Paul | Weiss

CLIENT MEMORANDUM

January 17, 2022

2021 Year-End U.S. Legal & Regulatory Developments

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The following is our summary of significant 2021 U.S. legal and regulatory developments of interest to Canadian companies and their advisors. The first section below covers key developments from the fourth quarter of 2021; the second section discusses certain key developments from the first three quarters of 2021.

Recent Developments (Fourth Quarter 2021)

1. Glass Lewis and ISS Issue 2022 Voting Policies

Proxy advisory firms Institutional Shareholder Services ("ISS") and Glass Lewis have issued final voting policy updates for the 2022 proxy season. Key changes relate to board diversity, oversight of environmental and social risk and accountability, in line with continuing shareholder focus on environmental, social and governance issues. The key voting policy updates are summarized below.

Board Diversity

Glass Lewis. Starting in 2022, for Russell 3000 companies, Glass Lewis will generally recommend against the chair of the nominating/governance committee ("NGC") of a board with fewer than two gender-diverse directors, or the entire NGC if there are no gender-diverse directors. Smaller boards with six or fewer directors and boards outside of the Russell 3000 index will only have to comply with the existing policy, which requires one gender-diverse director. In 2023, Glass Lewis will recommend against the NGC chair of a board that is not at least 30% gender diverse. Glass Lewis may refrain from recommending against directors of companies if boards have provided a sufficient rationale or plan to address the lack of diversity on the board. "Gender-diverse directors" is defined to include women and directors that identify with a gender other than male or female.

States have begun to adopt legislation encouraging or mandating that companies include women directors and/or directors from underrepresented

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communities on their boards. If a company does not comply with these types of mandated board composition requirements or does not provide adequate disclosure to make this determination, Glass Lewis will generally recommend voting against the NGC chair. Starting in 2023, Glass Lewis will recommend against the NGC chair at S&P 500 companies that do not provide any disclosure of racial/ethnic minority demographic information.

ISS. Starting February 1, 2023, the existing ISS policy to recommend against the nominating committee chair (or other directors on a case-by-case basis) for companies with no women on the board will be extended to all companies. As is currently the case, an exception will be made if there was a woman on the board at the prior annual meeting and the board makes a firm commitment to appoint at least one woman within a year. Starting in 2022, ISS will generally recommend against the chair of the nominating committee (or other directors on a case-by-case basis) at companies in the Russell 3000 and S&P 1500 indices that do not have at least one racially/ethnically diverse director.

ESG Initiatives

Glass Lewis. Glass Lewis will note as a concern (for Russell 1000 companies), and generally recommend against the NGC chair (for S&P 500 companies), when boards do not provide adequate disclosure on board-level oversight of environmental and social issues. Glass Lewis states, however, that companies should determine the best structure for this oversight. Additionally, due to its belief that a board is in the best position to set company strategy and that shareholders may not be able to make informed decisions regarding a company's climate strategy due to having incomplete information, Glass Lewis will generally oppose shareholder proposals requesting that companies adopt a say-on-climate vote. If a company has such a vote, however, Glass Lewis will evaluate climate transition plans on a case-by-case basis.

ISS. For companies that are significant greenhouse gas ("GHG") emitters through their operations or value chains (i.e., those 167 companies currently identified as the Climate Action 100+ Focus Group), ISS has added a policy to recommend against the incumbent chair of the responsible committee (or other directors on a case-by-case basis) where ISS determines that the company is not taking the minimum steps needed to understand, assess and mitigate risks related to climate change to the company and the larger economy. ISS defines "minimum steps" as making detailed disclosures of climate-related risks and setting appropriate GHG emission reduction targets. ISS expressly notes that its expectations about what constitutes "minimum steps" will increase over time. ISS has also added policies on management and shareholder say-on-climate proposals, which ISS will evaluate case-by-case based on specified factors.

Voting Rights

Glass Lewis. Glass Lewis will recommend against the chair of the NGC at companies with multi-class share structures and unequal voting rights when the company does not provide for a reasonable sunset (generally seven years or less) of the multi-class share structure. This builds upon Glass Lewis' existing policy of recommending against the board at newly public companies that adopted this type of structure without shareholder approval (in particular by unaffiliated shareholders) following the IPO or a reasonable sunset.

Where a special purpose acquisition company ("SPAC") target board adopts a multi-class share structure where voting rights are not aligned with economic interest or certain anti-takeover provisions (e.g., a poison pill or classified board), Glass Lewis will generally recommend against all members of the board who served at the time of the company becoming public. Exceptions to this policy include where the board (i) submits these provisions to a shareholder vote on an advisory basis at the meeting where shareholders voted on the business combination, (ii) committed to submit these provisions to a shareholder vote at the company's first shareholder meeting after the company becoming public or (iii) provided for a reasonable sunset of these provisions (generally three to five years in the case of a classified board or poison pill and seven years or less in the case of a multi-class structure).

ISS. In 2015, ISS adopted a voting policy to recommend against directors at newly public companies that had unequal voting rights without a reasonable, time-based sunset mechanism. Then existing public companies with unequal voting rights were not impacted by this policy. Starting February 1, 2023, however, ISS will extend the policy to all covered companies and will

recommend against one or more directors (except new nominees, who will be considered on a case-by-case basis) if the company has a common stock structure with unequal voting rights. ISS has clarified that these types of structures include high/low vote stock, classes of shares that are not entitled to vote on all the same ballot items or nominees and stock with time-phased voting rights. Exceptions will be made for (i) newly public companies with a sunset provision of no more than seven years from the date of the IPO, (ii) limited partnerships and the operating partnership units of real estate investment trusts ("REITs"), (iii) situations where the unequal voting rights are considered de minimis or (iv) companies providing sufficient protections for minority shareholders, such as allowing minority shareholders a regular binding vote on whether the capital structure should be maintained. ISS has clarified that "newly public companies" also includes companies going public in a de-SPAC transaction.

For the full text of our memorandum on Glass Lewis' voting policies, please see:

- https://www.paulweiss.com/media/3981559/glass_lewis_issues_2022_voting_policies.pdf

For the full text of our memorandum on ISS' 2022 voting policies, please see:

- https://www.paulweiss.com/media/3981598/iss_issues_final_policy_updates_for_2022_proxy_season.pdf

For Glass Lewis' United States 2022 policy guidelines, please see:

- https://www.glasslewis.com/wp-content/uploads/2021/11/US-Voting-Guidelines-US-GL-2022.pdf?hsCtaTracking=257fcf1c-f11e-4835-81a3-d13fbc7b1f4c%7C1dad2378-213f-45f6-8509-788274627609

For ISS' 2022 policy guidelines, please see:

- https://www.issgovernance.com/file/policy/latest/americas/US-Voting-Guidelines.pdf

2. SEC Mandates Universal Proxies

On November 17, 2021, the U.S. Securities and Exchange Commission ("SEC") adopted final rules requiring both companies and dissidents to use universal proxy cards that must include all director nominees in contested director elections. As a result of these changes, which will become effective after August 31, 2022, shareholders will be able to choose from all candidates, whether nominated by the company or dissidents, even when voting by proxy. These changes are a significant departure from current practice, where proxies are granted in favor of either the company's full slate or the dissident's full slate. Because these changes will make it easier for shareholders to "pick and choose" from all nominees, split-ticket results may become more common, which is likely to be materially beneficial to activists and other dissidents.

As summarized below, these new rules impose formatting and substantive requirements on the universal proxy card and notice and other procedures and deadlines to provide for consistency in timing and information sharing between the company and the dissident. The SEC also adopted amendments to the form of proxy and proxy statement disclosure requirements applicable to all director elections, primarily to clarify the availability and impact of various voting options. Investment companies and business development companies are exempt from the new universal proxy rules. Funds are also exempt at the moment; the SEC noted that further consideration is necessary before determining whether the universal proxy rules should apply to some or all funds.

Notice and Filing Procedures and Deadlines

The new Rule 14a-19 sets several notice and filing deadlines for companies and dissidents:

Sixty days before the anniversary of the prior year's annual meeting, the dissident must notify the company of its intent to solicit proxies in support of its nominees. This deadline must be disclosed in the company's proxy statement. The dissident is not required to file the notice with the SEC or otherwise make the notice publicly available.

Fifty days before the anniversary of the prior year's annual meeting, the company must notify the dissident of the names of all company nominees (unless already disclosed in a proxy statement). The company is also required to notify the dissident promptly of any changes to its nominee names.

Twenty-five days before the annual meeting or five calendar days after the company files its definitive proxy statement, whichever is later, the dissident must file its definitive proxy statement. If the dissident fails to file a definitive proxy statement on time, the company may disseminate a new, non-universal proxy card that only includes the names of the company's nominees.

Universal Proxy Card Requirements

The company and the dissident will each have the flexibility to design and disseminate their own universal proxy cards. However, Rule 14a-19 provides that, among other requirements, each universal proxy card must set forth the names of all duly nominated director candidates, provide a means for shareholders to grant authority to vote for the nominees and clearly distinguish among registrant nominees, dissident nominees and any proxy access nominees. If both the company and the dissident have presented a full slate of nominees and there are no proxy access nominees, the universal proxy card may allow shareholders to vote for the entire dissident or company slate as a group. In these circumstances, the universal proxy card must also allow shareholders to vote against or withhold the vote from such a group. Where state law provides for and gives effect to votes against nominees, the form of proxy must include the option to vote against nominees (in lieu of the option to withhold authority to vote) and the option to abstain.

Nominee Consent and Information Requirements

Under revised Rule 14a-4, the bona fide nominee rule is expanded to include any nominee that has consented to being named in any proxy statement for the next shareholder meeting for director elections (instead of being limited to consenting to being named in the proxy statement of the party making their nomination). Each party must refer shareholders to the other party's proxy statement for information about that other party's nominees, and include disclosure that shareholders can access that proxy statement free of charge on the SEC's website. A company must also include disclosure in its proxy statement advising shareholders how it will treat proxy authority granted in favor of the other party's nominees if the other party abandons its solicitation or fails to comply with the proxy rules (including if a dissident fails to solicit the required percentage of shareholders). If a dissident fails to comply with these rules, the dissident will be prohibited from using the universal proxy rules and continuing to solicit proxies.

Minimum Dissident Solicitation Requirement

The dissident must solicit shareholders representing at least 67% of the voting power of shares entitled to vote in the election of directors (an increase from the majority originally proposed). Failure to meet this solicitation threshold would expose the dissident to liability for violating the proxy rules. Additionally, the dissident would also be exposed to liability under Rule 14a-9 if its statements in the proxy statement/form of proxy regarding its intention to meet this solicitation threshold were false. The SEC's adopting release makes clear that the dissident may solicit shareholders under the "notice and access" method of mailing a notice of internet availability and posting the proxy materials to a website, which is less costly than mailing a full proxy statement to shareholders.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/media/3981565/sec_mandates_universal_proxies.pdf

For the SEC's final rules, please see:

- https://www.sec.gov/rules/final/2021/34-93596.pdf

3. SEC Proposes Amendments Regarding 10b5-1 Trading Plans and Disclosures for Executive Officer Equity Grants and Gifts

On December 15, 2021, the SEC proposed amendments to Rule 10b5-1, which provides an affirmative defense to insider trading liability under Rule 10b-5. To be eligible for the defense, the trading person must show that a trade is made pursuant to a contract, instruction or plan (a "10b5-1 plan"), which was entered into at a time when the person was not in possession of material nonpublic information, and that specifies the amount of securities to be sold and the pricing and timing parameters of such sales, and over which the person does not exercise any subsequent influence. These proposed amendments impose mandatory cooling-off periods, eliminate the use of multiple or overlapping 10b5-1 plans, and require significantly more disclosures regarding trading by issuers and insiders (under 10b5-1 plans and otherwise). If the measures are adopted as proposed without any transition provisions, companies and plan participants will want to consider the eligibility of existing 10b5-1 plans for the affirmative defense under Rule 10b5-1(c). The SEC's comment period on the proposal will close 45 days after it is published in the *Federal Register*. It is currently unclear how these proposed changes would affect Canadian issuers utilizing the Multijurisdictional Disclosure System that file annual reports on Form 40-F.

Under the proposed amendments:

- 10b5-1 plans by directors and officers required to file reports under Section 16 of the Securities Exchange Act of 1934 (the "Exchange Act") would require a mandatory 120-day cooling-off period between the adoption of a plan and the first trade thereunder, and after any modifications to an existing plan;
- 10b5-1 plans by issuers would require a mandatory 30-day cooling-off period between the adoption of a plan and the first trade thereunder, and after any modifications to an existing plan;
- the Rule 10b5-1(c) affirmative defense would not be available for multiple or overlapping trading plans, and its availability for single-trade plans would be limited to just one single-trade plan in any 12-month period;
- when adopting a 10b5-1 plan, officers and directors would be required to certify to the issuer that they are not aware of any material nonpublic information, and they are adopting the plan in good faith and not as part of a scheme to evade the insider trading laws, and to retain such certification for a period of 10 years;
- issuers would be required to disclose information regarding the adoption and termination of 10b5-1 trading plans and other trading plans, by the issuer and its officers and directors on their Form 10-Q and Form 10-K filings;
- issuers would be required to disclose whether they have adopted an insider trading policy and to describe such policy on their Form 10-K filings and proxy and information statements on Schedules 14A and 14C. A similar requirement with respect to disclosure of policies and procedures would extend to foreign private issuers that file annual reports on Form 20-F;
- issuers would be required to provide new annual quantitative disclosures regarding equity award grants made within 14 days before or after the issuer's disclosure of material nonpublic information (including earnings releases);
- Section 16 filers would be required to indicate, by ticking a box on either Form 4 or 5, whether reported transactions are being made pursuant to a 10b5-1 plan, and provide additional relevant disclosures about the transaction; and
- gifts by insiders would need to be disclosed within two (2) business days on Form 4 (instead of on a Form 5 due 45 days after the company's year-end).

For the full text of our memorandum, please see:

- https://www.paulweiss.com/media/3981641/sec_proposes_amendments_regarding_10b5_1_trading_plans_and_disclosures_for_executive_officer_equity_grants_and_gifts.pdf

For the SEC proposed amendments, please see:

- https://www.sec.gov/rules/proposed/2022/33-11013.pdf

4. Stockholder Nominees Barred for Noncompliance with "Clear Day" Advance Notice Bylaw

In *Rosenbaum* v*. CytoDyn Inc*. ("*Rosenbaum*"), the Delaware Court of Chancery upheld a board's decision to exclude stockholder nominees from being considered at CytoDyn Inc.'s ("CytoDyn") annual meeting because the stockholders' notice failed to include information required by the company's advance notice bylaw.

Plaintiff stockholders of CytoDyn provided advance notice of their nominations to CytoDyn's board the day before the advance notice deadline in CytoDyn's "commonplace" advance notice bylaw. One month after the deadline, the board sent a deficiency letter to the plaintiffs regarding the disclosures in their nomination notice. Plaintiffs attempted to address the deficiencies shortly after their receipt of the deficiency letter, but well after the advance notice deadline. Upon the continued rejection of their nominations by the CytoDyn board, the plaintiffs filed suit in the Court of Chancery. The court found that the board had not engaged in any manipulative or inequitable conduct in rejecting the nominees. Even though the board waited almost one month before notifying the stockholders of the deficiencies in their nomination notice, the court emphasized that the notice was deficient, that the stockholders had not submitted their notice until close to the deadline, which left no time to fix the deficiencies, and that, in any event, the bylaw did not require the board to engage in an iterative process with stockholders to fix deficiencies.

Key takeaways from the court's opinion include the following:

- Delaware courts continue to give deference to a board's adoption of an advance notice bylaw where the bylaw was adopted on a "clear day" and where its terms are not "overtly unreasonable." In *Rosenbaum*, the plaintiffs "wisely" did not challenge, and the court did not review, the CytoDyn board's adoption of the advance notice bylaw. The bylaw was not adopted in response to any corporate threat and had terms the court characterized as "commonplace." Thus, the *Rosenbaum* opinion does not change Delaware courts' approach to the review of similarly adopted advance notice bylaws. As such, companies thinking of enhancing their advance notice bylaws would be better served to do so on a "clear day," rather than waiting until there is a precipitating event.

- Stockholders can obtain equitable relief if they can demonstrate "compelling circumstances" that the board's enforcement of the bylaw is inequitable under *Schnell* v. *Chris-Craft Indus., Inc.* The court rejected plaintiffs' argument that enhanced scrutiny applied because there was no evidence of "manipulative conduct" by the board. The court did not, however, automatically apply the business judgment rule, instead invoking *Schnell* v. *Chris-Craft Indus., Inc.* and observing that equitable relief might be appropriate if the plaintiffs could show that an advance notice bylaw denied stockholders a fair opportunity to nominate director candidates. Here, however, the court found no such compelling circumstances. The nomination notice was deficient on at least two disclosures required by the advance notice bylaws. Further, the board's one-month delay in responding to the nomination notice was not inequitable because the stockholders chose to submit the notice on the eve of an unambiguous deadline with the full understanding that the bylaws did not provide stockholders an opportunity to cure deficiencies later.

- *Delaware courts' review of advance notice bylaws depends on the specific circumstances before the court.* In upholding the board's decision, the court emphasized that the particular bylaw at issue, unlike many advance notice bylaws, did not set forth a procedure to cure deficiencies beyond the deadline. The court observed in dicta that even without an express cure period in the bylaw, it would have been harder for the board to justify silence if the nomination notice had been made with ample time before the deadline to correct deficiencies.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/media/3981478/stockholder_nominees_barred_for_noncompliance_with_clear-day_advance_notice_bylaw.pdf

For the Delaware Court of Chancery's opinion in *Rosenbaum* v. *CytoDyn Inc*., please see:

- https://courts.delaware.gov/Opinions/Download.aspx?id=325470

5. SEC Proposes Amendments to Share Repurchase Disclosures

On December 15, 2021, the SEC proposed amendments to improve the "quality, relevance and timeliness" of issuer share repurchase disclosures. These amendments would require daily disclosures by issuers, including foreign private issuers, of share repurchases (currently issuers are required to disclose information about repurchases on a quarterly basis), within one (1) business day of the repurchase, on a new Form SR that would be furnished to the SEC, with greater detail about the structure of the issuer repurchase program to be provided quarterly.

The SEC has proposed a new Form SR, which would require issuers to furnish daily reports of any purchases by or on behalf of the issuer or any affiliated purchaser. Issuers would be required to furnish the Form SR to the SEC, via EDGAR, on the business day following any purchase.

In the Form SR, issuers would be required to disclose the class and number of shares (or units) purchased, including all issuer repurchases whether or not made pursuant to publicly announced plans or programs, the average price paid per security, and the aggregate total number of securities purchased on the open market in reliance on the Rule 10b-18 safe harbor and/or pursuant to a Rule 10b5-1 plan.

Under the proposal, Item 703 of Regulation S-K would be amended to require additional disclosure regarding: the objective or rationale for the issuer's share repurchases and process or criteria used to determine the amount of repurchases; any policies and procedures relating to purchases and sales of the issuer's securities by its officers and directors during a repurchase program; whether the issuer made its repurchases pursuant to a Rule 10b5-1 plan; whether purchases were made in reliance on the Rule 10b-18 nonexclusive safe harbor; and whether any "Section 16" officers or directors purchased or sold the shares (or units) that are the subject of the repurchase program within ten (10) business days before or after the announcement of the program.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/media/3981630/sec_proposes_amendments_to_share_repurchase_disclosures.pdf

For the SEC proposed amendments, please see:

- https://www.sec.gov/rules/proposed/2021/34-93783.pdf

6. SEC Issues New Guidance on Rule 14a-8 Shareholder Proposals

On November 3, 2021, the SEC Division of Corporation Finance issued Staff Legal Bulletin 14L ("SLB 14L"), regarding shareholder proposals under Rule 14a-8 under the Exchange Act. SLB 14L rescinds prior Staff Legal Bulletins 14I, 14J and 14K, noting that many proposals that raise significant social or environmental issues that would have previously been excludable on ordinary business and economic relevance grounds will no longer be excludable. We expect that this policy reversal will significantly increase the number of ESG proposals included in 2022 proxy statements. In the 2021 proxy season, 38 ESG proposals were successfully excluded from proxy statements on the basis of the ordinary business and economic relevance exceptions.

Rule 14a-8 Exemptions
Under Rule 14a-8(i)(7), shareholder proposals may be excluded if they deal with "a matter relating to the company's ordinary business operations." Under this rule, companies have historically been permitted to exclude shareholder proposals that raise significant social policy issues but are not significant to the particular company. SLB 14L reverses this position: the Staff instead noted that proposals will not be excludable under the ordinary business exemption when they raise "issues with a broad societal impact, such that they transcend the ordinary business of the company." SLB 14L specifically notes that certain proposals raising human capital management issues with a broad social impact (such as those related to employment discrimination) may no longer be excludable under the ordinary business exception. Similarly, SLB 14L reverses prior guidance, noting that shareholder proposals that raise issues of broad social or ethical concern related to the company's business will no longer be excludable under the economic relevance exception under Rule 14a-8(i)(5).

Additionally, in SLB 14L, the Staff states that it will return to a more measured approach to the concept of micromanagement. As a result, details and timelines will no longer per se constitute grounds to exclude shareholder proposals. The Staff will focus instead on the specificity of the proposal and the degree to which it might inappropriately limit board or management discretion. When assessing whether a matter is "too complex" for shareholders, the Staff states that it will consider the sophistication of investors, availability of data and public discussion and analysis on the topic. Where there are well-established national or international frameworks relating to disclosure, target-setting and timeframes, the topic is unlikely to be considered "too complex" for shareholders. Under this guidance, shareholder proposals requesting companies to adopt timeframes or targets to address climate change will unlikely be excludable as micromanagement so long as the proposals afford discretion to management as to how to achieve such goals.

Graphics, Ownership and Email
SLB 14L republishes that portion of Staff Legal Bulletin 14I stating that graphics and images may be excludable under Rule 14a-8(i)(3) if they would make a proposal materially false or misleading or inherently vague, would directly or indirectly impugn character, integrity or personal reputation or are irrelevant to a consideration of the subject matter of the proposal. Any text or words in the graphic or image would count towards the 500-word limit.

SLB 14L republishes that portion of Staff Legal Bulletin 14K and reiterates that the sample language proposed by the SEC to be used by brokers for proof of ownership is not mandatory and that deviations from this form are not grounds for exclusion, so long as the ownership requirements are demonstrated to be met. SLB 14L also clarifies that brokers do not need to calculate the share valuation and emphasizes that companies should identify specific defects in the proof of ownership letter to the proponent even when the company has already sent a deficiency notice prior to receiving the proof of ownership.

The Staff also provides guidance in SLB 14L on the use of email to communicate regarding shareholder proposals. Senders should ensure that they can prove delivery of their email (the burden of proof of timely delivery will rest on the sender), and can do so by requesting a reply email acknowledging receipt or by using email read receipts. The Staff further encourages companies and shareholder proponents to acknowledge receipt of emails when requested.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/media/3981521/sec_issues_new_guidance_on_rule_14a_8_shareholder_proposals.pdf

For the SEC Staff Legal Bulletin, please see:

- https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals

7. SEC Adopts Rules to Modernize Filing Fee Disclosure and Payment Methods
The SEC has adopted final rules modernizing filing fee disclosures and payment methods. Under the final rules, filing fee disclosures will be contained in a filing fee exhibit (as opposed to the cover page and submission header where they are

currently disclosed). Additionally, filing fee calculations will be presented on a tabular basis in a structured, prescribed format instead of in a narrative format. Filing fees may be paid by wire transfer, ACH, debit cards (if issued by a U.S. financial institution) or credit cards (if issued by a U.S. financial institution, and subject to a daily and per filing fee payment limit of $25,000); checks and money orders will be eliminated as a form of payment. Under the new rules, registrants will be allowed to reallocate previously paid filing fees between two or more classes of securities included on a registration statement, prior to effectiveness.

The filing fee disclosure amendments will take effect January 31, 2022 and issuers may choose to comply with them after that date. Compliance will be required by July 31, 2024 for large accelerated filers and by July 31, 2025 for accelerated filers and all other filers. The filing fee payment method amendments will take effect on May 31, 2022.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/media/3981474/sec_adopts_rules_to_modernize_filing_fee_disclosure_and_payment_methods.pdf

For the SEC final rules, please see:

- https://www.sec.gov/rules/final/2021/33-10997.pdf

2021 Developments (First through Third Quarters)

1. SEC Division of Corporation Finance Issues Sample Comments for Issuers Conducting Offerings During Periods of Volatility

On February 8, the SEC Division of Corporation Finance issued a Sample Letter to Companies Regarding Securities Offerings During Times of Extreme Price Volatility (the "Sample Letter"). The Staff identified, among other factors, recent stock run-ups, high short interest and reports of strong and atypical retail investor interest as circumstances giving rise to the risks that its comments were intended to address.

On the prospectus cover page, issuers should describe recent volatility of their stock price, disclose any known risks of investing in their stock as a result of the volatility, disclose their stock market price prior to the volatility and describe any recent changes in financial condition or results of operations that are consistent with recent changes in their stock price. If there are no such recent changes, issuers should disclose that fact.

Issuers should also consider including risk factors addressing recent volatility in their stock price, the effects of a potential "short squeeze" on their stock price and the potential impact of the offering on the stock price and investors if the issuer is issuing a large number of shares relative to the number of shares currently outstanding. Furthermore, if the issuer expects to conduct future offerings, it should include a risk factor addressing the dilutive impact of future offerings on investors that purchase shares in the current offering at a significantly higher price.

Finally, issuers should include clear disclosure about the maximum offering amount, the stock price on which it is predicated, the fact that the issuer may not raise the maximum offering amount unless it meets or exceeds such price and a discussion of the issuer's priorities for the proceeds received in the offering if less than the maximum offering amount is raised.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/media/3980849/sec_division_of_corporation_finance_issues_sample_comments_for_issuers_conducting.pdf

For the SEC Sample Letter, please see:

- https://www.sec.gov/corpfin/sample-letter-securities-offerings-during-extreme-price-volatility

2. The Impact of the Recent SEC Staff Statement on Accounting and Reporting Considerations for Warrants Issued by SPACs

On April 12, 2021, the Acting Director of the Division of Corporation Finance of the SEC and the Acting SEC Chief Accountant published their Staff Statement on Accounting and Reporting Considerations for Warrants Issued by SPACs (the "Staff Statement").

The Staff Statement states that if the warrants provide that the settlement amount may change based on the characteristics of its holder, the warrants should be classified as liabilities measured at fair value rather than being indexed to the entity's stock. The Staff Statement also indicates that if the warrants provide for net cash settlement upon the occurrence of an event outside of the entity's control, and if not all holders of the underlying equity securities would receive cash in such circumstances, then the warrant should be classified as a liability.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/media/3981076/the_impact_of_the_recent_sec_staff_statement_on_accounting_and_reporting_considerations_for_warrants_issued_by_spacs.pdf

For the SEC Staff Statement, please see:

- https://www.sec.gov/news/public-statement/accounting-reporting-warrants-issued-spacs

3. SEC Approves Amendments to NYSE Shareholder Approval Requirements

On April 2, 2021, the SEC approved the New York Stock Exchange's (the "NYSE") proposed amendments to its shareholder approval requirements applicable to issuances to directors, officers and substantial security holders ("Related Parties"), and to private placements in excess of 20% of a listed company's common stock by number of shares or by voting power. The NYSE rules are now largely consistent with the equivalent Nasdaq Marketplace Rules. The amended shareholder approval requirements provide companies with significantly greater flexibility to raise capital.

Issuances to Related Parties

The NYSE no longer requires shareholder approval for issuances to Related Parties in excess of 1% of a company's common stock if that issuance is made for cash at a price no less than the "Minimum Price" threshold.[1] Additionally, shareholder approval is no longer required for issuances to the subsidiaries, affiliates or other closely related persons of Related Parties. Shareholder approval is required in the case of issuances used to fund an acquisition where the Related Party has a 5% or greater, or a group of Related Parties collectively have a 10% or greater, direct or indirect interest in the company or assets to be acquired or the consideration to be paid.

Issuances in Excess of 20%

The NYSE no longer requires shareholder approval for private placements of more than 20% of a company's common stock (by number of shares or by voting power) so long as the issuance is made for cash and at a price no less than the Minimum Price, regardless of the number of investors participating in the offering. If the securities are to be issued in connection with the acquisition of the stock or assets of another company, and such securities together with other securities issued (or planned to be issued) in connection with the acquisition would equal or exceed 20% of the company's common stock (by number of shares or by voting power), then shareholder approval would be required.

[1] "Minimum Price" means a price that is the lower of: (i) the Official Closing Price immediately preceding the signing of the binding agreement or (ii) the average Official Closing Price for the five trading days immediately preceding the signing of the binding agreement. The "Official Closing Price" of the issuer's common stock means the official closing price on the NYSE as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities.

Remaining Shareholder Approval Requirements
Issuances to Related Parties and issuances in excess of 20% remain subject to shareholder approval if required under any other applicable listing rule, including the equity compensation requirements of Section 303A.08 and the change of control requirements of Section 312.03(d). Related Party transactions, including issuances in excess of 20% which involves a Related Party, are subject to NYSE's Related Party transaction review requirements of Section 314.00 which requires the issuance to be pre-approved by the audit committee or another body of independent directors as consistent with the interests of the company and its shareholders.

On August 19, 2021, the NYSE re-amended Rule 314.00, which now states that related party transactions below $120,000 are exempt from these approval requirements. This latest amendment adopts Item 404's definition of related party transactions wholesale, and aligns with Nasdaq's definition of related party transactions. The rule change took effect immediately upon filing with the SEC.

For the full text of our memorandum discussing the SEC's approval of the NYSE amendments, please see:

- https://www.paulweiss.com/media/3980981/sec_approves_amendments_to_nyse_shareholder_approval_requirements.pdf

For our January 12, 2021 memorandum discussing the original proposed requirements, please see:

- https://www.paulweiss.com/media/3980756/update_on_nyse_shareholder_approval_requirements_waiver_extension_and_proposed_amendments.pdf

For the full text of our memorandum discussing the NYSE's re-amendment of the related party transaction threshold requirement, please see:

- https://www.paulweiss.com/media/3981380/nyse_amends_related_party_transaction_threshold_requirement.pdf

For the SEC order granting approval to the NYSE's amendments to its shareholder approval requirements, please see:

- https://www.sec.gov/rules/sro/nyse/2021/34-91471.pdf

For Amendment No. 1 to the Original Proposal, please see:

- https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-filings/filings/2021/SR-NYSE-2020-85,%20Am.%201.pdf

For the Original Proposal, please see:

- https://www.sec.gov/rules/sro/nyse/2020/34-90803.pdf

For a copy of the Rule 314.00 rule change filing, please see:

- https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-filings/filings/2021/SR-NYSE-2021-43,%20Re-file%20Pdf.pdf

4. SEC Approves Nasdaq Rule Change Permitting Primary Direct Floor Listings
On May 19, 2021, the SEC approved Nasdaq's proposed rule change to permit primary direct floor listings. This will permit companies to undertake an initial primary public offering and concurrent Nasdaq listing without the use of underwriters to market the shares (a "Direct Listing with a Capital Raise"). Prior to the rule change, direct listings were available only for secondary offerings by existing shareholders. The rule change allows for primary direct listings to occur alone or together with a secondary direct listing. Primary direct floor listings have been permitted on the NYSE since December 2020.

Listing Requirements
Companies undertaking a Direct Listing with a Capital Raise will be deemed to meet the applicable Market Value of Unrestricted Publicly Held Shares requirement (as defined in the proposed rule change) if the aggregate market value of unrestricted publicly held shares immediately prior to listing, together with the market value of shares the company sells in the opening auction, totals at least $110 million (or $100 million, if the company has stockholders' equity of at least $110 million), with such market value calculated using a price per share equal to the price that is equal to the lowest price of the range disclosed by the issuer in its effective registration statement.

The company listing via a Direct Listing with a Capital Raise will be required to comply with all other initial listing requirements, namely, having the applicable minimum number of shareholders per Nasdaq Listing Rule 5315(f)(1), at least 1,250,000 unrestricted publicly held shares outstanding at the time of initial listing, and a price per share of at least $4.00 at the time of initial listing.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/media/3981117/sec_approves_nasdaq_rule_change_permitting_primary_direct_floor_listings.pdf

For our September 18, 2020 memorandum discussing Nasdaq's original proposal, please see:

- https://www.paulweiss.com/media/3980479/sec_publishes_nasdaqs_proposal_for_direct_listings_with_a_capital_raise.pdf

For Amendment No. 2 to the Original Proposal, which completely superseded and replaced Nasdaq's original proposal, please see:

- https://listingcenter.nasdaq.com/assets/rulebook/nasdaq/filings/SR-NASDAQ-2020-057_Amendment_2.pdf

For the Original Proposal as amended by Amendment No. 1, please see:

- https://listingcenter.nasdaq.com/assets/rulebook/nasdaq/filings/SR-NASDAQ-2020-057.pdf

5. SEC Approves Nasdaq Board Diversity Requirements
On Friday, August 6, 2021, the SEC approved Nasdaq's board diversity requirements. As a result, each Nasdaq-listed company will be required to disclose the self-identified diversity characteristics of its board members beginning on the later of August 8, 2022 or the date of the company's proxy/information statement for its 2022 annual meeting. By 2023, listed companies will be required to have at least one director who self-identifies as diverse or to explain why the company does not meet this requirement. By 2025, each company listed on the Nasdaq Global Select or Global Markets will be required to have at least two directors who self-identify as diverse, including at least one director who self-identifies as female and at least one director who self-identifies as an underrepresented minority, or to explain why the company does not meet such requirements.

These listing requirements also apply to smaller-reporting companies and non-U.S. issuers (including foreign private issuers). Companies with small boards (five or fewer directors) will be able to meet the board diversity requirements by having one director who self-identifies as diverse. Foreign issuers may use a different disclosure matrix, provide and use an alternate definition of "underrepresented minority" based on the relevant national, racial, ethnic, indigenous, cultural, religious or linguistic identities in the jurisdiction of their principal executive offices, and satisfy the board diversity requirement by having two directors who self-identify as female. If foreign issuers elect to follow alternative diversity requirements in accordance with home country practices, or are located in jurisdictions that restrict the collection of personal data, they may satisfy the listing requirements by explaining their reasons for doing so.

If a company fails to provide the required diversity disclosures, Nasdaq will notify the company of its noncompliance. Companies will have 45 calendar days to submit a plan to Nasdaq, and 180 calendar days to regain compliance. If a company then fails to regain compliance, Nasdaq will issue a Staff Delisting Determination. The diversity requirements include a grace period for board vacancies.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/media/3981309/sec_approves_nasdaq_board_diversity_requirements.pdf

For the Nasdaq proposal adopted by the SEC, please see:

- https://listingcenter.nasdaq.com/assets/RuleBook/Nasdaq/filings/SR-NASDAQ-2020-081_Amendment_1.pdf

For Nasdaq's guidance on the implementation of these rules, please see:

- https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf

6. SEC Initiates First Enforcement Proceeding of the SPAC Boom against SPAC, Sponsor, Merger Target and CEOs

On July 13, 2021, the SEC charged SPAC, its sponsor, its proposed merger target and both the SPAC's and target's CEOs with making false and misleading statements about the target company's technology and ability to obtain essential licenses. The charges represent the SEC's first enforcement action against a SPAC since the "SPAC boom" took off late last year.

Stable Road Acquisition Corp., a SPAC, completed its initial public offering in November 2019. The SPAC's CEO was also a managing member of the SPAC's sponsor. On October 7, 2020, the SPAC announced a merger with Momentus, Inc. ("Momentus"), an early-stage space transportation company. On the same day, the SPAC raised $175 million of capital by entering into subscription agreements with private investment in public equity ("PIPE") investors in exchange for shares in the merged company after the business combination was approved.

Before the proposed business combination closed, the SEC charged Momentus and its CEO with scienter-based fraud under Section 17(a) of the Securities Act of 1933 (the "Securities Act") and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The SEC alleged that Momentus falsely claimed that its propulsion technology had been successfully tested in space, and that Momentus misled investors by downplaying known national security concerns about its CEO.

The SEC also charged the SPAC, its sponsor, and its CEO with violations under Section 17(a)(2) and (3) of the Securities Act and Sections 13(a) and 14(a) of the Exchange Act, alleging principally that the SPAC issued misleading disclosures because it "did not perform reasonable due diligence" on the target. The SPAC retained a space technology consulting firm to investigate the target only one month before the merger announcement, and did not instruct the firm to investigate the target's space tests. Accordingly, the SEC alleged that the SPAC's investor presentations and public filings contained materially misleading statements. The SEC further alleged that the SPAC CEO's actions were attributable to the SPAC's sponsor because he served as the sponsor's managing member and his actions were taken on behalf of and for the benefit of the sponsor.

The parties, except Momentus' CEO, settled on a "no admit, no deny" basis, with the SPAC, its CEO and Momentus agreeing to pay civil penalties. The SPAC and Momentus also agreed to offer every PIPE investor the right to terminate its subscription agreement, and the SPAC's sponsor agreed to forgo 250,000 founder shares to which it would otherwise have been entitled upon the business combination. Momentus also agreed to retain an independent consultant to review its ethics and compliance programs. Litigation is currently proceeding for Momentus' CEO.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/media/3981274/sec_initiates_first_enforcement_proceeding_of_the_spac_boom_against_spac_sponsor_merger_target_and_ceos.pdf

For a copy of the SEC's order against Stable Road Acquisition Corp, its sponsor, its CEO and Momentus, please see:

- https://www.sec.gov/litigation/admin/2021/33-10955.pdf

For a copy of the SEC's complaint against Momentus' CEO in the United States District Court for the District of Columbia, please see:

- https://www.sec.gov/litigation/complaints/2021/comp-pr2021-124.pdf

7. SEC Division of Corporation Finance Publishes Sample Climate Disclosure Comments

On September 24, 2021, the Staff of the SEC Division of Corporation Finance issued a sample comment letter (the "Sample Comments") reflecting comments on climate disclosure that the Staff may issue when reviewing companies' public filings. The Sample Comments refer to the SEC's 2010 guidance on climate disclosures and request additional disclosure, where material, in the risk factors and MD&A sections. In addition, the Sample Comments indicate that the SEC will be reviewing the disclosures provided by companies in their social responsibility/sustainability reports and comparing those to the SEC filing disclosures. Companies that previously limited substantive climate-related disclosure to social responsibility/sustainability reports should now consider the guidance of these SEC comments when preparing their public filings.

The Sample Comments include the disclosure of certain risk factors, such as any material litigation risks related to climate change and an explanation of its potential impact on the company, as well as the disclosure of material effects of transition risks related to climate change that may affect the company's business, financial condition and results of operations.

Within MD&A sections, the Sample Comments include requests to identify material pending or existing climate change-related legislation, regulations and international accords, and describe any material effect on the business, financial condition and results of operations of the company. In addition, the Sample Comments include requests to identify and quantify material past and/or future capital expenditures for climate-related projects and to discuss the indirect consequences of climate-related regulations and business trends and the physical effects of climate change on operations and results.

The issuance of these comments reflects the SEC's increased scrutiny of climate disclosures and follows various initiatives announced earlier in 2021 by then Acting Chair Allison Herren Lee. Chair Gary Gensler has called on the SEC to develop mandatory climate disclosure requirements to provide investors with "consistent, comparable and decision-useful" disclosure.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/media/3981422/sec_division_of_corporation_finance_publishes_sample_climate_disclosure_comments.pdf

For the SEC's Sample Comments, please see:

- https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures?utm_medium=email&utm_source=govdelivery

For the SEC's 2010 guidance on climate disclosure, please see:

- https://www.sec.gov/rules/interp/2010/33-9106.pdf

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Matthew W. Abbott
+1-212-373-3402
mabbott@paulweiss.com

Christopher J. Cummings
+1-212-373-3434
ccummings@paulweiss.com

Andrew J. Foley
+1-212-373-3078
afoley@paulweiss.com

Adam M. Givertz
+1-212-373-3224
agivertz@paulweiss.com

Ian M. Hazlett
+1-416-504-0518
ihazlett@paulweiss.com

Audra J. Soloway
+1-212-373-3289
asoloway@paulweiss.com

Stephen C. Centa
+1-416-504-0527
scenta@paulweiss.com

Christian G. Kurtz
+1-416-504-0524
ckurtz@paulweiss.com

Rosita Lee
+1-212-373-3564
rlee@paulweiss.com

Andrea Quek
+1-416-504-0535
aquek@paulweiss.com

Associates Thea Winterton-Perks and Katharine S. Wilson and Law Clerk Ben Mayer-Goodman contributed to this Client Memorandum.