Vinson&Elkins

WINTER 2018-2019 SUPPLEMENT

TEN HOT TOPICS & ONE REMINDER:

DEVELOPMENTS IN GOVERNANCE AND DISCLOSURE

WINTER 2018-2019 SUPPLEMENT

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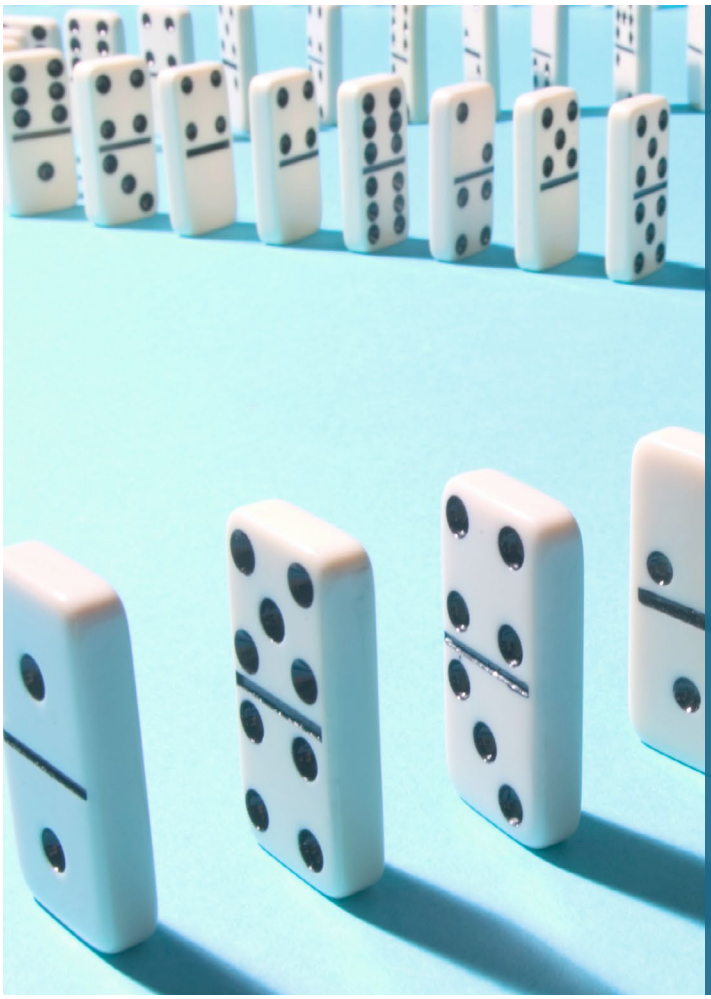
1 SEC CHAIRMAN CLAYTON OUTLINES 2019 AGENDA

On December 6, 2018, SEC Chairman Jay Clayton gave a **speech** in which he reviewed the Commission's progress on its agenda during 2018 and outlined the five key areas of focus for 2019:



- Chairman Clayton identified completing the rules relating to the standards of conduct for financial professionals as a key area of focus for 2019, stating that "the core obligations of investment professionals — and mandatory plain language disclosures — should match reasonable investor expectations."
- Improvements to the proxy process, including addressing concerns relating to the proxy solicitation and voting processes, reviewing the ownership and resubmission thresholds for shareholder proposals and clarifying the role and processes of proxy advisory firms, were also identified as 2019 priorities.
- Chairman Clayton also indicated that the Division of Corporation Finance is looking at the private offering framework, stating that the "'patchwork' private offering system is complex and it is time to take a critical look to see how it can be improved, harmonized and streamlined."
- Chairman Clayton briefly touched upon the current debate regarding quarterly reporting, and indicated that during 2019 the Commission will be considering ways to encourage long-term investment.
- Lastly, Chairman Clayton identified digital assets and initial coin offering markets, and their potential for abuse, as the fifth area of focus for 2019.

Chairman Clayton ended his speech by identifying three risks the Commission is closely monitoring: (i) the effect of "Brexit" on reporting companies, (ii) the transition away from LIBOR as a reference rate for financial contracts, and (iii) cybersecurity. Chairman Clayton discussed cybersecurity from an issuer, market, investor and enforcement perspective. From an issuer disclosure perspective, Chairman Clayton referred to the Commission's recent interpretive guidance, reminding companies that the guidance "emphasized the importance of disclosure controls and procedures that enable public companies to make accurate and timely disclosures about material cybersecurity events, as well as policies that protect against corporate insiders trading in advance of company disclosures of material cyber incidents."

2 SEC REQUEST FOR COMMENT ON QUARTERLY REPORTING

On December 18, 2018, the SEC published **a request for comment** on how the SEC can enhance, or at least maintain, the investor protection attributes of periodic disclosures while reducing quarterly reporting burdens. The SEC specifically requested input on the nature and timing of Form 10-Q disclosures, including any overlap with companies' earnings release disclosures, and input on allowing flexibility as to the frequency of periodic reporting. In addition, the SEC requested feedback on how the existing periodic reporting system, earnings releases, and earnings guidance may affect corporate decision making and strategic thinking, including whether these factors foster an inefficient outlook by focusing on short-term results. The public comment period will remain open until Tuesday, March 17, 2019. Comments may be submitted through the SEC's website by accessing the SEC's **page on submitting comments**.

3 SEC EXPANDS USE OF REGULATION A TO REPORTING COMPANIES

On December 19, 2018, the SEC **adopted final rules** to allow companies subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act to rely on the Regulation A exemption from registration for their securities offerings. These rules were mandated by the Economic Growth, Regulatory Relief, and Consumer Protection Act enacted effective May 24, 2018. Regulation A provides an exemption from the registration requirements of the Securities Act of 1933 for offerings and sales of securities up to $20 million for Tier 1 offerings or up to $50 million for Tier 2 offerings. Under the prior rules, Regulation A was not available to companies subject to the ongoing reporting requirements of Section 13 or 15(d) of the Exchange Act. The final rules adopted by the SEC amend Rule 251 of Regulation A to allow reporting companies to use the exemption provided by Regulation A, amend Rule 257 with respect to Tier 2 offerings to deem a reporting company issuer as having met the periodic and current reporting requirements of Rule 257 if the issuer meets the reporting requirements of Section 13 of the Exchange Act, and make certain conforming changes to Form 1-A. The final rules will become effective 30 days after they are published in the Federal Register.

In adopting the final rules, the SEC recognized that many of the reporting companies that choose to pursue a Regulation A offering would have otherwise pursued a registered offering. The SEC also recognized that many investors in those offerings would have invested in registered securities of those companies before the amendments. The SEC concluded, therefore, that "the net aggregate effects of the amendments on efficiency, competition, capital formation, and investor protection may be small."

4 PROXY STATEMENT DISCLOSURE OF HEDGING PRACTICES OR POLICIES

On December 18, 2018, the SEC **adopted final rules** that will require companies to disclose hedging practices or policies in their proxy statements as early as the 2020 annual meeting season. New Item 407(i) of Regulation S-K requires that any proxy or information statement relating to director elections must disclose any practices or policies (whether written or not) governing the ability of employees (including officers) and directors, or any of their designees, to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds), or otherwise engage in transactions that hedge or offset, or are designed to hedge or offset, any decrease in the market value of a company's equity securities granted to the employee or director by the company as part of the compensation of the employee or director, or held, directly or indirectly, by the employee or director. If a company does not have any such practices or policies, it must disclose that fact or state that hedging transactions are generally permitted. Companies may disclose the hedging practices or policies in full or provide a fair and accurate summary of the practices or policies that apply, including the categories of persons, the practices and policies affected and any categories of hedging transactions that are specifically permitted or specifically disallowed. Companies that do not qualify as "smaller reporting companies" (each, an "SRC") or "emerging growth companies" (each, an "EGC") must comply with these disclosure requirements for proxy and information statements with respect to the election of directors during fiscal years beginning on or after July 1, 2019, and SRCs and EGCs must comply for fiscal years beginning on or after July 1, 2020.

5 DELAWARE CHANCERY CLARIFIES PERMISSIBLE SCOPE OF EXCLUSIVE FORUM PROVISIONS

On December 19, 2019, the Delaware Court of Chancery ruled on a cross-motion for summary judgment in *Sciabacucchi v. Salzberg, C.A. No. 2017-0931-JTL* (Del. Ch. Dec. 19, 2018) that provisions in three corporations' certificates of incorporation that established an exclusive forum for the resolution of "any complaint asserting a cause of action arising under the Securities Act of 1933" ineffective and invalid. In a decision by Vice Chancellor Laster, the Court stated that "[t]he constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve the rights or relationships that were established by or under Delaware's corporate law. In this case, the Federal Forum Provisions attempt to accomplish that feat. They are therefore ineffective and invalid." In reaching its decision, the Court relied heavily on the Court's decision and discussion in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. June 25, 2013), in which the Court upheld the validity of exclusive forum provisions limited to derivative actions, actions pertaining to fiduciary duties, actions arising under the Delaware General Corporation Law, and actions asserting claims governed by the internal affairs doctrine.

Upcoming V&E CLE: January 30, 2019

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