nominating and corporate governance committee must carefully assess the contributions and skills of each director and ensure that they continue to fit the company's needs and strategy. If the nominating and corporate governance committee determines not to renominate a director, that director typically should be informed privately to provide him or her with the opportunity to exit gracefully.

Sometimes a senior and well-respected director who is departing from the board himself or herself can be helpful in encouraging other directors whom the committee or board would like to replace to step down at the same time.

E. Director Questionnaires

Whether or not the nominating and corporate governance committee chooses to engage in individual director evaluations as part of its annual review, it should ensure that directors fill out a director questionnaire at least annually. Among the topics typically covered by a director questionnaire are: material relationships with an officer, parent, subsidiary or affiliate of the company; current employment and other directorships; other directorships held in the past five years; relevant experience; certain legal actions in the past 10 years; beneficial ownership and trading of securities; compensation, benefits and other perquisites; and questions tailored to service on particular committees.

These questionnaires serve a number of functions. First, the SEC requires extensive disclosure regarding directors, and thus, gathering information from the directors is necessary to make full and accurate disclosures in the company's filings.[270] Similarly, both the NYSE and Nasdaq require a listed company to make a finding that its independent directors are indeed independent, and the questionnaire will help identify any relationships that may compromise director independence. Director questionnaires also may help the company to flag interlocking directorships that may be problematic under antitrust laws or determine that a director may simply have too many other commitments to serve effectively. Lastly, the questionnaires aid in the nominating and corporate governance committee's task of maintaining an up-to-date picture of its board composition, particularly with respect to experience and skills, as part of the process of matching directors' attributes to the company's needs.

ANNEX A

Comparison of NYSE and Nasdaq Corporate Governance Standards

Standard	**NYSE**	**Nasdaq**
1. Independence	The NYSE standards require that a listed company's board be composed of a majority of independent directors.[271] The NYSE's standard for determining director independence is discussed in Section X.C.1.	Nasdaq listing requirements likewise provide that a company's board must be composed of a majority of independent directors.[272] Nasdaq's standard for determining director independence is discussed in Section X.C.1. If a company fails to comply with this requirement due to one vacancy or because one director ceases to be independent because of circumstances beyond the director's reasonable control, the company has until the earlier of its next annual shareholder meeting or one year from the occurrence of the event causing noncompliance. However, if the next annual shareholder meeting is no later than 180 days following the event that caused noncompliance, the company instead has 180 days from such event to regain compliance.[273] There is no analogous cure period provision in the NYSE corporate governance guidelines.

Standard	NYSE	Nasdaq
2. Committees	NYSE-listed companies are required to have a nominating and corporate governance committee, a compensation committee and an audit committee, each of which must be composed entirely of independent directors.[274] Each of these committees must have a charter entrusting the committee with certain responsibilities and providing for an annual evaluation of the committee.[275] Additionally, members of the compensation committee[276] and members of the audit committee[277] must satisfy more stringent independence criteria than other directors.	Nasdaq-listed companies are also required to have an audit committee and a compensation committee composed entirely of independent directors.[278] Both of these committees must have a written charter vesting the committees with certain responsibilities.[279] For a more detailed discussion of these requirements, *see* Section XIV.B. Nasdaq does not require listed companies to have a nominating and corporate governance committee. However, if a Nasdaq-listed company does not have a nominating and corporate governance committee comprised solely of independent directors, director nominees must be selected or recommended to the board by independent directors constituting a majority of the board's independent directors in a vote in which only independent directors participate.[280] For listed companies with a nominations committee of at least three directors, Nasdaq permits one non-independent director to be a committee member in exceptional and limited circumstances.[281] Non-independent directors serving under this exception may serve no longer than two years.[282] Additionally, each Nasdaq-listed company must certify that it has adopted a formal written charter or board resolution addressing the nominations process and such related matters as may be required under federal securities laws.[283] The SEC requires that all members of the audit committee be independent.[284] Under SEC rules, an audit committee member may be considered independent only if he or she has not (i) accepted any consulting, advisory or other compensatory fee from the issuer or any of its subsidiaries or (ii) been an affiliate of the issuer or any of its subsidiaries.[285] The SEC also provides that national stock exchanges, which must ensure that listed companies have independent compensation committee members, must consider the same factors in assessing the independence of compensation committee

Standard	NYSE	Nasdaq
		members as the SEC uses to assess audit committee member independence.[286]
3. Corporate Governance Guidelines and Code of Conduct	As discussed in Section I.A.1, NYSE-listed companies are required to adopt, post to their website and disclose in SEC filings corporate governance guidelines that address director qualification standards, director responsibilities, director access to management (and, as necessary and appropriate, independent advisors), director compensation, director orientation and continuing education, management succession and annual performance evaluations of the board.[287]	In contrast to the NYSE listing standards, Nasdaq listing standards do not address corporate governance guidelines.

Standard	NYSE	Nasdaq
	NYSE-listed companies are also required to adopt, post to their website and disclose in SEC filings a code of business conduct and ethics for directors, officers and employees. While companies may determine their own policies, NYSE-listed companies must have a code of conduct that addresses at a minimum conflicts of interest, corporate opportunities, confidentiality, fair dealing, the protection and proper use of the company's assets, compliance with laws, rules and regulations (including insider trading laws) and encouraging the reporting of any illegal or unethical behavior. A code of conduct must require that any waiver of the code for executive officers or directors be made only by the board or a board committee, and listed companies must promptly disclose any waivers of the code for directors or executive officers. To the extent that any such waiver is granted, the waiver must be disclosed to shareholders within four (4) business days via press release, website disclosure, or through a current report on Form 8-K filed with the SEC. Each code of business conduct must also contain compliance standards and procedures that will facilitate the effective operation of the code. Listed companies must disclose in their annual proxy statements or, if the company does not file an annual proxy statement, in its annual report on Form 10-K filed with the SEC that its code of business conduct and ethics is available on or through its website and provide the website address.[288]	Nasdaq-listed companies are also required to adopt and make public a code of conduct applicable to all directors, officers and employees.[289] The code of conduct must include standards that promote: (i) honest and ethical conduct (including the ethical handling of conflicts of interest); (ii) full, fair, accurate, timely and understandable disclosure; (iii) compliance with applicable governmental laws, rules and regulations; (iv) prompt internal reporting of violations of the code; and (v) accountability for adherence to the code.[290] The code of conduct must also include an enforcement mechanism. Any waivers of the code for directors or executive officers must be approved by the board or a board committee and disclosed to the public, along with the reasons for the waiver, within four business days by filing a current report on Form 8-K with the SEC or, in cases where a Form 8-K is not required, by distributing a press release. Alternatively, within four business days, the company may disclose waivers on the company's website in a manner that satisfies the requirements of Item 5.05(c) of Form 8-K.[291]

Standard	NYSE	Nasdaq
4. Executive Sessions	The NYSE requires that non-management directors meet at regularly scheduled executive sessions without management.[292] "Non-management" directors include all those who are not executive officers, and include such directors who are not independent by virtue of a material relationship, former status or family membership, or for any other reason. A company may instead choose to hold regular executive sessions of independent directors only. If a company chooses to include all non-management directors in its regular executive sessions, it should hold an executive session including only independent directors at least once a year. An independent director must preside over each executive session of independent directors, although it need not be the same director at each session.[293]	Nasdaq requires that a company hold regularly scheduled executive sessions at which only independent directors are present.[294] This is a more stringent requirement than the NYSE requirement, which allows regularly scheduled executive sessions to include all non-management directors (including non-independent directors). Commentary to this rule instructs that executive sessions should occur at least twice a year, and perhaps more frequently, in conjunction with regularly scheduled board meetings.[295] Unlike the NYSE guidelines, Nasdaq does not address who must lead executive sessions.
5. Shareholder Approval of Certain Matters	Acquisitions: The NYSE requires shareholder approval prior to the issuance of securities in connection with any transaction or series of related transactions if the common stock to be issued is or will be equal to or greater than 20 percent of the voting power or number of shares of common stock outstanding before the issuance (subject to certain exceptions).[296] Changes in Control: Shareholder approval is required prior to an issuance that will result in a change of control of the company.[297]	Acquisitions: Nasdaq requires shareholder approval prior to the issuance of securities in connection with the acquisition of the stock or assets of another company if the common stock to be issued is or will be equal to or greater than 20 percent of the voting power or number of shares of common stock outstanding before the issuance.[298] Changes in Control: Shareholder approval is required prior to the issuance of securities if such issuance or potential issuance will result in a change of control of the company.[299]

Standard	NYSE	Nasdaq
	Insider Transactions: Shareholder approval is required prior to the issuance of common stock to a director, officer or substantial security holder, or any of their affiliates, if the issuance exceeds one percent of the voting power or shares of common stock of the company.[300]	Insider Transactions: Shareholder approval is required prior to the issuance of securities in connection with the acquisition of the stock or assets of another company if (A) any director, officer or substantial shareholder of the company has a five percent or greater interest (or if such persons have a 10 percent or greater interest, collectively) in the company or assets to be acquired or in the consideration to be paid in the transaction or series of related transactions, and (B) the present or potential issuance of common stock, or securities convertible into or exercisable for common stock could result in an increase in the company's voting power or outstanding common shares of five percent or more.[301]
	Equity Compensation: Subject to certain exceptions, shareholders must be given the opportunity to vote on the establishment or material amendment of equity-compensation plans.[302]	Equity Compensation: Subject to certain exceptions, shareholder approval is required prior to the issuance of securities when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.[303]

Standard	NYSE	Nasdaq
6. Exemptions	Limited Partnerships, Companies in Bankruptcy and Controlled Companies: Limited partnerships, companies in bankruptcy, and controlled companies (defined as a company in which more than 50 percent of the voting power for director elections is held by an individual, group or another company) are not required to have a majority-independent boards, compensation committee or nominating and corporate governance committee.[304] These companies are, however, subject to the remaining NYSE corporate governance standards under Section 303A of the NYSE Listed Company Manual.	Controlled Companies: Controlled companies (defined as a company in which more than 50 percent of the voting power for director elections is held by an individual, group or another company) are not required to have majority-independent boards or compensation committees, or to meet Nasdaq's requirements regarding nominations by independent directors.[305] Controlled companies are, however, subject to the remaining Nasdaq corporate governance standards.[306] Limited Partnerships: Limited partnerships are not generally subject to Nasdaq corporate governance requirements.[307] Limited partnerships must, however, maintain a corporate general partner or co-general partner with the authority to manage the day-to-day affairs of the company, which partner(s) must maintain a sufficient number of independent directors to satisfy Nasdaq's audit committee requirements.[308] Limited partnerships must also be audited by an independent public accounting firm, review related-party transactions and abide by Nasdaq's notification of non-compliance requirements. Limited partnerships are also subject to the shareholder approval requirements with respect to establishing or amending equity compensation arrangements. While Nasdaq does not require limited partnerships to hold annual meetings, if annual meetings are required by statute, regulation or the terms of the partnership's limited partnership agreement, Nasdaq imposes requirements regarding quorums and solicitation of proxies.[309]

Standard	NYSE	Nasdaq
	Foreign Private Issuers: Foreign private issuers listed on the NYSE are permitted to follow home country practice in lieu of the NYSE corporate governance standards, with the exception of the NYSE governance standards regarding audit committees and certification of compliance.[310] Foreign private issuers must disclose any significant ways in which their corporate governance practices differ from the NYSE listing standards. Commentary to the NYSE guidelines clarify that "what is required is a brief, general summary of the significant differences, not a cumbersome analysis."[311]	Foreign Private Issuers: Foreign private issuers listed on Nasdaq may follow the practices of their home countries in lieu of Nasdaq corporate governance requirements, except that they must comply with Nasdaq requirements concerning audit committees, board diversity, the prohibition on certain alterations to common stock voting rights and notification of noncompliance.[312] A foreign private issuer electing to follow home country practices in lieu of Nasdaq governance requirements must disclose in its annual SEC reports each requirement that it does not follow and describe the home country practice it follows in lieu of that requirement. Such issuer must also submit to Nasdaq a written statement from an independent counsel from the company's home country certifying that the company's practices are not prohibited by the home country's laws.[313]
7. Phase-In Exceptions	Companies Listing in Conjunction with an Initial Public Offering: A company listing on the NYSE in conjunction with an initial public offering ("IPO") must have a majority-independent board within one year of its listing date. The company must have at least one independent member of its compensation and nominating and corporate governance committees by the earlier of the date its IPO closes or five business days from its listing date (typically, the date on which "when-issued" trading begins), a majority of independent members of these committees within 90 days of its listing date, and fully independent committees within one year of listing. The company must have at least one independent member of its audit committee by its listing date, a majority of independent members within 90 days of the effective date of its registration statement and a fully independent audit committee within one year of the effective date of its registration statement.[314]	Companies Ceasing to Qualify as Controlled Companies and Companies Listing in Conjunction with an IPO or upon Emergence from Bankruptcy: A company that ceases to qualify as a controlled company, a company emerging from bankruptcy, or a company listing on Nasdaq in conjunction with an IPO must have a majority-independent board within one year of its listing date.[315] For each committee, the company must have one independent director as of its listing date, a majority of independent committee members within 90 days of listing and solely independent committee members within one year of listing.[316] Companies Transferring from Other Markets: Companies transferring to Nasdaq from other markets with a substantially similar requirement are afforded the balance of any grace period afforded by the other market. Companies transferring to Nasdaq from other listed markets that do not have a substantially similar requirement are afforded one year from the date of listing on Nasdaq.[317]

Standard	NYSE	Nasdaq
	Companies Listing in Conjunction with a Carve-Out or Spin-Off Transaction: A company listing on the NYSE in conjunction with a carve-out or spin-off transaction must have at least one independent member on its audit committee by the listing date, a majority-independent audit committee within 90 days of the effective date of its registration statement and a fully independent audit committee within one year of the effective date of its registration statement. Further, the audit committee must have at least two members within 90 days of the listing date and at least three members within one year of the listing date. Additionally, carved-out and spun-off companies must have at least one independent member on each of its compensation and nominating and corporate governance committees by the date the transaction closes, a majority of independent members on each committee within 90 days thereafter and fully independent committees within one year. The company must have a majority-independent board within one year of its listing date.[318] Companies Listing upon Emergence from Bankruptcy: A company listing on the NYSE upon emergence from bankruptcy must have a majority independent board within one year of the listing date. The company also must have at least one independent member on both its compensation and nominating and corporate governance committees by its listing date, a majority of independent members within 90 days after such date and fully independent committees within one year. The company must comply with the NYSE requirements regarding audit committees, including, if applicable, the independence requirements, as of its listing date, unless an exemption is available.[319]	

Standard	NYSE	Nasdaq
	Companies Ceasing to Qualify as a Controlled Company: An NYSE company that ceases to qualify as a controlled company must have a majority-independent board and fully independent compensation and nominating and corporate governance committees within one year from its status change. The company must also have at least one independent member on each of its compensation and nominating and corporate governance committees as of the date of its status change, and a majority of independent committee members within 90 days.[320] Companies Ceasing to Qualify as a Foreign Private Issuer: An NYSE company that ceases to qualify as a foreign private issuer must have a majority independent board and fully independent audit, compensation and nominating and corporate governance committees within six months of the date it ceases to so qualify.[321] Additionally, such companies must comply with the shareholder approval of equity compensation plans requirement by the later of six months after losing foreign private issuer status or its first annual meeting after losing foreign private issuer status, but, in any event, within one year after loss of status.[322] Companies Transferring from Another National Securities Exchange: With regards to particular requirements of the NYSE's Corporate Governance Standards, companies transferring to the NYSE from another national securities exchange that has a substantially similar governance requirement are afforded the balance of any transition period afforded by the other exchange. Companies transferring to the NYSE from other national securities exchanges that do not have a substantially similar requirement are afforded one year from the date of listing on the NYSE.[323]	

Standard	**NYSE**	**Nasdaq**
8. Noncompliance	The CEO of a NYSE-listed company must certify to the NYSE each year that he or she is not aware of any violation by the company of the NYSE corporate governance standards, qualifying the certification to the extent necessary.[324] The CEO must promptly notify the NYSE in writing after any executive officer of the company becomes aware of any noncompliance with the NYSE corporate governance standards.[325]	A company must provide Nasdaq with prompt notification after an executive officer of the company becomes aware of any noncompliance with Nasdaq's corporate governance rules.[326]

ANNEX B

Example of
Director Resignation Policy

This Director Resignation Policy ("Policy") of [COMPANY] (the "Company") applies to annual elections of directors in which the number of director nominees equals or is less than the number of board seats being filled, hereinafter referred to as uncontested elections of directors. All other elections of directors shall be governed by the Company's Certificate of Incorporation and Bylaws without giving effect to this Policy.

In an uncontested election of directors, any incumbent nominee who receives a greater number of votes "withheld" from his or her election than votes "for" his or her election will, [promptly] [within [five] days] following the certification of the stockholder vote, tender his or her resignation in writing to the Chair of the Board for consideration by the Nominating and Governance Committee (the "Committee").

The Committee will consider any such tendered resignation and, within [90] days following the date of the stockholders' meeting at which the election occurred, will make a recommendation to the Board of Directors concerning the acceptance or rejection of such resignation. In determining its recommendation to the Board of Directors, the Committee will consider all factors deemed relevant by the members of the Committee including, without limitation, the reasons why stockholders who cast "withhold" votes for such director did so, if known, the qualifications of the director (including, for example, the impact the director's resignation would have on the Company's compliance with the requirements of the Securities and Exchange Commission and the [NASDAQ] [NYSE]), and whether the director's resignation from the Board of Directors would be in the best interests of the Company and its stockholders.

The Committee may also consider a range of possible alternatives concerning the director's tendered resignation as the members of the Committee deem appropriate, which may include, without limitation, acceptance of the resignation, rejection of the resignation or rejection of the resignation coupled with a commitment to seek to address and cure the underlying reasons reasonably believed by the Committee to have substantially resulted in the "withhold" votes.

The Board of Directors will take formal action on the Committee's recommendation within a reasonable period of time following the date of the stockholders' meeting at which the election occurred. In considering the Committee's recommendation, the Board of Directors will consider the

information, factors and alternatives considered by the Committee and such additional information, factors and alternatives as the Board of Directors deems relevant.

The Company, within four business days after such decision is made, will publicly disclose, in a Form 8-K filed with the Securities and Exchange Commission, the Board of Director's decision to accept or reject the resignation, together with [a full explanation of the process by which the decision was made and], if applicable, the reasons for rejecting the tendered resignation.

No director who, in accordance with this policy, is required to tender his or her resignation, shall participate in the Committee's deliberations or recommendation, or in the Board of Director's deliberations or determination, with respect to accepting or rejecting his/her resignation as a director. Any such director shall, however, otherwise continue to serve as a director during this period.

This Policy is effective commencing with the Company's [next] annual stockholders' meeting.

ANNEX C

Example of
Nominating and Corporate Governance Committee Charter[327]

Purpose

The Nominating & Corporate Governance Committee (the "Committee") is appointed by the Board of Directors (the "Board") of **[**COMPANY**]** (the "Company") (1) to assist the Board by identifying individuals qualified to become Board members, consistent with criteria approved by the Board, and to recommend to the Board the director nominees for the next annual meeting of stockholders and the individuals to fill vacancies occurring between annual meetings of stockholders; (2) to develop and recommend to the Board matters of corporate governance, including the Corporate Governance Guidelines applicable to the Company; (3) to lead the Board in its annual review of the Board and management's performance; and (4) to recommend to the Board director nominees for each committee.

Committee Membership

The size of the Committee shall be determined by the Board in its sole discretion, provided that, in no event, shall it consist of fewer than [●][328] member(s).

The members of the Committee shall be appointed annually by the Board and will serve at the Board's discretion. Committee members may be removed from the Committee by the Board at any time, with or without cause and any vacancies will be filled through appointment by the Board.

The Board shall appoint one member of the Committee as its Chairperson.

All members of the Committee shall meet the independence requirements of the [New York Stock Exchange/Nasdaq] and any other applicable laws or regulations.

Meetings

The Committee shall meet as often as necessary to carry out its responsibilities, but not less than [●] each year. The Committee Chairperson shall preside at each meeting. In the event the Committee Chairperson is not present at a meeting, the Committee members present at that meeting shall designate one of its members as the acting chair of such meeting.

Committee Authority and Responsibilities

1. The Committee shall have the resources and authority to discharge its responsibilities, including the sole authority (i) to retain and terminate any search firm to be used to identify director candidates and (ii) to approve the search firm's fees and other retention terms. The Committee shall also have authority to obtain advice and assistance from internal or external legal, accounting or other advisors.

2. The Committee shall actively seek individuals qualified to become directors for recommendation to the Board, consistent with criteria identified by the Board.

3. The Committee shall seek to complete customary vetting procedures and background checks with respect to individuals suggested for potential Board membership by stockholders of the Company or other sources.

4. The Committee shall monitor and evaluate the orientation and training needs of directors and make recommendations to the Board where appropriate.

5. The Committee shall assist the Board in determining and monitoring whether or not each director and prospective director is "independent" within the meaning of any rules and laws applicable to the Company.

6. The Committee shall annually review and make recommendations to the Board with respect to the compensation and benefits of directors, including under any incentive compensation plans and equity-based compensation plans.

7. The Committee shall receive comments from all directors and report annually to the Board with an assessment of the Board's performance, to be discussed with the full Board following the end of each fiscal year.

8. The Committee shall annually, or more frequently as it deems appropriate, review and reassess the adequacy of the Corporate Governance Guidelines of the Company and recommend any proposed changes to the Board for approval.

9. The Committee shall review and recommend to the Board proposed changes to the Company's Certificate of Incorporation and Bylaws.

10. The Committee shall review stockholder proposals relating to corporate governance and other matters and recommend to the Board the Company's response to such proposals.

11. The Committee shall periodically review the Company's policies, practices and disclosures with respect to sustainability and environmental, social and governance factors.

12. The Committee shall annually, or more frequently as it deems appropriate, review the succession planning for the Company's senior executive officers, including but not limited to the Chief Executive Officer and [may] [will] do so in concert with the Compensation Committee.

13. The Committee shall make regular reports to the Board.

14. The Committee shall review and reassess the adequacy of this Charter annually and recommend any proposed changes to the Board for approval.

15. The Committee shall annually review its own performance.

16. The Committee may form and delegate authority to subcommittees when appropriate.

[1] Item 407(c) of Regulation S-K; NYSE Listed Company Manual, Rule 303A.04; Nasdaq Listing Rule 5605-6(e)(B).
[2] NYSE Listed Company Manual, Rule 303A.04(a).
[3] For a description of the NYSE's independence requirements, *see* Section X.C.1(a).
[4] Nasdaq Listing Rule IM-5605-6(e)(1).
[5] For a description of Nasdaq's independence requirements, *see* Section X.C.1(b).
[6] Nasdaq Listing Rule IM-5605-7.
[7] Nasdaq Listing Rule IM-5605-6(e)(3).
[8] Note, however, that ISS recommends "against" or "withhold" votes for non-independent directors who serve on the audit, compensation, or nominating committee. *See* ISS, *2025 U.S. Proxy Voting Guidelines* (January 2025).
[9] Item 407(b)(3) of Regulation S-K. 17 C.F.R. § 229.407(b)(3).
[10] *Id*.
[11] Item 407(c)(1) of Regulation S-K. 17 C.F.R. § 229.407(c)(1).
[12] Item 407(a) of Regulation S-K. 17 C.F.R. § 229.407(a).
[13] Item 407(a)(1)(i) of Regulation S-K. 17 C.F.R. § 229.407(a)(1)(i).
[14] *Id*.
[15] Instruction 1 to Item 407(a) of Regulation S-K. 17 C.F.R. § 229.407(a).
[16] NYSE Listed Company Manual, Rule 303A.04(b).
[17] Nasdaq Listing Rule IM-5605-6(e)(2).
[18] In 2024, 100 percent of S&P 500 companies had a nominating and corporate governance committee. Spencer Stuart, *2024 U.S. Spencer Stuart Board Index* 44 (2024), spencerstuart.com/-/media/2024/09/ssbi2024/2024_us_spencer_stuart_board_index.pdf.
[19] NYSE Listed Company Manual, Rule 303A.04(b)(i).
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] NYSE Listed Company Manual, Rule 303A.04(b)(ii).
[24] Commentary to NYSE Listed Company Manual, Rule 303A.04.
[25] *Id*.
[26] *Id*.
[27] Commentary to NYSE Listed Company Manual, Rule 303A.09.
[28] NYSE Listed Company Manual, Rule 303A.04.
[29] NYSE Listed Company Manual, Rule 303A.09.
[30] Nasdaq Listing Rule 5605(e)(2).
[31] Item 407(c)(2)(i) of Regulation S-K. 17 C.F.R. § 229.407(c)(2)(i).
[32] Instruction 2 to Item 407 of Regulation S-K. 17 C.F.R. § 229.407.
[33] NYSE Listed Company Manual does not prescribe a minimum or maximum number of members, Nasdaq does not require the formation of a nominating and corporate governance committee, and the SEC requires only disclosure of committee-related information.
[34] NYSE Listed Company Manual, Rule 303A.04.
[35] Nasdaq Listing Rule 5605(e)(1).
[36] A glaring example of the expansive nature such requests can occasionally take occurred in 2014, when the Delaware courts required Wal-Mart, in response to a shareholder demand to investigate potential wrongdoing associated with illegal payments to Mexican officials, to produce documents from 11 different custodians, including those on disaster recovery tapes, spanning a seven-year period. The order also required production of documents that were otherwise protected by attorney-client privilege. The stockholder investigation was prompted by an April 2012 *New York Times* article titled "Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle." *Wal-Mart Stores, Inc.* v. *Ind. Elec. Workers Pension Trust Fund IBEW*, 95 A.3d 1264 (Del. 2014); *cf. United Techs. Corp.* v. *Treppel*, 109 A.3d 553, 559 (Del. 2014) (permitting the company to condition use of materials obtained in an inspection of its books and records only to cases filed in Delaware courts and noting that "the stockholder's inspection right is a 'qualified one'" for which the "Court

of Chancery has wide discretion to shape the breadth and use of inspections under § 220 to protect the legitimate interests of Delaware corporations"); *see also* David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES (April 21, 2012), https://archive.nytimes.com/www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html.

37 8 *Del. C.* § 220.

38 8 *Del. C.* § 220(b)(2).

39 8 *Del. C.* § 220(b)(3).

40 *Rivest* v. *Hauppauge Digital, Inc.,* C.A. No. 2019-0848-PWG, 2022 WL 3973101, *2 (Del. Ch. September 1, 2022) (the company's concern that the produced information would be used by the company's competitors did not sufficiently outweigh the stockholder's legitimate interests in free communication), *aff'd sub nom., Hauppauge Digital Inc.* v. *Rivest*, 330 A.3d 1270 (Del. 2023).

41 Commentary to NYSE Listed Company Manual, Rule 303A.04.

42 Item 407(c)(2)(vii) of Regulation S-K. 17 C.F.R. § 229.407(c)(2)(vii).

43 *See, e.g.*, *Aronson* v. *Lewis*, 473 A.2d 805, 812 (Del. 1984).

44 *Id.* at 813.

45 *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006).

46 *See* 8 *Del. C.* § 141(a).

47 *Smith* v. *Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

48 *Aronson* v. *Lewis*, 473 A.2d at 812; *Benihana of Tokyo, Inc.* v. *Benihana, Inc.*, 891 A.2d 150, 192 (Del. Ch. 2005), *aff'd*, 906 A.2d 114 (Del. 2006).

49 *See* Section III.C for a discussion of reliance on corporate records and experts. *See also* 8 *Del. C.* § 141(e).

50 *See Smith* v. *Van Gorkom*, 488 A.2d at 873.

51 *Benihana of Tokyo, Inc.* v. *Benihana, Inc.*, 891 A.2d at 192.

52 *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 697-98 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).

53 *Cede & Co.* v. *Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993).

54 *Stone ex rel. AmSouth Bancorporation* v. *Ritter*, 911 A.2d 362, 369-70 (Del. 2006).

55 *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006).

56 *See* 8 *Del. C.* § 141(e).

57 *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 127 n.63 (Del. Ch. 2009).

58 International Business Council of the World Economic Forum, *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth* (September 2016), https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf?ck=6368.

59 *Commonsense Principles of Corporate Governance 2.0* (October 2018), https://www.governanceprinciples.org/wp-content/uploads/2018/10/CommonsensePrinciples2.0.pdf (the 21 executives included: Tim Armour, Capital Group; Mary Barra, General Motors Company; Edward Breen, DowDuPont; Warren Buffett, Berkshire Hathaway Inc.; Jamie Dimon, JPMorgan Chase; Mary Erdoes, J.P. Morgan Asset Management; Larry Fink, BlackRock; Alex Gorsky, Johnson & Johnson; Mark Machin, CCP Investment Board; Lowell McAdam, Verizon; Bill McNabb, Vanguard; Brian Moynihan, Bank of America; Ronald O'Hanley, State Street Global Advisors; James Quincey, Coca-Cola; Brian Rogers, T. Rowe Price; Ginni Rometty, IBM; Charlie Scharf, BNY Mellon; Randall Stephenson, AT&T; David Taylor, Procter & Gamble; Jeff Ubben, ValueAct Capital; and Theresa Whitmarsh, Washington State Investment Board).

60 Business Roundtable, *Principles of Corporate Governance* (August 2016), https://s3.amazonaws.com/brt.org/Principles-of-Corporate-Governance-2016.pdf.

61 *The Stewardship Principles*, INVESTOR STEWARDSHIP GROUP (July 2020), https://isgframework.org/wp-content/uploads/2020/07/ISG_Stewardship_Principles.pdf. Investor co-founders and signatories include (a) U.S. Asset Managers (BlackRock; MFS; State Street Global Advisors; TIAA Investments; T. Rowe Price; Vanguard; ValueAct Capital; Wellington Management); (b) U.S. Asset Owners (CalSTRS; Florida State Board of Administration (SBA); Washington State Investment Board); and (c) non-U.S. Asset Owners/Managers (GIC Private Limited (Singapore's Sovereign Wealth Fund); Legal and General

Investment Management; MN Netherlands; PGGM; and Royal Bank of Canada (Asset Management)). *See* Wachtell, Lipton, Rosen & Katz, *Promoting Long-Term Value Creation – The Launch of the Investor Stewardship Group (ISG) and ISG's Framework for U.S. Stewardship and Governance* (January 31, 2017), http://www.wlrk.com/webdocs/wlrknew/ WLRKMemos/WLRK/WLRK.25508.17.pdf. For a discussion of the various frameworks that have arisen, *see* Wachtell, Lipton, Rosen & Katz, *A Synthesized Paradigm for Corporate Governance, Investor Stewardship, and Engagement* (April 4, 2017), http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.25546.17.pdf. Other institutions are also involved in combatting short-termism. For example, FCLTGlobal, a not-for-profit organization, advocates for a longer-term focus in business and investment decision-making. *See* "Top Global CEOs Agree to Combat Short-Term Patterns in Business," BUSINESSWIRE (March 2, 2018), https://www.businesswire.com/news/home/20180302005092/en/Top-Global-CEOs-Agree-Combat-Short-Term-Patterns.

62 The British Academy, *Principles for Purposeful Business* (November 2019), https://www.thebritishacademy.ac.uk/sites/default/files/future-of-the-corporation-principles-purposeful-business.pdf.

63 World Economic Forum, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution* (December 2, 2019), https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/.

64 Business Roundtable, *Statement on the Purpose of a Corporation* (August 19, 2019), https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf.

65 A recent governance survey of public companies found that 97 percent of boards list oversight of strategy development as one of their goals for major improvement over the next 12 months. National Association of Corporate Directors, *2025 Governance Outlook* 5 (2024).

66 8 *Del. C.* § 141(b).

67 *See, e.g.*, 8 *Del. C.* §§ 141(b) (number of directors), 141(k)(1) (grounds for removal of directors) and 211(b) (election of directors by written consent).

68 Pub. L. 107-204, 116 Stat. 745.

69 For a discussion of Rule 14a-8, *see* Section VII.A.

70 Pub. L. 111-203, 124 Stat. 1376.

71 17 C.F.R. § 240.14a-21.

72 *Id*.

73 17 C.F.R. § 229.402.

74 15 U.S.C. § 78(a).

75 Items 3.03, 5.01, 5.02, 5.03, 5.05, 5.07 and 5.08 of Form 8-K. 17 C.F.R. § 249.308.

76 17 C.F.R. § 240.10A-3(b).

77 17 C.F.R. § 240.10A-3(b)(ii)(A).

78 17 C.F.R. §§ 240.10A-3(a)-(b).

79 Former SEC Commissioner Daniel Gallagher has criticized the trend towards increased federalization of corporate governance matters traditionally left to the states, citing Rule 14a-8 and the Dodd-Frank requirement for a say-on-pay vote as particular incursions: "Some of these requirements unashamedly interfere in corporate governance matters traditionally and appropriately left to the states. Others masquerade as disclosure, but are in reality attempts to affect substantive behavior through disclosure regulation… This stands in stark contrast with the flexibility traditionally achieved through private ordering under more open-ended state legal regimes." Daniel M. Gallagher, former Comm'r, SEC, Remarks at the 26th Annual Corporate Law Institute, Tulane University Law School: Federal Preemption of State Corporate Governance (March 27, 2014), https://www.sec.gov/news/speech/2014-spch032714dmg.html. The impact of the SEC's traditional role in mandating disclosure on substantive corporate governance has also drawn the attention of Congress: In the context of examining the impact of Sarbanes-Oxley on the cost of public company operations, the U.S. House Committee on Financial Services on July 18, 2017 held hearings that, in part, addressed the increased role of the federal government in corporate governance. *See The Cost of Being a Public Company in Light of Sarbanes-Oxley and the Federalization of Corporate Governance: Hearing Before the H. Fin. Servs. Comm.*, 115th Cong. (2017), https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=402116.

80 NYSE Listed Company Manual, Rule 303A.01; Nasdaq Listing Rule 5605(b)(1).

[81] NYSE Listed Company Manual, Rules 303A.05 and 303A.07; Nasdaq Listing Rules 5605(c)(2)(a) and 5605(d)(2)(a).

[82] NYSE Listed Company Manual, Rules 303A.05 and 303A.07; Nasdaq Listing Rules 5605(c) and 5605(d).

[83] NYSE Listed Company Manual, Rule 303A.04.

[84] Nasdaq Listing Rule 5605(e).

[85] NYSE Listed Company Manual, Rule 303A.10; Nasdaq Listing Rule 5610.

[86] NYSE Listed Company Manual, Rule 303A.03.

[87] Nasdaq Listing Rule 5605(b)(2).

[88] Nasdaq Listing Rule IM-5605-2.

[89] NYSE Listed Company Manual, Rule 312.03(c); Nasdaq Listing Rule 5635(a)(1).

[90] NYSE Listed Company Manual, Rule 312.03(d); Nasdaq Listing Rule 5635(b).

[91] NYSE Listed Company Manual, Rule 312.03(b); Nasdaq Listing Rule 5635(a)(2).

[92] NYSE Listed Company Manual, Rule 303A.08; Nasdaq Listing Rule 5635(c).

[93] Nasdaq Listing Rules 5615(a)(2), 5615(a)(5) and 5615(c). In 2019, Nasdaq implemented a rule exempting issuers whose only securities listed on Nasdaq are non-voting preferred securities, debt securities or derivative securities from, among other requirements, the majority independent boards, compensation committees, independent director oversight of nominations and audit committee requirements (other than, with respect to the audit committee requirements, the applicable requirements of SEC Rule 10A-3). Nasdaq Listing Rule 5615(a)(6).

[94] Nasdaq Listing Rule 5615(a)(4). Among other things, a Nasdaq-listed limited partnership must maintain a general partner, have at least three independent directors pursuant to Rule 5605(c)(2)'s audit committee composition requirements, review all related-party transactions on an ongoing basis and review potential material conflict-of-interest situations, where appropriate, through the use of an audit committee or comparable body of the partnership's board of directors.

[95] *Id*.

[96] NYSE Listed Company Manual, Rule 303A.00.

[97] NYSE Listed Company Manual, Rule 303A.00; Nasdaq Listing Rule 5615(a)(3).

[98] NYSE Listed Company Manual, Rule 303A.11; Nasdaq Listing Rule 5615(a)(3)(B).

[99] Nasdaq Listing Rule 5615(a)(3)(B).

[100] NYSE Listed Company Manual, Rule 303.A00; Nasdaq Listing Rules 5615(b)(1)-(2) and (c)(3).

[101] *Id*.

[102] NYSE Listed Company Manual, Rule 303A.12(b); Nasdaq Listing Rule 5625.

[103] NYSE Listed Company Manual, Rule 303A.12(a).

[104] *See* Staff of H. Comm. on Fin. Servs., 119th Cong., *Press Release: Capital Markets Subcommittee Examines Market Influence by Proxy Advisory Firms* (April 29, 2025), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=40971; *see also* Harvard Law School Forum on Corporate Governance, *Imputing Proxy Advisor Recommendations* (August 12, 2024), https://corpgov.law.harvard.edu/2024/08/12/imputing-proxy-advisor-recommendations/

[105] Press Release, Deutsche Börse Group, Deutsche Börse Successfully Completes Acquisition of ISS, Strengthening the Focus on Sustainable Investing (February 26, 2021), https://www.deutsche-boerse.com/dbg-en/media/news-stories/press-releases/Deutsche-B-rse-successfully-completes-acquisition-of-ISS-strengthening-the-focus-on-sustainable-investing-2555110.

[106] Press Release, Glass Lewis, *Peloton Capital Management and Stephen Smith Acquire Glass Lewis* (March 16, 2021), https://www.glasslewis.com/press-release-peloton-capital-management-and-stephen-smith-acquire-glass-lewis/.

[107] Investment Advisers Act of 1940, as amended, 15 U.S.C. § 80b-1-21. *See also* 17 C.F.R. § 275.206(4)-6; Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 17 (November 2010) ("The problem of short-termism is also illustrated by the policies of proxy advisory firms whose growth was fueled by the Labor Department's informed voting requirements for regulated investment funds."), https://www.jstor.org/stable/25758524.

[108] SEC, *Statement Regarding Staff Proxy Advisory Letters* (September 13, 2018), https://www.sec.gov/news/public-statement/statement-regarding-staff-proxy-advisory-letters.

[109] *See, e.g.,* James R. Copland *et al*., Manhattan Inst., *Proxy Advisory Firms: Empirical Evidence and the Case for Reform* 13 (2018), https://media4.manhattan-institute.org/sites/default/files/R-JC-0518-v2.pdf.

[110] *See* Hearing Before the H. Fins. Servs. Comm., 119th Cong. (2025), *Exposing the Proxy Advisory Cartel: How ISS & Glass Lewis Influence Markets*, https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=409697; *see also* Hearing Before the H. Jud. Servs. Comm., 119th Cong. (2025), *The Proxy Advisor Duopoly's Anticompetitive Conduct*, https://judiciary.house.gov/committee-activity/hearings/proxy-advisor-duopolys-anticompetitive-conduct.

[111] *See*, Press Release, Texas Office of the Attorney General, *Attorney General Ken Paxton Investigates Proxy Advisors Glass Lewis and ISS for Misleading Public Companies to Push Radical Agenda* (September 16, 2025), https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-investigates-proxy-advisors-glass-lewis-and-iss-misleading-public. *See also,* Press Release, My Florida Legal, *Attorney General James Uthmeier Announces Investigation into Glass Lewis & Co. and Institutional Shareholder Services Inc. for ESG and DEI Policies* (March 20, 2025), https://www.myfloridalegal.com/newsrelease/attorney-general-james-uthmeier-announces-investigation-glass-lewis-co-and, *and*, Press Release, *Attorney General Office of Missouri, Attorney General Bailey Leads Fight Against Hidden ESG And DEI Agendas In Corporate America* (July 11, 2025), https://ago.mo.gov/attorney-general-bailey-leads-fight-against-hidden-esg-and-dei-agendas-in-corporate-america/.

[112] *Id*. at 51-55.

[113] Alexandra White, *Glass Lewis to end benchmark voting recommendations on proxy issues*, FINANCIAL TIMES, https://www.ft.com/content/7860f94c-7b1c-49c9-9f4c-a561ee39ee31.

[114] ISS, *Board Refreshment: Finding the Right Balance* (2018), https://www.issgovernance.com/library/board-refreshment-finding-the-right-balance/.

[115] DealPointData (as of April 2025).

[116] Carsten Stendevad *et al.*, Citigroup Global Markets Inc., *M&A: Hostility on the Horizon* 12-13 (September 2009).

[117] *See* Leo E. Strine, Jr., *Can We Do Better by Ordinary Shareholders? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 454 n.16 (2014) ("As it turns out, they were right and, within a few months, the stock was trading well above Air Products' final bid of $70.00 and has continued to trade above that threshold ever since."). On November 18, 2015, Airgas agreed to be sold to Air Liquide at a price of $143 per share, in cash, nearly 2.4 times Air Products' original $60 offer and more than double its final $70 offer, in each case before considering the more than $9 per share of dividends received by Airgas shareholders in the intervening years.

[118] *See* K.J. Martijn Cremers, Lubomir P. Litov & Simone M. Sepe, *Staggered Boards and Long-Term Firm Value, Revisited*, 126 J. FIN. ECON. 422 (2017); K.J. Martijn Cremers & Simone M. Sepe, *The Shareholder Value of Empowered Boards*, 68 STAN. L. REV. 67, 71 n.17 (2016) (explaining Tobin's Q valuation).

[119] K.J. Martijn Cremers, Lubomir P. Litov & Simone M. Sepe, *Staggered Boards and Long-Term Firm Value, Revisited*, 126 J. FIN. ECON. 422, 443 (2017). For the entrenchment view, *see* Lucian A. Bebchuk, *The Costs of Entrenched Boards*, 78 J. FIN. ECON. 409 (2005). Our firm has criticized the Harvard Law School Shareholder Rights Project headed by Professor Lucian Bebchuk, a leading advocate for the position that classification entrenches boards and reduces firm value, for engaging in advocacy advancing a narrow and controversial agenda that would exacerbate the short-term pressures under which U.S. companies are forced to operate. *See* Wachtell, Lipton, Rosen & Katz, *Harvard's Shareholder Rights Project is Wrong* (March 21, 2012), http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.21664.12.pdf; Wachtell, Lipton, Rosen & Katz, *Harvard's Shareholder Rights Project is Still Wrong* (November 28, 2012), http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.22209.12.pdf.

[120] *See* K.J. Martijn Cremers & Simone M. Sepe, *The Shareholder Value of Empowered Boards*, 68 STAN. L. REV. 67, 138-40 (2016).

[121] *See* Lucian A. Bebchuk & Alma Cohen, *Recent Board Declassifications: A Response to Cremers and Sepe* (May 1, 2017), https://ssrn.com/abstract=2970629.

[122] *See* K.J. Martijn Cremers & Simone M. Sepe, *Board Declassification Activism: Why Run Away from the Evidence?* (June 2017), https://ssrn.com/abstract=2991854.

[123] *See, e.g.*, 8 *Del. C.* § 215(c)(3).

[124] DealPointData (as of April 2025).

[125] ISS, *2025 U.S. Proxy Voting Guidelines* 23 (January 2025); Glass Lewis, *2025 Policy Guidelines* 43 (November 14, 2024).

[126] *See City of Westland Police & Fire Ret. Sys.* v. *Axcelis Techs., Inc.*, 1 A.3d 281 (Del. 2010). *But cf. Louisiana Mun. Police Employees Ret. Sys.* v. *Morgan Stanley & Co. Inc.*, C.A. No. 5682-VCL, 2011 WL 773316, at *6 (Del. Ch. March 4, 2011) (citing *Axcelis*, 1 A.3d at 290, 291) (noting that a board may be subject to a stockholder books-and-records request for the purpose of evaluating whether the board's decision not to accept resignations tendered by directors failing to obtain the requisite support was in the best interests of the corporation).

[127] *Levitt Corp.* v. *Office Depot, Inc.*, C.A. No. 3622-VCN, 2008 WL 1724244, at *3, *15-16 (Del. Ch. April 14, 2008).

[128] DealPointData (as of April 2025).

[129] *Paragon Techs., Inc.* v. *Cryan*, No. 2023-1013-LWW, 2023 WL 8269200, at *10-11, *14 (Del. Ch. Nov. 30, 2023).

[130] *Kellner* v. *AIM ImmunoTech Inc.*, 307 A.3d 998, 1027-29 (Del. Ch. 2023), *aff'd in part, rev'd in part*, 320 A.3d 239 (Del. 2024).

[131] *Id.* at 60 (internal quotation marks and citation omitted).

[132] *Id.* at 60 (internal quotation marks and citation omitted).

[133] *Id.* at 60 (internal quotation marks and citation omitted).

[134] *Id.* at 263-67.

[135] Item 407(h) of Regulation S-K. 17 C.F.R. § 229.407(h).

[136] 8 *Del. C.* § 228(a).

[137] DealPointData (as of October 2025).

[138] *See Edelman* v. *Authorized Distrib. Network, Inc.*, C.A. No. 11104, 1989 WL 133625 (Del. Ch. November 3, 1989); *see also Nomad Acquisition Corp.* v. *Damon Corp.*, C.A. No. 10173, 1988 WL 383667 (Del. Ch. September 20, 1988).

[139] DealPointData (as of October 2025).

[140] Notably, in a transcript ruling, the Delaware Court of Chancery invalidated charter and bylaw provisions providing that directors of a company without a staggered board and cumulative voting could only be removed for cause. The stockholder plaintiffs argued—and the court agreed—that under § 141(k) of the DGCL, stockholders have the right to remove directors without cause unless the company has a staggered board or cumulative voting. Companies with unclassified boards whose charters allow director removal only "for cause" should consult with counsel, as these charter provisions may be unenforceable and plaintiffs' firms will be seeking to compel companies to amend their charters to eliminate them, to earn a fee. Ruling Tr., *In re Vaalco Energy S'holder Litig.*, C.A. No. 11775-VCL (Del. Ch. December 21, 2015).

[141] 8 *Del. C.* § 141(k)(1).

[142] Ruling Tr., *In re Vaalco Energy S'holder Litig.*, C.A. No. 11775-VCL (Del. Ch. December 21, 2015).

[143] *Frechter* v. *Zier*, C.A. No. 12038-VCG, 2017 WL 345142 (Del. Ch. January 24, 2017).

[144] ISS, *2025 U.S. Proxy Voting Guidelines* 15, 34 (January 2025).

[145] 17 C.F.R. Part 240 (final rule, January 31, 2022), https://www.sec.gov/rules/final/2021/34-93596.pdf.

[146] Wachtell, Lipton, Rosen & Katz, *SEC Announces Proposed Rules to Require Universal Ballots in Proxy Fights* (October 26, 2016), http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.25415.16.pdf.

[147] The SEC proposed a proxy access rule in 2003 and in 2007, approving a final rule in 2010.

[148] DealPointData (as of October 2025).

[149] Harvard Law School Forum on Corporate Governance, *The Universal Proxy: An Early Look* (February 28, 2023), https://corpgov.law.harvard.edu/2023/02/28/the-universal-proxy-an-early-look/.

[150] *Id.* The amendments also included other changes that require shareholders relying on representatives to submit their proposals to provide authorizing documentation, impose requirements on shareholders to provide their availability to meet with the company after submitting a proposal, amend the one-proposal limit to apply

to "each person" rather than "each shareholder" and increase the threshold levels of shareholder support that a proposal must receive to be eligible for resubmission at the same company's future shareholder meetings. *Id.*

[151] These thresholds were increased from three percent, six percent and 10 percent, respectively, as a result of the 2020 amendments to Rule 14a-8.

[152] *Statement Regarding the Division of Corporation Finance's Role in the Exchange Act Rule 14a-8 Process for the Current Proxy Season* (November 17, 2025), https://www.sec.gov/newsroom/speeches-statements/statement-regarding-division-corporation-finances-role-exchange-act-rule-14a-8-process-current-proxy-season ; Commissioner Caroline A. Crenshaw, *Statement on Division of Corporation Finance's Announcement on the 14a-8 Process* (November 17, 2025), https://www.sec.gov/newsroom/speeches-statements/crenshaw-statement-division-corp-fins-announcement-14a-8-process-111725

[153] ISS, *2025 U.S. Proxy Voting Guidelines* 9 (February 25, 2025).

[154] *Id*.

[155] Glass Lewis, *2025 Benchmark Policy Guidelines* 18 (December 2024).

[156] *Id*.

[157] We have noted the rise of "debt default activism," by which investors purchase debt of a company on the theory that the borrower is already in default, and then actively seek to enforce that default in a manner by which they stand to profit (sometimes by buying "credit default swaps," which will pay out if the borrower struggles financially). Wachtell, Lipton, Rosen & Katz, *Default Activism in the Debt Markets* (November 16, 2018), http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.26271.18.pdf.

[158] Probably the most famous "short attack" was Pershing Square's $1 billion short on Herbalife and ultimately unsuccessful efforts to have it declared an illegal pyramid scheme.

[159] Larry Fink, Chairman and CEO of BlackRock Inc., *Letter to CEOs: A Sense of Purpose* (January 12, 2018), https://www.wlrk.com/files/2018/BLKCEOLetter2018.pdf.

[160] *See* Section VI.E for a discussion on advance notice bylaws.

[161] *See* Wachtell, Lipton, Rosen & Katz, *Dealing with Activist Hedge Funds and Other Activist Investors Introduction* (September 9, 2025), https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.29833.25.pdf

[162] ProxyPulse: A Broadridge Publication, *2024 Proxy Season Review* 6 (2025), https://www.broadridge.com/_assets/pdf/proxypulse2024.pdf.

[163] *See* Wachtell, Lipton, Rosen & Katz, *Risk Management and the Board of Directors* (September 2025), https://www.wlrk.com/wp-content/uploads/2025/09/2025-Risk-Management-and-the-Board-of-Directors-1.pdf

[164] *See* Wachtell, Lipton, Rosen & Katz, *Thoughts for Boards: Key Issues in Corporate Governance for 2024* (December 21, 2023), https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.28464.23.pdf.

[165] Item 407(h) of Regulation S-K. 17 C.F.R. § 229.407(h).

[166] *See* Subpart C of Regulation YY. 12 C.F.R. § 252.22(a)(3)(ii).

[167] Updates to Glass Lewis' U.S. benchmark voting policies for the 2024 proxy season reflect continued focus on board oversight and accountability over internal controls, cyber risk, environmental and social issues, and climate. For example, where a company has been materially impacted by a cyber-attack, Glass Lewis may recommend against appropriate directors should it find the board's oversight, response or disclosures concerning cybersecurity-related issues to be insufficient or are not provided to shareholders. *See* Glass Lewis, *2025 Benchmark Policy Guidelines* (December 2024); *see also* Wachtell, Lipton, Rosen & Katz, *Glass Lewis Releases Final 2024 U.S. Voting Policies; Updates Reflect Continued Focus on Board Oversight and Accountability* (November 17, 2023), https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.28446.23.pdf.

[168] *See id.*; *see also* National Association of Corporate Directors, *2024 Governance Outlook* (2023).

[169] *See* Wachtell, Lipton, Rosen & Katz, *The Boeing Report: A Reminder of the Board's Indispensable Role in Risk Oversight* (March 4, 2024), https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.28511.24.pdf. While the Boeing situation is unique, it sends a resounding message to all boards to oversee and regularly review risk management.

[170] In 2025, 75% of surveyed directors believed that their board is effective at collaborating with management during times of crisis or uncertainty and 7 percent reported that their company had conducted tabletop

exercises on navigating a geopolitical crisis. *See Driving a culture of accountability in the boardroom: PwC's 2025 Annual Corporate Directors Survey* (2025), https://www.pwc.com/us/en/services/governance-insights-center/library/assets/pwc-2025-annual-corporate-directors-survey.pdf.

171 *See* Wachtell, Lipton, Rosen & Katz, *Key ESG Considerations in the Crisis* (April 13, 2020), https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.26916.20.pdf.

172 *See* Wachtell, Lipton, Rosen & Katz, *War in Ukraine: Is ESG at a Crossroads?* (March 18, 2022), https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.28007.22.pdf.

173 A 2025 study found that directors believe industry expertise, financial expertise, operational expertise and technology expertise to be the most important attributes to have represented on a corporate board. PwC, *Driving a culture of accountability in the boardroom: PwC's 2025 Annual Corporate Directors Survey* 26 (2025), https://www.pwc.com/us/en/services/governance-insights-center/library/assets/pwc-2025-annual-corporate-directors-survey.pdf. Compared to the same survey in 2015, directors were much less likely to say that any particular area of expertise is "very important" to the board (for example, in 2015, 70 percent of directors indicated that industry experience was very important, compared to only 34 percent in 2025), indicating a broadening of attributes and skills that directors find valuable. *Id.* at 13.

174 Item 407(c)(2)(v) of Regulation S-K. 17 C.F.R. § 229.407(c)(2)(v).

175 Item 401(e)(1) of Regulation S-K. 17 C.F.R. § 229.401(e)(1).

176 Item 407(d)(5) of Regulation S-K. 17 C.F.R. § 229.407(d)(5).

177 Commentary to NYSE Listed Company Manual, Rule 303A.07(a); Nasdaq Listing Rule 5605(c)(2)(A)(iv).

178 Nasdaq Listing Rule 5601.

179 Commentary to NYSE Listed Company Manual, Rule 303A.09.

180 NYSE Listed Company Manual, Rule 303A.09.

181 NYSE Listed Company Manual, Rule 303A.02(a)(i); Nasdaq Listing Rules 5605(a)(2) and IM-5605.

182 Commentary to NYSE Listed Company Manual, Rule 303A.02; Nasdaq Listing Rule IM-5605.

183 "Immediate family member" is defined to include a person's spouse, parents, children, siblings, mothers- and fathers-in-law, sons- and daughters-in-law, brothers- and sisters-in-law, and anyone (other than domestic employees) who shares such person's home. General Commentary to NYSE Listed Company Manual, Rule 303A.02(b).

184 NYSE Listed Company Manual, Rule 303A.02(b)(i). Employment as an interim chairman, CEO or other executive officer will not disqualify a director from being considered independent following that employment. Commentary to NYSE Listed Company Manual, Rule 303A.02(b)(i).

185 NYSE Listed Company Manual, Rule 303A.02(b)(ii). This $120,000 limit does not apply to compensation received for former service as an interim chairman, CEO or other executive officer; compensation received by an immediate family member for service as an employee of the listed company (other than as an executive officer); or pension or other forms of deferred compensation for prior service; provided that such compensation is not contingent in any way on continued service. Commentary to NYSE Listed Company Manual, Rule 303A.02(b)(ii).

186 NYSE Listed Company Manual, Rule 303A.02(b)(iii).

187 NYSE Listed Company Manual, Rule 303A.02(b)(iv).

188 Contributions to tax-exempt organizations are excepted from this limitation, but such contributions must be disclosed either on the company's website or in its annual proxy statement. Despite this exception, contributions to tax-exempt organizations may, in some circumstances, constitute a material relationship that compromises director independence. Commentary to NYSE Listed Company Manual, Disclosure Requirement, Rule 303A.02(b)(v).

189 "Family member" is defined to mean a person's spouse, parents, children and siblings, mothers- and fathers-in-law, sons- and daughters-in-law, brothers- and sisters-in-law, and anyone (other than domestic employees) who shares such person's home. Nasdaq Listing Rule 5605(a)(2).

190 Nasdaq Listing Rules 5605(a)(2)(A) and 5605(a)(2)(C). Service as an interim executive officer will not render a director non-independent after the cessation of the employment, provided that the interim employment lasted less than one year. Nasdaq Listing Rule IM-5605.

191 Nasdaq Listing Rule 5605(a)(2)(B). Note that, unlike the NYSE rules, Nasdaq rules include indirect compensation in this $120,000 threshold. For example, Nasdaq provides that political contributions to the campaign of a director or a family member would be considered indirect compensation. Nasdaq Listing Rule

IM-5605. However, this $120,000 restriction does not apply to compensation paid to a family member who is an employee (other than an executive officer) of the company, or to benefits under a tax-qualified retirement plan or non-discretionary compensation. Nasdaq Listing Rules 5605(a)(2)(B)(ii)-(iii). It likewise does not apply to compensation received for former service as an interim executive officer, so long as that service did not last more than one year. Nasdaq Listing Rule IM-5605.

192 Payments arising solely from investments in the company's securities or under a nondiscretionary charitable contribution matching program are exempt from this restriction. Nasdaq Listing Rules 5605(a)(2)(D)(i)-(ii). However, except for the non-discretionary charitable contribution matching program, a director may not be considered independent if the director or a family member serves as an executive officer of a charitable organization to which the company makes payments in excess of the greater of five percent of the charity's revenues or $200,000. Nasdaq Listing Rule IM-5605.

193 Nasdaq Listing Rule 5605(a)(2)(E).

194 Nasdaq Listing Rule 5605(a)(2)(F). In the case of an investment company, in lieu of these restrictions, a director's independence is determined by reference to the "interested person" definition provided in Section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee. Nasdaq Listing Rule 5605(a)(2)(G).

195 Items 407(a)(1)-(2) of Regulation S-K. 17 C.F.R. §§ 229.407(a)(1)-(2).

196 Item 407(a)(3) of Regulation S-K. 17 C.F.R. § 229.407(a)(3).

197 In a 2023 survey, 45% of directors surveyed viewed industry expertise as a "very important" attribute for directors on their board and 45% viewed industry expertise as "somewhat important." PwC, *PwC's 2023 Annual Corporate Directors Survey* 21 (2023), https://www.pwc.com/us/en/services/governance-insights-center/library /assets/ pwc-gic-acds-2023.pdf; In a 2025 survey, 34% of directors surveyed reported that industry expertise was among the skills/attributes that their board planned to add in the upcoming 12 months. PwC, *PwC's 2025 Annual Corporate Directors Survey* (2025), https://www.pwc.com/us/en/services/governance-insights-center/library/assets/pwc-2025-annual-corporate-directors-survey.pdf

198 *See* Section X.B.3.

199 The effects of these independence requirements, as reflected in average board independence among S&P 500 companies, may have recently peaked. In 2022, 86 percent of all directorships were held by independent directors and companies with fewer-than-average independent directors typically have governance structures that make near-term change unlikely. Spencer Stuart, *2022 U.S. Spencer Stuart Board Index* 4, 14 (October 2022), https://www.spencerstuart.com/-/media/2022/october/ssbi2022/2022_us_spencerstuart_board_index_final.pdf; *see also* ISS, *2018 U.S. Board Study: Board Accountability Practices Review* 11 (April 17, 2018).

200 Jay W. Lorsch, You Can't Know It All: Why Directors Have Such Difficulty Understanding Their Companies, Directors & Boards, Annual Report (Summer 2012), 64.

201 Report of the New York Stock Exchange Commission on Corporate Governance 5 (September 23, 2010).

202 Commentary to NYSE Listed Company Manual, Rule 303A.04(b).

203 Item 407(c)(2)(viii) of Regulation S-K. 17 C.F.R. § 229.407(c)(2)(viii).

204 NYSE Listed Company Manual, Rule 303A.04(b)(i).

205 Item 407(c)(2)(vii) of Regulation S-K. 17 C.F.R. § 229.407(c)(2)(vii).

206 *Harrah's Entm't, Inc.* v. *JCC Holding Co.*, 802 A.2d 294, 310-11 (Del. Ch. 2002) (citations omitted).

207 Item 407(c)(2)(ii) of Regulation S-K.

208 *Id.*

209 Item 407(c)(2)(iii) of Regulation S-K. 17 C.F.R. § 229.407(c)(2)(iii).

210 Items 407(c)(2)(iv), (vi) of Regulation S-K. 17 C.F.R. §§ 229.407(c)(2)(iv), (vi).

211 17 C.F.R. Part 240 (final rule, January 31, 2022), https://www.sec.gov/rules/final/2021/34-93596.pdf.

212 The nominating shareholder will still need to comply with the deadlines under the company's advance notice bylaws, including deadlines that require notice earlier than the 60 calendar days prescribed under the universal proxy rules.

213 *Id.*

[214] *See* Harvard Law School Forum on Corporate Governance, *Director Commitments Policies, Overboarding, and Board Refreshment* (March 20, 2024), https://corpgov.law.harvard.edu/2024/03/20/director-commitments-policies-overboarding-and-board-refreshment/

[215] Commentary to NYSE Listed Company Manual, Disclosure Requirement, Rule 303A.07(a).

[216] Clayton Act § 8, 15 U.S.C. § 19. Under the thresholds for 2024, simultaneous service as director or officer of two corporations each with capital, surplus and undivided profits in excess of $48,559,000 and "competitive sales" of $4,855,900 or more is prohibited, subject to several exceptions. Revised Jurisdictional Thresholds for Section 8 of the Clayton Act, 89 Fed. Reg. 3,926 (January 12, 2024). In particular, if the "competitive sales" of either corporation are less than two percent of that firm's total sales, or less than four percent of each firm's total sales, the interlock is exempt under the statute. 15 U.S.C. § 19(a)(2). In addition, the statute expressly prohibits service on competing corporations, not other business structures (*e.g.*, partnerships or limited liability companies). *Id.* § 19(a)(1). Finally, Section 8 does not apply to interlocks between banks. *Id.* Section 8 provides a one-year grace period for an individual to resolve an interlock issue that arises as a result of entry into new markets through acquisition or expansion. *Id.* § 19(b).

[217] *See* Harvard Law School Forum on Corporate Governance, *Shareholder Activism: Ten Trends for 2026* (October 2025), https://corpgov.law.harvard.edu/2025/10/16/shareholder-activism-ten-trends-for-2026/

[218] ISS, *2025 U.S. Proxy Voting Guidelines* 12 (January 2025).

[219] Glass Lewis, *2025 Benchmark Policy Guidelines* 31 (December 2024).

[220] Council of Institutional Investors, *Corporate Governance Guidelines*, Section 2.11 (March 6, 2023), https://www.cii.org/corp_gov_policies. CalPERS recommends that boards adopt and disclose guidelines in proxy statements "to address competing time commitments that are faced when directors, especially acting CEOs, serve on multiple boards." CalPERS, *Governance & Sustainability Principles* 10 (September 2019). CalPERS also sets out that it will consider a director overboarded if the director (1) "is a non-executive director who serves on more than four public boards," or (2) "is an executive director who serves on more than two public boards." CalPERS, *Proxy Voting Guidelines* 2 (February 2023). BlackRock sets out a maximum number of boards on which a director may serve before he/she is considered overboarded and subject to withhold votes: where the director (1) serves on more than four public company boards (including the company under review); or (2) is a named executive officer or executive chair at a public company and is serving on more than two public company boards (including the company under review where he/she serves as a named executive officer or executive chair). BlackRock Investment Stewardship, *Proxy Voting Guidelines for U.S. Securities* 5 (January 2024), https://www.blackrock.com/corporate/ literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf. Beginning in 2024, State Street Global Advisors will require S&P 500 companies to develop their own director overboarding policies to replace the quotas that State Street has previously enforced through withhold votes. State Street Global Advisors, *CEO's Letter on Our 2023 Proxy Voting Agenda* (March 31, 2023), https://web.archive.org/web/20231029125130/https://www.ssga.com/us/en /institutional/etfs/insights/2023-proxy-focus. T. Rowe Price will generally vote against directors who sit on more than five public company boards and against CEOs who sit on more than one other public company board. T. Rowe Price, *Proxy Voting Guidelines* 2 (February 2023), https://www.troweprice.com/content/dam/trowecorp/Pdfs/proxy-voting-guidelines-TRPA.pdf.

[221] ISS, *2025 U.S. Proxy Voting Guidelines* 19 (January 2025).

[222] This factor awards increasing credit for increasing proportions of the board represented by directors with less than six years of tenure, but gives no additional credit once such proportion exceeds one-third and does not count executive directors. Another factor, "Does the board have any mechanisms to encourage director refreshment?", is for informational purposes only and does not impact a company's QualityScore. *See* ISS, *Governance QualityScore: Methodology Guide* 38-39 (January 2021).

[223] Amy Borrus, Council of Institutional Investors, *More on CII's New Policies on Universal Proxy and Board Tenure* (October 1, 2013).

[224] CalPERS, *Governance & Sustainability Principles* 17 (September 2019). Additionally, CalSTRS advocates that boards should have a mechanism to ensure that there is periodic refreshment and believes that the board should review the director's years of board service as part of its annual board review, but does not support limiting director tenure. CalSTRS, *Corporate Governance Principles* 6 (January 2021), https://web.archive.org/web/20220223151007/https://www.calstrs.com/sites/main/files/file-

attachments/corporate_governance_principles_1.pdf?1617148753. State Street will generally vote against age and term limits unless the company is found to have poor board refreshment and director succession practices and has a preponderance of non-executive directors with excessively long tenures serving on the board. State Street Global Advisors, *Proxy Voting and Engagement Guidelines: North America* 5 (March 2023), https://corpgov.law.harvard.edu/2023/05/08/north-america-proxy-voting-and-engagement-guidelines/.

225 BlackRock Investment Stewardship, *Proxy Voting Guidelines for U.S. Securities* 8 (January 2025), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf.

226 Commentary to NYSE Listed Company Manual, Rule 303A.03.

227 Nasdaq Listing Rules 5605(b)(2), IM 5605-2.

228 NYSE Listed Company Manual, Rule 303A.06; Nasdaq Listing Rules 5605(c)(2), IM-5605-4.

229 Commentary to NYSE Listed Company Manual, Rule 303A.07(a).

230 Nasdaq Listing Rule 5605(c)(2)(A)(iv); Commentary to NYSE Listed Company Manual, Rule 303A.07(a).

231 Commentary to NYSE Listed Company Manual, Rule 303A.07(a).

232 Commentary to NYSE Listed Company Manual, Rule 303.07A(a).

233 Nasdaq Listing Rules 5605(c)(2)(A), IM-5605-4.

234 Item 407(d)(5)(i) of Regulation S-K. 17 C.F.R. § 229.407(d)(5)(i).

235 Item 407(d)(5)(ii) of Regulation S-K. 17 C.F.R. § 229.407(d)(5)(ii).

236 Item 407(d)(5)(iii) of Regulation S-K. 17 C.F.R. § 229.407(d)(5)(iii).

237 NYSE Listed Company Manual, Rule 303A.02(a)(ii).

238 The specific conditions that must be met for such exemption to be available, as well as the precise contours of the Nasdaq definition of "independent," are discussed in Annex A and Section X.C.1 of this Guide, respectively.

239 Nasdaq Listing Rules 5635(c)(2), (c)(4). Under these Nasdaq rules, shareholder approval is required prior to the issuance of securities when an equity compensation plan is to be established or materially amended, except for, among other things, tax-qualified non-discriminatory employee benefits plans that are approved by the company's compensation committee and certain "sign-on" equity compensation awards that are approved by the company's compensation committee.

240 12 U.S.C. § 5365(h)(2)(A).

241 *Id*. at 44.

242 *Beam ex rel. Martha Stewart Living Omnimedia, Inc.* v. *Stewart*, 845 A.2d 1040, 1049-50 (Del. 2004).

243 *Beam* v. *Stewart*, 845 A.2d at 1049-52. However, in 2015, the Delaware Supreme Court clarified that *Beam* was not intended to suggest "that deeper human friendships could not exist that would have the effect of compromising a director's independence." *Delaware Cty. Emps. Ret. Fund* v. *Sanchez*, 124 A.3d 1017, 1022 (Del. 2015). Drawing on this notion, the Delaware Supreme Court questioned the independence of a director who: (i) had a close friendship of over 50 years with the controlling shareholder and chairman of the company; and (ii) was an executive at an insurance brokerage that is a wholly owned subsidiary of a separate corporation of which the same chairman was the largest stockholder. *Id.* at 1022-23. Additionally, in *Sandys* v. *Pincus*, 152 A.3d 124, 130 (Del. 2016), the Delaware Supreme Court opined that the standard in *Beam* did "not require a plaintiff to plead a detailed calendar of social interaction to prove that directors have a very substantial personal relationship rendering them unable to act independently of each other," and consequently found that plaintiffs had pleaded sufficiently particularized facts to create a reasonable doubt that the directors in question were independent, including the fact that they co-owned a private airplane with the company's controlling stockholder. *Id.* at 11.

244 *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917 (Del. Ch. 2003).

245 Exxon Mobil Corp. Proxy Statement (Schedule 14A) (April 14, 2015), https://www.sec.gov/Archives/edgar/data/34088/000119312515128602/d855824ddef14a.htm ; Exxon Mobil Corp. Environment, Safety and Public Policy Committee Charter (February 27, 2024) https://corporate.exxonmobil.com/corporate-governance/board-of-directors/public-issues-and-contributions-committee-charter.

246 4-139850/0001193125-14-139850.pdf.

there has been significant pushback against small (*i.e.*, two-person) board committees when the committee plays a critical function from both governance activists and institutional shareholders. Glass Lewis opposes reelection of directors at companies with fewer than three audit committee members, and the Global Head of

Corporate Governance at BlackRock has noted that two-member committees are "out of step with how other boards operate." Joann S. Lublin, *Two-Person Board Committees Exist at Some Big Firms*, THE WALL ST. J. (January 27, 2016), http://www.wsj.com/articles/two-person-board-committees-exist-at-some-big-firms-1453942169.

247 NYSE Listed Company Manual, Rule 303A.09.

248 This is particularly the case for smaller companies. A 2019 survey found that approximately 25 percent of surveyed companies valued under $1 billion in annual revenue formally assign succession-planning responsibilities to the nominating and corporate governance committee, compared to 21 percent of companies valued between $1 billion and $4.9 billion, 14 percent of companies valued between $5 billion to $19.9 billion and 11 percent of companies valued at $20 billion or more. The Conference Board, *CEO Succession Practices in the Russell 3000 and S&P 500* 62 (2019), https://www.conference-board.org/publications/publicationdetail.cfm?publicationid=8857.

249 A 2017 survey found that 69 percent of boards formally discuss CEO succession at least once per year, 20 percent, two or three times a year, and nine percent, four or more times per year. Spencer Stuart, *2017 Spencer Stuart U.S. Board Index 2017* 23 (2017), https://www.spencerstuart.com/research-and-insight/ssbi-2017.

250 *See* Section XVII.C.

251 *See* Section XVII.A.

252 Spencer Stuart, *2023 CEO Transitions*, at 2 (2023), https://www.spencerstuart.com/-/media/2024/02/ceotransitions/2023_ceo_transitions.pdf.

253 *Id*. at 2.

254 *See* Section X.B. For an extensive discussion of board composition and qualifications that the nominating committee should consider during board succession planning, *see* Section X.B.1. The process of identifying and recruiting new directors is discussed in Section XI.A.

255 *See, e.g.*, *Tate & Lyle PLC* v. *Staley Continental, Inc.*, 1988 Del. Ch. LEXIS 61, at *20–22 (Del. Ch. May 9, 1988) (invalidating rabbi trust covering both inside and outside directors because of conflict of interest).

256 *See id*.

257 ISS, *2025 U.S. Proxy Voting Guidelines* 47 (January 2025).

258 *See* Item 402(k) of Regulation S-K, 17 C.F.R. § 229.402(k), and related Instructions.

259 8 *Del. C.* § 102(b)(7).

260 *See* 8 *Del. C.* § 145.

261 Item 402(x) of Regulation S-K. 17 C.F.R. § 229.402(x).

262 NYSE Listed Company Manual, Rule 303A.04(b)(i).

263 Spencer Stuart, *2024 U.S. Spencer Stuart Board Index* 38 (2024), https://www.spencerstuart.com/research-and-insight/us-board-index.

264 In 2024, 28 percent of S&P 500 companies disclosed engagement of an independent third party to facilitate and conduct all or a portion of the board evaluation process. Spencer Stuart, *2024 U.S. Spencer Stuart Board Index* 31 (2024), https://www.spencerstuart.com/research-and-insight/us-board-index.

265 NYSE Listed Company Manual, Rules 303A.07(b)(ii); 303A.05(b)(ii); 303A.04(b)(ii).

266 Nearly half of S&P 500 boards (48 percent) evaluate the full board and its committees annually and roughly the same percentage of S&P 500 boards (47 percent) evaluate the full board, committees and individual directors. *See* Spencer Stuart, *2024 U.S. Spencer Stuart Board Index* 38 (2024), https://www.spencerstuart.com/-/media/2024/09/ssbi2024/2024_us_spencer_stuart_board_index.pdf.

267 *See, e.g.*, Spencer Stuart, *2014 Spencer Stuart Board Index* 32 (2014), https://www.spencerstuart.com/~/media/PDF%20Files/Research%20and%20Insight%20PDFs/SSBI2014web14Nov2014.pdf.

268 NYSE Listed Company Manual, Rule 303A.04(b)(i).

269 Nearly half of S&P 500 boards (48 percent) evaluate the full board and its committees annually and roughly the same percentage of S&P 500 boards (47 percent) evaluate the full board, committees and individual directors. *See* Spencer Stuart, *2024 U.S. Spencer Stuart Board Index* 38 (2024), https://www.spencerstuart.com/-/media/2024/09/ssbi2024/2024_us_spencer_stuart_board_index.pdf.

270 Several SEC enforcement actions alleging various failures to disclose perquisites highlight the significance of the director questionnaires when used in connection with the preparation of SEC reports and proxy

statements, among other public disclosures. *See, e.g., In the Matter of Stanley Black & Decker, Inc.*, Respondent, Release No. 4422 (June 20, 2023); *In the Matter of the Greenbrier Companies, Inc.*, Respond Ent., Release No. 11162 (Mar. 2, 2023).

271 NYSE Listed Company Manual, Rule 303A.01.

272 Nasdaq Listing Rule 5605(b)(1).

273 A company relying on this cure period must provide notice to Nasdaq immediately upon learning of the event or circumstance that caused the noncompliance. Nasdaq Listing Rule 5605(b)(1)(A).

274 NYSE Listed Company Manual, Rules 303A.04, 303A.05 and 303A.06.

275 NYSE Listed Company Manual, Rules 303A.04, 303A.05, 303A.06 and 303A.07.

276 NYSE-listed companies must affirmatively determine that compensation committee members do not have any relationship to the listed company that is material to the director's ability to be independent from management in connection with the duties of compensation committee members by considering all relevant factors, including, but not limited to, (i) the source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the listed company to such director (excluding standard compensation for board service) and (ii) whether the director is affiliated with the listed company, its subsidiaries, or any affiliates of the listed company. NYSE Listed Company Manual, Rule 303A.02(a)(ii). However, while the NYSE requires companies to broadly analyze any and all potentially relevant circumstances when determining independence, it does not consider ownership of a significant amount of company stock, by itself, as a bar to independence. Commentary to NYSE Listed Company Manual, Rule 303A.02(a)(ii).

277 In addition to the generally applicable independence requirements for NYSE directors, audit committee members must, in the absence of an applicable exemption, satisfy the independence requirements of Exchange Act Rule 10A-3. NYSE Listed Company Manual, Rule 303A.07(a).

278 Nasdaq Listing Rules 5605(c)(2)(A) and 5605(d)(2)(A).

279 Nasdaq Listing Rules 5605(c)(1) and 5605(d)(1).

280 Nasdaq Listing Rule 5605(e)(1).

281 A company that relies on this exception must disclose the nature of the relationship and the reasons for the determination either on or through the company's website or in the proxy statement for the next annual meeting subsequent to such determination (or, if the company does not file a proxy, in its annual report on Form 10K or 20F). Nasdaq Listing Rule 5605(e)(3).

282 *Id*.

283 Nasdaq Listing Rule 5605(e)(2).

284 17 C.F.R. § 240.10A-3(b)(1)(i).

285 17 C.F.R. § 240.10A-3(b)(1)(ii)

286 17 C.F.R. § 240.10C-1(a)-(b).

287 NYSE Listed Company Manual, Rule 303A.09.

288 NYSE Listed Company Manual, Rule 303A.10.

289 Nasdaq Listing Rule 5610.

290 The requirements for a Nasdaq-listed company's Code of Ethics are derived from Section 406(c) of the Sarbanes-Oxley Act of 2002 and Item 406 of Regulation S-K promulgated thereunder. *Id.*; 17 C.F.R. § 229.406(b).

291 Nasdaq Listing Rule 5610.

292 NYSE Listed Company Manual, Rule 303A.03.

293 Additionally, if one director is chosen to preside at all executive sessions, his or her name must be disclosed either on or through the company's website or in its annual proxy statement, or, if it does not file an annual proxy statement, in its annual report on Form 10-K. If this disclosure is made on or through the company's website, the company must disclose that fact in its annual proxy statement or annual report, as applicable, and provide the website address. If the same director does not preside over every executive session, then the company must publicly disclose the procedure by which a presiding director is chosen (for example, if the position rotates among the chairs of its board committees). Disclosure Requirements to NYSE Listed Company Manual, Rule 303A.03.

294 Nasdaq Listing Rule 5605(b)(2).

295 Nasdaq Listing Rule IM-5605-2.

[296] NYSE Listed Company Manual, Rule 312.03(c).
[297] NYSE Listed Company Manual, Rule 312.03(d).
[298] Nasdaq Listing Rule 5635(a)(1).
[299] Nasdaq Listing Rule 5635(b).
[300] NYSE Listed Company Manual, Rule 312.03(b).
[301] Nasdaq Listing Rule 5635(a)(2).
[302] NYSE Listed Company Manual, Rule 303A.08.
[303] Nasdaq Listing Rule 5635(c).
[304] NYSE Listed Company Manual, Rule 303A.00.
[305] Nasdaq Listing Rules 5615(c)(1)-(2).
[306] Nasdaq Listing Rule 5615(c)(2).
[307] Nasdaq Listing Rule 5615(a)(4).
[308] Nasdaq Listing Rules 5615(a)(4)(B)-(C).
[309] Nasdaq Listing Rules 5615(a)(4)(D)-(J).
[310] *Id*.
[311] Commentary to NYSE Listed Company Manual, Rule 303A.11.
[312] Nasdaq Listing Rule 5615(a)(3).
[313] *Id.*; Nasdaq Listing Rule IM-5615-3.
[314] NYSE Listed Company Manual, Rule 303A.00.
[315] Nasdaq Listing Rules 5615(b)(1)-(2) and 5615(c)(3).
[316] *Id*. Companies may choose not to adopt a nomination committee and may instead rely upon a majority of the Independent Directors to discharge responsibilities under Rule 5605(b).
[317] Nasdaq Listing Rule 5615(b)(3).
[318] NYSE Listed Company Manual, Rule 303A.00.
[319] *Id*.
[320] *Id*.
[321] *Id*.
[322] NYSE Listed Company Manual, Rule 303A.08.
[323] NYSE Listed Company Manual, Rule 303A.00.
[324] NYSE Listed Company Manual, Rule 303A.12(a).
[325] NYSE Listed Company Manual, Rule 303A.12(b).
[326] Nasdaq Listing Rule 5625.
[327] This is a generic, minimalist example of a Charter. Given the breadth of issues that Nominating and Corporate Governance Committees oversee, and the different and evolving emphases they may have (for example, at different times, a Board may prioritize diversity, experience, specific expertise, refreshment, etc.), the Charter should be reviewed on a regular basis to ensure that it reflects the Board's current priorities.
[328] Minimum number to be set in a manner consistent with governing state law and the Company's charter and bylaws.