



## **Top 10 Topics for Directors in 2019: SEC Regulation and Enforcement**

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In August 2018, the SEC adopted significant rule changes in its ongoing disclosure update and simplification program. Companies and boards will want to ensure that accounting and disclosure controls are in place for the upcoming annual report and proxy season to take advantage of these rule changes. Most of these revisions reduce disclosure requirements that are duplicative or are no longer considered important to investors. However, some amendments expand existing requirements, and companies will want to implement any changes necessary to comply with the revised rules, including the expanded requirement to provide quarterly, in addition to annual, statements of changes in stockholders' equity and disclosure of the amount of dividends per share for each class of shares with respect to interim financial periods. In addition, the SEC plans to seek comment on President Trump's proposal to shift from quarterly to semiannual reporting, as well as earnings guidance and related matters. Boards will want to monitor developments in this area and the ongoing development of investor and regulator views, including the formal SEC request for comment on earnings releases and quarterly reports.

### **Proxy Voting, Proxy Advisors and Shareholder Proposals.**

In November 2018, the SEC conducted a proxy roundtable on the proxy voting process and solicited comments for possible rule revisions, including amendments to the regulation of proxy advisory firms, such as ISS and Glass Lewis. Possible amendments include increased regulation of potential conflicts of interest on the part of proxy advisors, due to their relationships with investor groups and companies, and satisfaction of investment advisors' fiduciary duties when they rely on proxy advisor recommendations. The proxy roundtable also addressed the Rule 14a-8 shareholder proposal process. As with the subject of proxy advisor regulation, this builds on the SEC's 2010 Concept Release on the proxy system and

follows on SEC Staff Legal Bulletins in 2017 and 2018 emphasizing the role of the board's analysis in determining whether shareholder proposals may be excluded from a company's proxy statement under the "ordinary business" exclusion of Rule 14a-8. While the SEC staff has provided interpretations that may reduce the burdens of the shareholder proposal process on public companies, significant institutional investors and advocates have proposed expanding the shareholder proposal process and submitted an October 2018 petition for rulemaking to mandate increased environmental, social and governance (ESG) disclosures, including expanded requirements relating to gender and other diversity measures, climate change, executive compensation and human capital management. These and other aspects of the proxy system have been the subject of ongoing legislative initiatives that would increase regulation of the activities of proxy advisory firms, such as the proposed Corporate Governance Reform and Transparency Act, H.R. 4015, and Corporate Governance Fairness Act, S. 3614, and we expect the new Congress will also consider these topics. Boards will want to consider appropriate responses to developments in this area, considering the increased emphasis on ESG matters by proxy advisors and institutional investors when voting on director elections, and the potential for changes in emphasis following the midterm elections.

## **Securities Litigation and Enforcement**

The Supreme Court is expected to continue its recent trend of deciding significant securities law cases in *Lorenzo v. Securities and Exchange Commission*. In *Lorenzo*, the Court will revisit the question of whether a secondary actor can be held liable under Rule 10b-5 for a false or misleading statement, even if they are not the "maker" of the statement under the Court's 2011 decision in *Janus Capital Group Inc. v. First Derivative Traders*. In addition, the Court will consider whether secondary actors can be held liable under Rule 10b5 in SEC enforcement actions, in contrast to private causes of action, where the Court's decisions have explained that "secondary actor" and "aiding and abetting" liability is generally not available.

Newly appointed Justice Kavanaugh has recused himself from the appeal because he heard the case in the D.C. Circuit. This could lead to a 4-4 split decision that would effectively affirm the D.C. Circuit decision that Rule 10b-5 scheme liability can attach in this context. However, the situation is likely to recur, and the Court's decision may be informative in this area. As a result, boards and compliance professionals will want to carefully consider the implications of this case when evaluating potential exposure to securities litigation.

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