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■ SECURITIES DISCLOSURE

Considerations for Climate Change Disclosures in SEC Reports

The SEC last issued climate change-specific disclosure guidance for public companies over 10 years ago, and it has done little since then to reinforce that guidance. However, recent SEC announcements, including a statement by SEC Acting Chair Lee, herald a greater focus on enforcement and compliance, and indicate that additional rulemaking is not far off.

By Hillary H. Holmes, Elizabeth A. Ising, Thomas J. Kim, and Ronald O. Mueller

On February 24, 2021, Allison Herren Lee, Acting Chair of the Securities and Exchange Commission (SEC), issued a statement titled "Statement on the Review of Climate-Related Disclosure" that "direct[s] the Division of Corporation Finance to enhance its focus on climate-related disclosure in public company filings" (Climate Change Statement).[1] The Climate Change Statement expressly builds on the interpretive guidance that the SEC previously issued in 2010 regarding how the SEC's existing principles-based disclosure requirements apply to climate change matters (2010 Climate Change Guidance).[2] This article reviews the Climate Change Statement, the SEC's 2010 Climate Change Guidance, and other recent SEC announcements regarding climate change disclosures and addresses what public companies should consider going forward. (*Editor's note: On March 15, Acting SEC Chair Lee delivered a speech at a briefing hosted by the Center for American Progress in which she discussed areas where the SEC's regulatory mission intersects with climate and other ESG issues and initiatives she has directed the SEC to undertake. On the same day, she issued a statement calling for public comment on climate disclosures and raising a number of questions to be addressed.*)

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Overview of the Climate Change Statement

The Climate Change Statement explains that "[n]ow more than ever, investors are considering climate-related issues when making their investment decisions" and that it is the SEC's "responsibility to ensure that they have access to material information when planning for their financial future." To that end, the Climate Change Statement announces that the SEC and its Staff will take "immediate steps" to "[e]nsur[e] compliance with the rules on the books, and updat[e] existing guidance" as part of "the path to developing a more comprehensive framework that produces consistent, comparable, and reliable climate-related disclosures." Specifically, as part of their "enhanced focus in this area," the SEC Staff

> will review the extent to which public companies address the topics identified in the [2010 Climate Change Guidance], assess compliance with disclosure obligations under the federal securities laws, engage with public companies on these issues, and absorb critical lessons on how the market is currently managing climate-related risks.

The Climate Change Statement also notes that the SEC Staff "will use insights from this work to begin updating the [2010 Climate Change Guidance] to take into account developments in the last decade."

Overview of the 2010 Climate Change Guidance

The 2010 Climate Change Guidance referenced in the Climate Change Statement is an interpretative release issued by the SEC clarifying how existing SEC disclosure rules[3] may require public companies to describe climate change matters.[4] The 2010 Climate Change Guidance notes four topics in particular that may trigger climate change disclosure under the SEC's rules.

1. The Impact of Climate Change Legislation and Regulation. The 2010 Climate Change Guidance notes that companies should consider the impact of existing (and in some circumstances, pending) legislation and regulation related to climate change both in the United States and globally.
2. The Impact of International Climate Change Accords. The 2010 Climate Change Guidance advises companies to consider, and disclose under existing SEC rules, when material, the impact of international accords relating to climate change.
3. Indirect Consequences of Climate Change Regulation or Business Trends. The 2010 Climate Change Guidance indicates that companies should consider actual and potential indirect consequences of climate change-related regulation and business trends.
4. The Physical Impacts of Climate Change. The 2010 Climate Change Guidance also states that companies should consider actual or potential impacts of the physical effects of climate change on their business.

The 2010 Climate Change Guidance appeared to have dramatically impacted public company disclosures regarding climate change. The number of S&P 500 companies mentioning climate change and/or greenhouse gas(es) in their Annual Reports on Form 10-K approximately doubled from the one year prior to the one year after the release of the 2010 Climate Change Guidance.[5] However, the 2010 Climate Change Guidance was not a focus of SEC Staff comments in the years that followed. According to a 2018 Government Accountability Office Report (GAO Report), the SEC Staff issued a limited number of climate change comments to public companies and often without citing the 2010 Climate Change Guidance.[6] For example, the GAO Report noted that based on a review of SEC filings by companies in five industries particularly "affected by climate change-related matters" (oil and gas, mining, insurance, electric and gas utilities, and food and beverage), the SEC Staff issued only 14 comment letters relating to climate-related disclosures to 14 companies, out of the over 41,000 comment letters issued from January 1, 2014, through August 11, 2017.[7]

New SEC "Climate and ESG Task Force"

Subsequently, on March 4, 2021, the SEC announced the creation of the "Climate and ESG Task Force" in the SEC's Division of Enforcement.[8] The purpose of the Task Force is to "develop initiatives to proactively identify ESG-related misconduct." The Task Force's initial focus will be to identify "any material gaps or misstatements in issuers' disclosure of climate risks under existing rules." The Task Force also will "analyze disclosure and compliance issues relating to investment advisers' and funds' ESG strategies."

In carrying out these responsibilities, the Task Force will coordinate the Enforcement Division's resources to identify potential violations, including through "the use of sophisticated data analysis to mine and assess information across registrants." In addition, the Task Force will evaluate and pursue tips, referrals, and whistleblower complaints on ESG-related issues, and assist teams working on ESG-related matters across the Enforcement Division. The SEC's press release also provided a link to the SEC's Website "Report Suspected Securities Fraud or Wrongdoing," noting that "tips, referrals and whistleblower complaints on ESG related issues" can be submitted there.

The Task Force includes 22 members from the SEC's headquarters, regional offices and specialized units within the Enforcement Division. The Task Force will be led by Acting Deputy Director of Enforcement Kelly L. Gibson, who noted that "proactively addressing emerging disclosure gaps that threaten investors and the market has always been core to the SEC's mission." The SEC also announced that the Task Force will work closely with other SEC Divisions and Offices, including the Divisions of Corporation Finance, Investment Management, and Examinations.

What Companies Should Do Now

These announcements along with recent senior SEC appointments—including Acting Chairman Lee's appointment of the SEC's first-ever senior policy adviser on "climate and ESG" matters earlier this month[9]—signal that climate and other ESG matters will be priorities at the SEC during the Biden Administration. As a result, public companies should consider the following.

1. **As part of the company's disclosure controls and procedures, review the existing process for assessing the materiality of climate change matters to the company and determine whether any additional climate change disclosures should be included in their SEC filings.** The process should include discussions among the company's securities law counsel, environment/safety/health, sustainability and government relations personnel and members of the company's disclosure committee. Companies that will file their Annual Reports on Form 10-K in the coming weeks should in particular review their disclosures in light of the Statement and the 2010 Climate Change Guidance. However, it is important to note that the Statement was released after many large accelerated filers had already filed their 2020 Annual Reports on Form 10-Ks. That said, the number of S&P 500 companies now mentioning climate change and/or greenhouse gas(es) in their Annual Reports on Form 10-K has approximately doubled when compared to the one year after the release of the 2010 Climate Change Guidance.[10] In addition, as disclosures become more granular and science-based, it is important to avoid unintentionally including statements that would need to be "expertized" under the Securities Act of 1933 (Securities Act) without following appropriate related procedures.
2. **Assess the company's other public climate change disclosures (for example, state- and EPA-mandated disclosures, voluntary disclosures in sustainability reports and to third-party organizations such as the CDP, and disclosures on Websites and in investor presentations).** Companies have increased the scope and quantity of voluntary ESG disclosures over the last decade, often in response to stakeholders and in an attempt to address the many surveys and other data requests from entities that rate companies' ESG practices. While many of these disclosures may not be material under the federal securities laws, the increasing focus on ESG matters may lead to SEC Staff comments regarding their absence from issuers' SEC filings.[11] For example, in 2016, the SEC Staff issued a comment letter that quoted text from a company's CDP Report[12] and a different comment letter that referenced disclosures in a company's sustainability report.[13]
3. **Evaluate whether additional disclosure controls are needed around the company's other public climate change disclosures, particularly with respect to voluntary disclosures.** Companies should carefully evaluate their disclosure controls and procedures that are in place for reviewing and approving public disclosures regarding climate change. This is important both because the SEC Staff may now review such disclosures and comment on whether they should be included in SEC filings, but also because—whether presented on an investor

relations Website or not—it may now be more likely that investors will review and potentially even rely on such statement (or at least that plaintiffs' lawyers may claim so in hindsight). Among other things, companies should evaluate whether each of their statements are verifiable, make sure that goals and aspirations are clearly stated as such as opposed to being stated as accomplished facts, and remove any materially misleading statements or omissions. Companies should consider including forward-looking statement disclaimers with any statement of goals or intentions.[14]

4. **Monitor regulatory and legislative developments on greenhouse gas and climate change matters at the international, Federal, state and regional levels, and assess the potential impact of such developments on the company's business.** Public policy responses to climate change are rapidly developing internationally and in the United States. This is especially the case given recent actions by President Joseph Biden related to the United States rejoining the Paris Agreement (an agreement within the United Nations Framework Convention on Climate Change) and promised additional actions in his January executive orders[15] addressing climate change.[16] Companies will need to stay informed of these developments and continue to assess their impact on the risks and opportunities presented by climate change.
5. **Prepare for additional SEC scrutiny related to climate change and ESG matters as well as new disclosure requirements.** The steady drumbeat of SEC announcements is a clear call for issuers to redouble their evaluation and updates of their climate-related disclosures. At the same time, while market forces ranging from highly sophisticated analysts that are focusing on ESG-related investments to increased attention on climate risk oversight in proxy statements already are leading to significantly enhanced ESG-related disclosures, the threat of potential SEC enforcement actions based on "emerging disclosure gaps" may have the effect of dissuading some issuers from providing enhanced voluntary disclosures. The need for carefully documenting the basis of, and exercising careful legal review over, climate-related disclosures is greater than ever.[17]

We also expect the SEC to adopt additional ESG-related disclosure requirements. In their dissenting statement issued in connection with the adoption of Regulation S-K amendments in November 2020, Acting Chair Lee and the other Democratic Commissioner Caroline Crenshaw noted that "[w]e have an opportunity going forward to address climate, human capital, and other ESG risks, in a comprehensive fashion with new rulemaking specific to these topics," possibly providing a glimpse of what to expect from a new Democratic-controlled SEC.[18] During his March 2 confirmation hearing, SEC Chairman nominee Gary Gensler pledged his support for increased climate risk disclosure, saying that "[t]here are tens of trillions of investor dollars that are going to be looking for more information about climate risk," and adding that—as to what information companies should be required to disclose as issues such as climate risk evolve—it is "the investor community that gets to decide what is material. I am going to be guided by that."[19]

Coates emphasized the need for the SEC to lead in the creation of "adaptive and innovative" ESG disclosure requirements.

Acting Director of the Division of Corporation Finance John Coates recently elaborated on the various factors to be considered as the SEC develops additional disclosure requirements.[20] Observing that "[t]here remains substantial debate over the precise contents and details of what ESG disclosures might or should encompass," Coates noted that "there is no one set of metrics that properly covers all ESG issues for all companies." However, Coates emphasized the need for the SEC to lead in the creation of "adaptive and innovative" ESG disclosure requirements and outlined various items to be considered in doing so. Coates also conveyed the need to consider both "the costs of new ESG disclosures" and "the costs from the absence of a consensus ESG-focused disclosure system." Coates also outlined key considerations related to two other topics of current debate: (1) "whether ESG disclosures should be the subject of mandatory versus voluntary disclosure provisions;" and (2) whether there should be "a single global ESG reporting framework."

By way of background, Coates previously served as a member of the SEC's Investor Advisory Committee when it urged the SEC to update its disclosure requirements to include "material, decision-useful, ESG factors" in May 2020.[21] Coates also recently told financial industry members at a conference on climate how the SEC can help create "a cost-effective and flexible disclosure system," adding that "[s]omething like that is clearly increasingly necessary to the capital markets at the center of our global economy to adequately price climate and other ESG risks and opportunities."[22] In a recent interview about ESG disclosure and related rulemaking, Acting Director Coates said that, "[i]f I were to pick a single new thing that I'm hoping the SEC can help on, it would be this area."[23]

In addition, companies should carefully monitor SEC guidance on ESG reporting metrics and frameworks. Reliance on certain voluntary climate risk reporting frameworks, such as the one developed by the Task Force for Climate-Related Financial Disclosures, may soon receive added scrutiny from SEC Staff. Acting Chair Lee commented on the inadequacy and lack of consensus on such metrics:

> [a]nalysts create metrics connected to the E, the S, and G, and businesses are competing for capital based on those metrics. [The SEC] need[s] to capitalize on that momentum and take a holistic look at those issues and not see mispricing of assets and misallocation of capital.[24]

Public companies also should note that legislation in the US Congress would mandate additional climate change-related disclosures. For example, the House Financial Services Committee's Subcommittee on Investor Protection, Entrepreneurship and Capital Markets held a hearing on February 25, 2021[25] on several bills that would require additional climate change disclosures in SEC filings, including:

- the "Climate Risk Disclosure Act of 2021,"[26] which would amend the Securities Exchange Act of 1934 (Exchange Act) to require issuers to disclose in SEC filings various climate change-related risks and require the SEC to adopt rules mandating certain other climate change-related disclosures such as "input parameters, assumptions and analytical choices to be used in climate scenario analyses."
- the "Paris Climate Agreement Disclosure Act,"[27] which would amend the Exchange Act to require disclosures related to the Paris Climate Agreement, including "[w]hether the issuer has set, or has committed to achieve, targets that are a balance between greenhouse gas emissions and removals, at a pace consistent with limiting global warming to well below 2 degrees Celsius and pursuing efforts to limit it to 1.5 degrees Celsius" (or if it is committed to setting such targets in the future or, if it is not, a statement to that effect and a detailed explanation as to why and whether it supports the Paris Agreement's temperature goals).

Notes

1. Allison Herren Lee, Statement on the Review of Climate-Related Disclosure (February 24, 2021), available at *https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure?utm_medium=email&utm_source=govdelivery.*
2. Securities and Exchange Commission, Commission Guidance Regarding Disclosure Related to Climate Change (17 CFR PARTS 211, 231 and 241; Release Nos. 33-9106; 34-61469; FR-82), available at *http://www.sec.gov./rules/interp/2010/33-9106.pdf.*

3. The key rules addressed are in Regulation S-K: Item 101 (Description of Business); Item 103 (Legal Proceedings); Item 303 (Management's Discussion of Financial Condition and Results of Operations (MD&A)); and Item 503(c) (Risk Factors).
4. For additional information, *see* Gibson Dunn, "SEC Issues Interpretive Guidance on Climate Change Disclosures" (February 4, 2010), available at *https://www.gibsondunn.com/sec-issues-interpretive-guidance-on-climate-change-disclosures/*.
5. Based on an Intelligize search of S&P 500 companies' Forms 10-K filed between February 1, 2009 and February 1, 2010 (82 filings) compared to February 2, 2010 to February 1, 2011 (167 filings).
6. United States Government Accountability Office, Climate-Related Risks: SEC Has Taken Steps to Clarify Disclosure Requirements (February 2018) (the "GAO Report"), available at *https://www.gao.gov/assets/700/690197.pdf*.
7. *Id*. at 14.
8. Securities and Exchange Commission, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (March 4, 2021), available at *https://www.sec.gov/news/press-release/2021-42*. For analysis, *see* Gibson Dunn, "SEC Announces Enforcement Task Force Focused on Climate and ESG Issues" (March 5, 2021), available at *https://www.securitiesregulationmonitor.com/Lists/Posts/Post.aspx?ID=440*.
9. Securities and Exchange Commission, Satyam Khanna Named Senior Policy Advisor for Climate and ESG (February 1, 2021), available at *https://www.sec.gov/news/press-release/2021-20*.
10. Based on an Intelligize search of S&P 500 companies' Forms 10-K filed between February 2, 2010 to February 1, 2011 (167 filings) compared to February 1, 2020 to February 1, 2021 (329 filings).
11. As noted in the GAO Report, one of the challenges the SEC Staff faces in reviewing climate change-related and other disclosure in companies' SEC filings is that the "SEC relies primarily on information that companies determine is material [and] may not have details of the information companies used to support their determination of material climate-related risks." GAO Report, *supra* n.6 at 16.
12. *See* comment letter to Anadarko Petroleum dated September 16, 2016 stating "Please reconcile this assertion in your proxy statement with your description of the climate change risks from your CDP Report as having a 'high' impact on your business and provide your analysis as to why you believe such 'uncertaint[ies]' do not constitute 'known trends or . . . uncertainties' requiring disclosure pursuant to Item 303(a) of Regulation S-K,'" available at *https://www.sec.gov/Archives/edgar/data/773910/000000000016093302/filename1.pdf*.
13. *See* comment letter to Mettler Toledo International dated March 23, 2016 inquiring about operations in Sudan and Syria and noting "[t]he 2014 Sustainability Report posted on your Website states that you have largely ceased business in Sudan," available at *https://www.sec.gov/Archives/edgar/data/1037646/000000000016069396/filename1.pdf*.
14. For additional information, *see* Gibson Dunn and the Society for Corporate Governance, ESG Legal Update: "What Corporate Governance and ESG Professionals Need to Know" (June 2020), available at *https://www.gibsondunn.com/wp-content/uploads/2020/10/Ising-Meltzer-McPhee-Percopo-Assaf-Holmes-ESG-Legal-Update-What-Corporate-Governance-and-ESG-Professionals-Need-to-Know-Society-for-Corporate-Governance-06-2020.pdf*.
15. The White House, FACT SHEET: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government (January 27, 2021), available at *https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/*.
16. For additional information, *see* Gibson Dunn, "President Biden Issues Executive Orders on Climate Change Policy" (February 9, 2021) (Climate Change Alert), available at *https://www.gibsondunn.com/president-biden-issues-executive-orders-on-climate-change-policy/*.
17. The new SEC Division of Examinations' 2021 examination priorities also indicate greater focus "on climate and ESG-related risks by examining proxy voting policies

and practices," in Acting Chair Lee's words. Securities and Exchange Commission, SEC Division of Examinations Announces 2021 Examination Priorities: Enhanced Focus on Climate-Related Risks (March 3, 2021), available at *https://www.sec.gov/news/press-release/2021-39*. Public filing companies should also monitor for potential changes to investors' proxy voting policies reflecting this focus.

18. Allison Herren Lee and Caroline A. Crenshaw, Joint Statement on Amendments to Regulation S-K: Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information (November 19, 2020), available at *https://www.sec.gov/news/public-statement/lee-crenshaw-statement-amendments-regulation-s-k*.
19. Hazel Bradford, Nominee Gensler backs SEC climate risk disclosure (PI Online, March 2, 2021), available at *https://www.pionline.com/esg/nominee-gensler-backs-sec-climate-risk-disclosure*.
20. John Coates, "ESG Disclosure—Keeping Pace with Developments Affecting Investors, Public Companies and the Capital Markets" (Securities and Exchange Commission, March 11, 2021), available at *https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121*.
21. Al Barbarino, "SEC to Drill Down On Co[mpanies'] Climate-Related Risk Disclosures," *Law360* (Feb. 25, 2021), available at *https://www.law360.com/articles/1358615/sec-to-drill-down-on-cos-climate-related-risk-disclosures*.
22. Bloomberg Law Staff, ESG Reporting Top Priority for SEC Director on Leave from Harvard (February 24, 2021), available at *https://news.bloomberglaw.com/environment-and-energy/esg-reporting-top-priority-for-sec-director-on-leave-from-harvard*.
23. *Id.*, *quoting* Acting Director Coates.
24. Amena Saiyid, CERAWeek: "Acting SEC Chair Seeks an International Baseline for Measuring Climate Risk," *IHS Markit* (March 1, 2021), available at *https://ihsmarkit.com/research-analysis/ceraweek-acting-sec-chair-seeks-an-international-baseline-for-.html.*
25. US House Committee on Financial Services, Virtual Hearing: Climate Change and Social Responsibility: Helping Corporate Boards and Investors Make Decisions for a Sustainable World, (accessed February 24, 2021), available at *https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=407109*.
26. *See* Climate Risk Disclosure Act of 2021 (Discussion Draft) (January 26, 2021), available at *https://financialservices.house.gov/uploadedfiles/02.25_bills-1173ih.pdf*.
27. *See* Paris Climate Agreement Disclosure Act (Discussion Draft) (February 17, 2021), available at *https://financialservices.house.gov/uploadedfiles/02.25_bills-1 176ih.pdf*.

CORPORATE LITIGATION

The Delaware Court of Chancery Enjoins "Extreme, Unprecedented" Stockholder Rights Plan

In The Williams Companies Stockholder Litigation*, the Delaware Court of Chancery enjoined a stockholder rights plan, having described it as having "an extreme, unprecedented collection of features." Nevertheless, the opinion does not signal a major shift in Delaware law with respect to the adoption and maintenance of stockholder rights plans.*

By John Mark Zeberkiewicz

Stockholder rights plans, or so-called poison pills, are one of the most effective devices that a board of directors can deploy unilaterally to defend against hostile or abusive takeover threats. In general, they subject stockholders to the risk of massive dilution if they acquire beneficial ownership of the corporation's stock above a specified threshold, thereby deterring them from making hostile or abusive takeover offers and effectively forcing them to negotiate with the board. In the wake of the market volatility and economic uncertainty arising out of the COVID-19 pandemic, an increased number of companies adopted stockholder rights plans to protect the long-term interests of stockholders against opportunistic buyers or to protect tax assets.[1]

While many companies adopted traditional anti-takeover rights plans with a single triggering threshold fixed at 15 percent or 20 percent of the voting stock, others adopted anti-takeover rights plans with relatively newer technology that pre-dated the pandemic but appeared well-positioned to address some of the risks associated with the pandemic. These included "dual triggers," that is, a lower triggering threshold (for example, 10 percent) applicable to stockholders filing under Section 13D and a higher triggering threshold (for example, 20 percent) for passive investors, and so-called wolf-pack, or acting-in-concert provisions (that is, provisions that aggregate, for purposes of the triggering threshold, the ownership of stockholders who, although they have no express agreement, act in a coordinated manner toward a common objective). The adoption of rights plans with non-traditional features, particularly the wolf-pack provisions, gave rise to the filing of several complaints in the Delaware Court of Chancery,[2] including the challenge to The Williams Companies, Inc.'s rights plan (Plan), which, in addition to having a wolf pack provision, had a highly unusual 5 percent triggering threshold.

In *The Williams Companies Stockholder Litigation*,[3] the Court declared the Plan—which it described as having "an extreme, unprecedented collection of features,"—unenforceable and permanently enjoined its continued operation.[4] Despite the outcome, the Court's opinion in *Williams* supports the view that boards of directors have significant latitude in adopting targeted measures to respond to specific threats. The Court provides substantial guidance as to the process the board should follow in identifying such threats and in crafting appropriate responses to them.

John Mark Zeberkiewicz *is a director of Richards, Layton & Finger, P.A. in Wilmington, DE. Although Richards, Layton & Finger may have been involved in some of the cases mentioned in this article, the views expressed herein are the views of the author and are not necessarily the views of the firm or its clients.*

Background

The Williams Companies, Inc. (Williams or Company) is a publicly traded company headquartered in Oklahoma that owns and operates natural gas infrastructure assets. In 2011, the Company became the target of an activist campaign, resulting in a 2014 agreement in which two designees of the activists gained representation on the board. Those designees were "instrumental" in pushing Williams to enter into a merger agreement with Energy Transfer Equity LP, a transaction that ultimately failed and was followed by additional activist intrigue.[5]

The Plan contained a wolf-pack provision that deterred parties from acting in concert.

In March of 2020, against a backdrop of disruption in the global energy market and the onset of the COVID-19 lockdown measures, the Company's stock entered a period of volatility and suffered steep declines.[6] In early March, one of the Company's outside directors recommended the notion of adopting a rights plan geared toward addressing threats from stockholder activism.[7] He proposed a rights plan with a one-year term and a 5 percent triggering threshold, albeit with an exception for passive investors, as the intention would be to insulate management from the distraction of an activist campaign and allow them to focus on operating the business during a turbulent period.[8] As ultimately adopted, the Plan contained, in addition to the foregoing features, a wolf-pack provision that deterred parties from acting in concert as well as a definition of "beneficial ownership" that included options and other derivative securities.[9]

At a meeting on March 18, 2020, with its legal and financial advisors in attendance, the Williams board received a presentation from management with respect to the Plan, including an overview of the core objectives that a rights plan is designed to achieve: Discouraging inadequate takeover offers and coercive or abusive takeover tactics and encouraging bidders to negotiate with the board. The presentation also noted that rights plans are merely a deterrent and will not prevent acquisitions, deter fully priced offers, or prevent proxy contests for board control or stock acquisitions below the triggering threshold. Although the minutes of the meeting indicated that the board discussed the 5 percent triggering threshold, the presentation did not summarize features specific to the Plan.[10] The board, however, received advice from its financial advisor that, among other things, the adoption of a rights plan was a "valid consideration" in light of market volatility stemming from the COVID-19 pandemic and that, in light of current federal securities laws, an opportunistic investor could acquire a sizable position in the stock before the Company would obtain any knowledge or have an opportunity to react to the acquisition. The minutes reflected that the Plan would protect the interests of "long-term" stockholders, including by exempting passive investors.

At a meeting held the following day, the board formally approved the rights plan. At that meeting, the board received a presentation from its financial advisor noting that the Plan, with its 5 percent triggering threshold, "would deter an activist from taking advantage of the current market dislocation and challenges in monitoring unusual trading patterns."[11] After some discussion, including with respect to the impact of the Plan on the trading volume of the stock, the triggering threshold, and the acting-in-concert provision, the board unanimously approved the Plan. In spite of this record, the Court observed that the key features of the Plan, while a major focus of the litigation, "received little attention" at the March board meetings, where the discussion centered "almost exclusively on the 5 percent trigger."[12]

The Court noted that the public reaction to the Plan was negative, with the proxy advisory firm Institutional Shareholder Services recommending against the reelection of one director on the basis that the board's adoption of the Plan was "'not a reaction to an actual threat . . . of an activist investor or hostile bidder.'"[13] In response, the Company initiated an investor outreach campaign that included an investors' call during which the Company explained the rationale for the Plan, stating that it was intended to

> reduce the likelihood of those seeking short-term gains taking advantage of current market conditions at the expense of the long-term interests of stockholders.[14]

The Company also noted that its experience in the "recent past"—an apparent reference to its history with activism—"reinforced [the] Board's view that 5% is the right threshold in this environment."[15]

The Court observed that, in the face of public disapproval and in spite of a recovery in the stock price, the board "never considered redeeming the Plan."[16] Despite the defendants' assertions in post-trial briefing that the board had determined that redeeming the plan was not in the Company's best interests, the Court found that it had no factual record to support the contention, as the defendants had claimed privilege over the materials relating to the "one occasion" on which the matter was considered.[17]

The Court's Ruling

The Court first addressed whether the claims could be brought directly by the stockholders, as the plaintiffs contended, or whether they had to be brought derivatively in the name of the Company, as the defendants maintained. The Court rejected the defendants' position.[18] Pointing to the Delaware Supreme Court's test in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*[19] for determining whether claims are direct or derivative, the Court stated that

> poison pills, if improper, work an injury on stockholders directly by interfering with at least two fundamental stockholder rights,

namely the right to vote and the right to sell stock. Acknowledging that "[a]ll rights plans interfere to some degree" with those rights, the Court indicated that the level of interference is "nominal" in a traditional rights plan with a relatively high triggering threshold.[20] But the Court found that the Plan's combination of the "parsimonious" triggering threshold and the acting-in-concert provision operated to limit stockholders' ability to communicate freely in connection with an election of directors. In that regard, the Plan inflicted harm on the stockholders directly, and the benefit of an order enjoining the Plan would flow to them directly.[21]

The Court proceeded to review the board's actions under the *Unocal* standard, which requires directors to make two showings: (1) that they had reasonable grounds to believe that a threat to corporate policy or effectiveness existed; and (2) that the defensive measures were reasonable in relation to the identified threat. Analyzing the first prong, the Court observed that the board materials and related documents indicated that the Plan "was intended in part to serve as a takeover deterrent,"[22] but concluded that the Plan was not adopted to achieve that objective, noting, among other things, that "some of the directors did not have that in mind when adopting the Plan."[23] In fact, the Court found that the Plan "was not adopted to protect against any *specific* threat at all" but was instead intended "to interdict hypothetical future threats."[24] Despite the Company's history with activists, the Court found that there was no evidence suggesting that the Plan was adopted in light of that history—and cited to testimony from directors suggesting that the rights plan was targeting threats from "short-term" investors and "activist activity" more generally.[25]

The rights plan was targeting threats from "short-term" investors and "activist activity" more generally.

The Court then examined the nature of the threats identified, which required an examination of the board's process. The Court found that the board had demonstrated that it "conducted a good faith, reasonable investigation" in its adoption of the Plan, noting that nearly all of the directors were outside, independent directors, that they had considered the Plan over the course of two meetings, that they had engaged in genuine deliberations and that they had been advised by outside legal and financial advisors. The Court took issue, however, with the threats the board identified, characterizing the first (preventing activism in a time of uncertainty) as too "general," the second (concerns that activists would pursue "short-term" agendas and otherwise disrupt management) as "only slightly more specific," and the third (concerns that stockholders could rapidly accumulate significant positions before the board received notice and had an opportunity to react) as just "a hair more particularized."[26] The Court stated that each was "purely hypothetical," as the board was not aware of any specific activist threat.[27] It then proceeded to address whether the "hypothetical" threats were cognizable under Delaware law.

First, the Court dismissed the notion that stockholder activism, viewed on its own, constituted a legitimate threat, stating that viewing an attempt to influence corporate direction as a threat represented "an extreme manifestation of the proscribed we-know-better justification for interfering with the franchise,"[28] but acknowledging that a board "can adopt defensive measures in response to concrete action by a stockholder activist."[29] Next, the Court noted that it was debatable whether "short-termism" or "management distraction" could constitute legitimate threats. But, having found that the concerns the board had identified were insufficiently concrete, the Court did not see a need to resolve the debate.

According to the Court, generalized concerns regarding short-termism and distraction to management—untethered from specific activities or events—amounted to "mere euphemisms for stereotypes of stockholder activism," rather than cognizable threats. Finally, the Court assumed, without deciding, that the board's concerns that stockholders could rapidly accumulate stock or engage in concerted action without reporting the stock acquisitions for up to 10 days, leaving the Company vulnerable to a "lightning strike raid," constituted a legitimate threat. The Court reviewed the scholarly literature positing the use of rights plans as an effective early detection mechanism to fill gaps in the reporting requirements under federal securities laws.[30] The Court was cautious, however, about flatly sanctioning a rationale that would "provide an omnipresent justification for poison pills," which it described as "situationally specific defenses."[31]

The Plan's features, in the aggregate, constituted a disproportionate response to the rapid accumulation threat.

Assuming that one cognizable threat had been identified, the Court proceeded to analyze the Plan's proportionality to it, starting with the observation that Williams was only one of two Delaware corporations to have adopted a rights plan with a 5 percent trigger (outside the context of an NOL pill).[32] The Court concluded that the Plan's features, in the aggregate, constituted a disproportionate response to the rapid accumulation threat. The Court compared the Plan's features to less preclusive alternative "gap-filling plans," including a hypothetical plan with a 5 percent triggering threshold and an exemption for stockholders who disclose their acquisitions above 5 percent within two days thereof or who file a Schedule 13D before acquiring shares above the 5 percent threshold.[33] The Court stated that the Plan's features raised concerns when considered independently, and not solely in comparison with less preclusive alternatives. The Court appeared principally concerned with the effect of the Plan's acting-in-concert provision on communications among stockholders. While acknowledging that the Plan contained exceptions for proxy contests, the Court expressed concern that the acting-in-concert provision, by thwarting communications designed to assess stockholders' initial views regarding a proxy contest, could impede their ability to initiate a proxy contest in the first instance. The Court's analysis of the acting-in-concert provision, however, should not be taken out of the specific context in which it appeared—that is, against the backdrop of an uncommonly low triggering threshold.

Key Takeaways

Although the Court of Chancery in *Williams* ultimately enjoined the operation of the Plan, the opinion does not signal a major shift in Delaware law with respect to the adoption and maintenance of stockholder rights plans. As the Court noted in its conclusion, the Plan had an "extreme, unprecedented collection of features." The opinion, however, does provide substantial guidance regarding the manner in which a board of directors should approach the decision whether to adopt a rights plan and, having adopted such a plan, whether to redeem or terminate it or modify its terms.

Shelf Plans

Adopting a "shelf plan" is a sound component of any takeover preparedness strategy. In circumstances where no specific threat has emerged warranting the adoption of a rights plan, having the rights plan "on the shelf"—and a record of the board having engaged in discussions regarding the operation and uses of rights plans generally—can be extremely valuable if a specific threat later emerges that mandates a rapid response. The advance planning and discussion regarding rights plans generally, including the operation of alternative features that are available for potential use, should enable the board, at the time it considers implementing a rights plan, to have more focused discussions regarding the specific threats that have emerged and the specific features designed to respond to those threats.

The Process

The Court did not find fault with the process by which the Company's board adopted the Plan, which process involved deliberating over the course of two meetings and relying on outside legal and financial advisors. In some cases, circumstances may not permit deliberations to extend over multiple meetings. For that reason, advance planning on a "clear day," including the adoption of a shelf plan, may serve to bolster the record. In all cases, boards should seek and obtain input from outside experts and advisors. In addition, the board should ensure the preparation of a clear robust record with respect to the specific threats it identified in adopting the rights plan as well as its determinations regarding the manner in which the specific features of the rights plan respond to those threats. The materials should include not only general summaries of the operation and uses of rights plans, but also appropriately detailed summaries of the specific events or circumstances that have been identified as threats. The materials also should summarize the manner in which specific features of the rights plan address those threats. Longer-form minutes that appropriately detail the board's discussions are bound to provide greater protection to the directors.

If the board is considering the adoption of a rights plan that includes features that are more preclusive than those found in traditional rights plans, it should give careful consideration to whether any such feature is critical and, if so, whether a less preclusive alternative will operate to achieve the same objective. If the less preclusive alternative is rejected, the basis for its rejection should be documented. Boards should seek advice from their experts and advisors, including legal counsel, with respect to various provisions. In particular, boards should consider the Court's observations with regard to the acting-in-concert provision in the *Williams* Plan in assessing whether to adopt a rights plan with such a provision.

Triggering Thresholds

Even with an exception for passive investors, the 5 percent triggering threshold in the Plan was off-market for an anti-takeover rights plan. Rights plans with triggering thresholds at the 10 percent range, however, are likely to continue to be adopted. In setting the triggering threshold, the board should consider the specific threats that the corporation faces. If the objective is solely to deter hostile or abusive takeover threats and encourage potential acquirers to negotiate with the board, a 15 percent threshold may suffice. If the board is considering a lower threshold, such as 10 percent, it should give due and careful consideration to the reason for which the lower threshold is needed, and should consider whether to include a higher threshold for passive investors.

Notes

1. In the years leading up to the pandemic, the number of poison pills adopted on an annual basis was in a steady decline. For years ended December 31, 2017, 2018 and 2019, the number of public companies having a rights plan (and the percentage of S&P 1500 companies having rights plans) were 270 (3.6 percent), 200 (1.8 percent), and 171 (1.7 percent), respectively. In the 12 months following March 1, 2020, a total of 97 companies adopted stockholder rights plans, with 22 of those plans being adopted in March of 2020 alone. Of those 97 rights plans, roughly 25 percent were so-called NOL pills designed to protect tax assets. By comparison, in the 12-month period preceding March 2020, only 37 rights plans were adopted, nearly 50 percent of which were NOL pills. Source: *Dealpoint data.*
2. *See* Nathaniel J. Stuhlmiller and Taylor D. Anderson, "Recent Developments Regarding 'Wolf Pack' Provisions in Rights Plans," *Delaware Business Court Insider* (Nov. 11, 2020).
3. The Williams Companies Stockholder Litigation, 2021 WL 754593 (Del. Ch. Feb. 26, 2021).
4. *Id.* at *40.
5. *Id.* at *3.
6. *Id.* at *4.
7. *Id.* at *5. The Court noted that the director "was not concerned with a potential takeover or with NOLs" but instead believed that the "'circumstances that existed because of the pandemic' warranted 'a different type of pill' and that "'uncertainty' in the market required a solution that could 'insulat[e]' management from activists 'who were trying to influence the control of the company.'" *Id.*
8. *Id.*
9. The acting-in-concert provision operated to deem a person to be "acting in concert" with another person where the person "'knowingly acts . . . in concert or in parallel . . . or towards a common goal' with another," "if the goal 'relates to changing or influencing control of the Company,' where each person is 'conscious of the other Person's conduct' and such consciousness is an element in their decisionmaking, and where there is the presence of at least one other factor, as determined by the board, suggesting coordinated activity, such as attending meetings or conducting discussions." *Id.* at *11. It also included what the Court referred to as the "daisy chain" concept, whereby "stockholders act in concert with one another by separately and independently 'Acting in Concert' with the same third party." *Id.*
10. *Id.* at *7.
11. *Id.* at *8.
12. *Id.* at *9.
13. *Id.*at *13–14.
14. *Id.* at *15.
15. *Id.*
16. *Id.* at *16.
17. *Id.* at *15.
18. The defendants argued that Moran v. Household International, Inc., 490 A.2d 1059 (Del. Cha. 1985), *aff'd* 500 A.2d 1346, stands for the proposition that all poison pill challenges are derivative outside of circumstances where an active proxy contest is underway and there is a unique harm to one or more stockholders.
19. Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. 2004). In *Tooley*, the Supreme Court articulated a two-part test for determining whether a claim is direct or derivative, involving an inquiry as to who suffered the alleged harm (the corporation or the stockholders) and who would receive the benefit of a remedy (the corporation or the stockholders individually).
20. *Williams*, 2021 WL 754593 at *20.
21. *Id.* at *20.
22. *Id.* at *23.
23. *Id.*
24. *Id.*
25. *Id.* at *27–28.
26. *Id.* at *29.
27. *Id.*
28. *Id.* at 30.
29. *Id.* at *32.
30. *Id.* at *33–34.
31. *Id.*

32. *Id.* at *35. The Court noted that the other corporation adopted its rights plan in "distinguishable circumstances" in which it was facing a specific threat from an activist holding 7% of its stock.

33. *Id.* at *36–37. The Court also observed that the alternate "gap-filling" rights plans it discussed were proposed with additional "compromise" positions to temper their potential preclusive effects.

■ CORPORATE LITIGATION

Delaware Court of Chancery Orders Facebook to Produce Books and Records

Delaware courts have become more willing to require the production of emails in response to stockholders' books and records demands. In a recent case, the Court of Chancery ordered the production of board-level email communications but not attorney-client privileged materials.

By Shannon German, Lori Will, Brad Sorrels, and Amy Simmerman

In February 2021, the Delaware Court of Chancery added to a string of significant recent decisions under Section 220, Delaware's books and records statute, this time addressing when a company may be required to provide board-level email communications to a stockholder. In this decision, the court ordered Facebook, Inc. to produce board emails on a limited topic because, the court found, the minutes and other board materials previously produced by Facebook did not provide sufficient insight into the potential wrongdoing the demanding stockholder sought to investigate. But the court refused to order the production of attorney-client privileged materials under the so-called *Garner* exception.

Background

A stockholder of Facebook made a books and records demand for the purpose of investigating potential director oversight claims in connection with the unauthorized release of Facebook user data to a data analytics firm, Cambridge Analytica. The stockholder alleged that the data breach likely violated a 2012 consent decree Facebook had entered into with the Federal Trade Commission (FTC) to settle prior data privacy breaches. Following a revived investigation by the FTC, Facebook agreed to a $5 billion settlement in 2019 to resolve the potential claims against Facebook and its Chief Executive Officer Mark Zuckerberg.

The stockholder's purposes for its demand included to investigate wrongdoing in connection with the 2019 settlement and communicate with other stockholders regarding "changes in management policies." Facebook ultimately produced 2,931 documents (consisting of 30,266 pages) to the stockholder but refused to produce: (1) any board-level email communications regarding the FTC negotiations; or (2) any privileged board-level documents (whether emails or unredacted board and special committee minutes) regarding the FTC negotiations. Facebook already had produced to the stockholder: (1) the materials that had been provided to a stockholder in a prior books and records action regarding the initial FTC consent decree (including board-level hard copy documents, company policies, procedures, and audit reports, director and officer independence questionnaires, and emails from four company custodians); (2) board and special committee minutes regarding the 2019 settlement (redacted for privilege); (3) the special committee's report and recommendations regarding the 2019 settlement; and (4) a privilege log containing approximately 300 entries for communications regarding the negotiations with the FTC.

Facebook contended that those books and records were sufficient for the stockholder's purposes. Facebook also argued that the stockholder's "trumpeting" that it could survive a motion to dismiss a

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plenary action with the facts it already had gathered from the books and records provided demonstrated the stockholder had more than "sufficient" information for its purposes.

The Decision

At the outset of its post-trial decision, the court commended the parties for agreeing to focus trial on the limited scope of the documents for inspection rather than litigating whether the stockholder had proper purposes. The court noted that the parties' "conduct stands in marked contrast to the tactics that have prompted expressions of concern by this court regarding 'overly aggressive' Section 220 litigation."[1]

On the merits, the court determined that board-level electronic communications regarding the FTC negotiations were necessary and essential to the stockholder's stated purposes because the stockholder needed those communications to be able to assess the board's process in reaching the 2019 settlement. Specifically, the court explained that those communications were necessary, in light of the limited other information on the subject, to determine whether the board deliberately caused Facebook to overpay in the settlement in order to protect Mr. Zuckerberg from personal liability.

The court explained that the standard for determining whether the production of emails is necessary in response to a books and records demand is whether the stockholder has identified additional categories of books and records, beyond board-level documents, that exist and presented "some evidence" that other board-level documents alone are insufficient. The court noted that a showing of "compelling evidence" is "unrealistic" and not required. The court also explained that, just because the stockholder believed it had sufficient facts to allege a claim for breach of fiduciary duty did not mean it

> should be denied the use of the 'tools at hand' to develop those facts further so that it can well-plead its claims in a complaint, particularly a derivative complaint.[2]

The court found the stockholder had met its burden of showing entitlement to a production of emails.[3] Among other things, the court reasoned that the "heavily redacted" board and special committee minutes only "provid[ed] a basic outline of the Board's process and the resulting negotiations with the FTC," but were "bereft of any information concerning the substance of Facebook's non-privileged discussions with the FTC."[4] The court viewed the 300-entry privilege log as evidence that information existed to address the stockholder's questions but noted the log itself provided no "substantive insight into the Board's decisionmaking."[5] Notably, a white paper submitted to the FTC by Facebook's outside counsel outlined the view that the company's maximum exposure was "well below the $5 billion Facebook ultimately agreed to pay." The court explained the white paper supported the stockholder's argument that it should be entitled to investigate why the company agreed to pay more than what it believed its maximum exposure to be, an issue the documents provided by the company had not explained.

Stockholder was not entitled to privileged board-level communications and unredacted board and special committee minutes.

At the same time, the court found that the stockholder was not entitled to privileged board-level communications and unredacted board and special committee minutes. The stockholder sought these materials under the *Garner* doctrine, which permits stockholders to access a corporation's attorney-client privileged documents in limited circumstances where corporate fiduciaries are alleged to have acted inimically to the stockholders' interests and the stockholders show "good cause" that the privilege should not apply.[6] Reiterating the Delaware Supreme Court's guidance that the *Garner* doctrine is "narrow, exacting, and intended to be very difficult to satisfy,"[7] the court determined there was not "good cause" to overcome the privilege and justify requiring the company to produce privileged materials for inspection. The court reasoned that, given that the stockholder's purpose for obtaining the privileged documents was the same as its purpose for obtaining the non-privileged communications the court had ordered to be produced, the stockholder could obtain the information it sought through the production of the non-privileged communications. In other words, the information the stockholder sought was available from another source and the stockholder therefore could not show a need for the privileged communications and documents.

Ultimately, the court ordered the parties to confer regarding the limited production it had ordered, including the number of appropriate and non-duplicative custodians and appropriate and targeted search terms.

Implications

This decision serves as a reminder that the Delaware courts have become more willing to require the production of emails in response to a books and records demand where the stockholder can show the traditional board-level documents do not provide the information the stockholder seeks to investigate and there is a true need for the emails. The decision also reflects that Delaware courts continue to respect the attorney-client privilege and will not require the production of privileged documents and communications in response to a books and records demand where other non-privileged documents exist that can satisfy the stockholder's purposes.

Notes

1. Employees Ret. Sys. of Rhode Island v. Facebook, Inc., C.A. No. 2020-0085-JRS (Del. Ch. Feb. 10, 2021), at 3 n. 11 (*citing* Pettry v. Gilead Scis., Inc., 2020 WL 6870461, at *30 (Del. Ch. Nov. 24, 2020)).
2. *Id.* at 16–17.
3. *Id.* at 17.
4. *Id.* at 19.
5. *Id.*
6. *Id.* at 22 (*citing* Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971)).
7. *Id.* at 22-23 (*citing* Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr. Fund IBEW, 95 A.3d 1264, 1276 (Del. 2014)).

IN THE COURTS

Initial Decisions on Motions to Dismiss COVID-19 Securities Class Actions Offer Mixed Results

By Gregory A. Markel, Vincent A. Sama, Daphne Morduchowitz, and Matthew C. Catalano

Two recent decisions by separate federal courts on motions to dismiss in COVID-related class action securities litigations—one successfully dismissed, the other largely surviving—show that a bare allegation of failure to predict the extent of the pandemic in public filings likely will not be enough to state a claim, but more robust allegations of misleading disclosures to investors on COVID issues generally will be viable. On January 25, 2021, the Central District of California in *Berg v. Velocity Financial, Inc.*, dismissed a claim of alleged failure to adequately disclose COVID risks.[1] On February 16, 2021, the Eastern District of Pennsylvania in *McDermid v. Inovio Pharmaceuticals*, largely permitted claims to proceed in connection with alleged overly-optimistic statements about a company's COVID response, including a claim that the company had "constructed" a vaccine in three hours.[2] Though the pandemic presents novel issues, the courts' analyses in these cases focus on fundamental securities law principles, and offer a window into potential outcomes for similar cases.

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Velocity Financial: Failure to Predict COVID Risks in Early 2020 Not Actionable

Velocity Financial is a real estate finance company that went public in January 2020, before the risks of COVID were well known by the public. After the stock dropped, plaintiff brought a putative class action[3] alleging, among other things, false and misleading statements in the initial public offering (IPO) registration statement in violation of Section 11 of the Securities Act of 1933 (Securities Act). Notably, plaintiff's allegations included that "Defendants painted a 'rosy' picture of the real estate market when the market was really set to collapse because of the coronavirus pandemic"[4] and that defendants "should have disclosed the uncertainty in the real estate market because of the coronavirus pandemic."[5]

In dismissing the claim based on the alleged "rosy" statement characterizing the market for investor real estate loans as substantial and durable," the court emphasized that "[g]enerally, securities claims may not hinge on a corporation's optimistic market projections," and analogized the alleged misstatements at issue to similar statements that had been dismissed in other cases as puffery."[6]

The *Velocity Financial* court also swiftly rejected plaintiff's theory that defendants should have disclosed COVID-related uncertainty in the real estate market, concluding that

> Plaintiff does not allege that Defendants would or could have known the extent of the coronavirus pandemic, or even the presence of the disease in America, at the time of the IPO.[7]

Inovio: Alleged Overly-Optimistic Statements on COVID Vaccine May Survive

In March 2020, Inovio Pharmaceuticals became one of the first companies sued for alleged

COVID-related securities violations when its CEO allegedly touted the company's ability "to fully construct our vaccine within three hours" and its plan to start trials in April of 2020.[8] Plaintiff brought a putative class action alleging that these and other alleged misstatements regarding Inovio's progress towards vaccine dose production and relationship with the federal government's "Operation Warp Speed" violated Section 10(b) of the Securities Exchange Act of 1934 (the Exchange Act) and Rule 10b-5.[9]

On February 16, 2021, the Eastern District of Pennsylvania declined to dismiss the complaint's allegations in connection with statements about constructing a vaccine or progress towards vaccine dose production,[10] but dismissed allegations in connection with statements about the company's inclusion in Operation Warp Speed.[11]

With regards to the statement about constructing a vaccine, Inovio argued that the statement was not misleading, as it had "designed" a vaccine in three hours, and "construct" and "design" were synonymous terms.[12] The court found that this question was one of fact, and not appropriate for determination on a motion to dismiss. The court also found scienter to be adequately pled, given, among other things, allegations that the CEO had the background and experience in the pharmaceutical industry to understand the difference between "constructing" and "designing" a vaccine.[13] The court similarly rejected defendants' loss causation arguments, finding that the allegation that the company stock price "tumbled" following the first announcement that the company had "designed" but not "constructed" a vaccine to be sufficient to state a claim.[14]

The court also declined to dismiss allegations regarding production capabilities and goals for 2020 vaccine production, rejecting defendants' contention that these qualified for immunity under the Private Securities Litigation Reform Act's (PSLRA) Safe Harbor provision for forward-looking statements.[15] For example, the court found an alleged statement that the company was "on track" to produce one million doses by the end of 2020 to be "inextricably linked" to "current manufacturing capabilities."[16]

Takeaways

The first motion to dismiss decisions in COVID-related class action securities litigation show that pandemic related securities law claims will be subjected to the same analysis as other securities claims. Thus, disclosures by companies should be reviewed carefully through this lens. This is illustrated by the findings seen in, for example, the *Velocity Financial* court's finding that certain statements were mere puffery or the *Inovio* court's finding that the company's announcement regarding involvement with Operation Warp Speed was not actually misleading. They also show that the allegation of a lack of COVID disclosures at a time before the pandemic was in full swing should not be enough to state a claim, as in *Velocity.* However, it may be more difficult to secure dismissal of alleged statements that were overly positive assessments of one's own business or products, even in the context of the pandemic, as in *Inovio*. More clarity should emerge as additional COVID-related securities suits reach the dismissal stage. As noted, companies should continue to be proactive and minimize risk by carefully reviewing disclosures and including cautionary language.

Notes

1. Berg v. Velocity Financial *et al*, 2:20-cv-06780-RGK-PLA, ECF No. 53 (C.D. Cal.); available via Stanford University at *http://securities.stanford.edu/filings-documents/1074/VFI00_01/2021125_r01x_20CV06780.pdf*.
2. McDermid v. Inovio Pharmaceuticals *et al*, 20-01402, ECF No. 85 (E.D. Pa.); available at *https://www.paed.uscourts.gov/documents/opinions/21D0179P.pdf*.
3. *Velocity Financial*, *supra* n. 1 at 2.
4. *Id.* at 14.
5. *Id.* at 16.
6. *Id.* at 14-15.
7. *Id.* at 16.
8. *See* McDermid v. Inovio, 2:20-cv-01402-GJP (E.D. Pa.), Compl. ¶ 5.
9. *McDermid v. Inovio*, *supra* n. 2 at 8.
10. *Id.* at 11.

11. The court rejected plaintiffs' argument that defendants led investors to believe that the company had been chosen to receive government funding for its vaccine when it had been chosen only to participate in a government-backed study. Instead, the court found that defendants disclosed that the company was selected for the study in question. *Id.* at 25-26.

12. *Id.*

13. *Id.* at 14.

14. *Id.* at 17.

15. *Id.* at 18.

16. *Id.* at 19.

CLIENT MEMOS

A summary of recent memoranda that law firms have provided to their clients and other interested persons concerning legal developments. Firms are invited to submit their memoranda to the editor. Persons wishing to obtain copies of the listed memoranda should contact the firms directly.

Akin, Gump, Strauss, Hauer & Feld LLP
Washington, DC (202-887-4000)

National Defense Authorization Act Boosts SEC's Disgorgement Authority (February 5, 2021)

A discussion of the provision of the National Defense Authorization Act that contains significant amendments to Section 21(d) of the Securities Exchange Act of 1934 (Exchange Act) addressing the Securities Exchange Commission's (SEC) ability to seek disgorgement and other equitable relief following two Supreme Court decisions which had cabined the SEC's disgorgement authority.

Ten Topics for Directors in 2021 (February 2021)

A discussion of issues and insights on how directors and managements must proactively embrace their stewardship roles in the new world.

Ballard Spahr LLP
Philadelphia, PA (215-665-8500)

Investors Speak: Diversity Matters (February 18, 2021)

A discussion of a survey identifying non-financial factors that are important in investment decisions.

Cahill Gordon & Reindel LLP
New York, NY (212-701-3000)

SEC Charges the Cheesecake Factory (February 4, 2021)

A discussion of SEC settled charges against The Cheesecake Factory for making material misstatements concerning the impact of COVID-19 on its business operations and financial condition.

Glass Lewis and ISS Update Their 2021 Voting Guidelines (February 16, 2021)

A discussion of updated voting guidelines for the 2021 proxy season issued by Glass Lewis & Co. and Institutional Shareholder Services, Inc.

Covington & Burling LLP
Washington, DC (202-662-6000)

Second Circuit Provides Guidance on Identifying "Predominately Foreign" Transactions that Are Outside the Scope of the Federal Securities Laws (February 1, 2020)

A discussion of a Second Circuit decision, *Cavello Bay Reinsurance Ltd. V. Stein*, that provides guidance on the factors that are relevant in considering when a domestic transaction may be so predominantly foreign that it falls outside the scope of the federal securities laws.

Davis Polk & Wardwell LLP
New York, NY (212-450-4000)

Ninth Circuit Affirms Dismissal of Securities Class Action against Tesla, Inc. (February 3, 2021)

A discussion of a Ninth Circuit, *Friedman v. Tesla, Inc. et al.*, affirming the dismissal of a securities fraud class action holding that the plaintiffs had failed to identify any actionable misrepresentation, finding that most of the relevant statements were "optimistic projections" protected by the Private Securities Litigation Reform Act's safe harbor for forward-looking statements.

SEC Acknowledges that Disgorgement Principles in *Liu* Apply to Administrative Proceedings (February 9, 2021)

A discussion of a SEC administrative order implicitly acknowledging that the limiting principles for disgorgement that the Supreme Court outlined in *Liu v. Securities and Exchange Commission*, apply to administrative proceedings.

Debevoise & Plimpton LLP
New York, NY (212-909-6000)

Acting SEC Chair Lee Reinstitutes Delegated Authority (February 16, 2021)

A discussion of two announcements by the Acting SEC Chair relating to the delegation of authority to issue Formal Orders of Investigation and the SEC's waiver process.

Dechert LLP
Philadelphia, PA (215-994-4000)

Delaware Supreme Court Adopts Primedia Test for Post-Merger Shareholder Actions (February 4, 2021)

A discussion of a Delaware Supreme Court decision, in *Morris v. Spectra Energy Partners (DE) GP, LP,* clarifying the test for determining when former equityholders have standing to pursue post-merger direct claims for a controller's alleged failure to secure the value of a material derivative claim during merger negotiations.

Certain US Reporting and Compliance Obligations for Investment Advisers and Private Funds (February 2021)

A discussion of the reporting and compliance obligations on asset managers and investment funds.

Dorsey & Whitney LLP
Minneapolis, MN (612-340-2600)

Nasdaq, the SEC, GOP Senators, and Diversity Requirements (February 25, 2021)

A discussion of a letter submitted by the Republican members of the Senate Banking Committee urging the SEC to reject Nasdaq's proposed rule that would require listed companies to have diverse directors.

Gibson, Dunn & Crutcher LLP
Los Angeles, CA (213-329-7870)

The GameStop Short Squeeze—Potential Regulatory and Litigation Fall Out (February 1, 2021)

A discussion of potential regulatory and litigation fallout from the turbulent and volatile series of events related to the trading of a small group pf public companies' shares.

2020 Year-End Securities Litigation Update (February 16, 2021)

A discussion of securities litigation developments and trends for the second half of 2020.

2020 Year-End Activism Update (February 22, 2021)

A discussion of shareholder activism activity involving NYSE- and Nasdaq-listed companies with equity market capitalizations in excess of $1 billion and below $100 billion in second half of 2020.

Jenner & Block LLP
Chicago, IL (312-222-9350)

Simplifying Your 10-K: Survey Information on Companies Removing Selected Financial Data (February 19, 2021)

A discussion of a sample of 100 Form 10-Ks filed by Large Accelerated Filers and Accelerated Filers looking at whether companies continued to include the selected financial data now that companies could eliminate such disclosure if they early adopted SEC rule changes.

Jones Day LLP
Cleveland, OH (216-586-3939)

SEC Chairman Nominee Expected to Usher in Era of Increased SEC Enforcement, Regulation (February 2021)

A discussion of what companies can expect from Gary Gensler if confirmed as the next SEC Chairman.

Mayer Brown LLP
Chicago, IL (312-782-0600)

SEC Office of Municipal Securities Issues Staff Statement on LIBOR Transition (February 22, 2021)

A discussion of a statement issued by the Staff of the SEC's Office of Municipal Securities Office focusing on the impact of the discontinuation of LIBOR on the municipal securities markets.

SEC Acting Chair Directs Staff to Enhance Focus on Climate-Related Disclosure (February 25, 2021)

A discussion of the statement issued by the Acting SEC Chair announcing that the agency will be focusing on public companies' climate change disclosures as part of an effort to assess current compliance with the federal securities laws and develop new disclosure requirements for climate change.

McGuire Woods
Richmond, VA (804-775-1000)

SPAC Litigation Likely to Surge in 2021 (February 1, 2021)

A discussion of guidance issued by the SEC's Division of Corporation Finance regarding special purpose acquisition companies (SPACs) and the growing trend of SPAC shareholder lawsuits.

Mintz, Levin, Cohn, Ferris, Glovsky & Popeo P.C.
Boston, MA (617-542-6000)

SEC Amends MD&A and Other Financial Disclosure Rules (February 5, 2021)

A discussion of the amendments the SEC adopted in November 2020 that become effective on February 10, 2021, impacting management's discussion and analysis of financial condition and results of operations and other financial disclosure requirements.

Proskauer Rose LLP
New York, NY (212-969-3000)

SEC Revises Marketing Rule for Registered Investment Advisers (February 9, 2021)

A discussion of the SEC's adoption of amendments to existing Rule 206(4)-1 (the Advertising Rule) and the rescission of Rule 206(4)-3 (the Cash Solicitation Rule) under the Investment Advisers Act of 1940.

Seward & Kissel LLP
New York, NY (212-574-1200)

SEC Seeks Comment on Potential Money Market Fund Reform Measures (February 17, 2021)

A discussion of the SEC's request for comment on potential reform measures aimed to improve the resilience of money market funds growing out of a December 2020 report of the President's Working Group on Financial Markets.

New York Adopts New Rules Requiring Registration and Exams for Investment Adviser Representatives, Principals and Solicitors (February 8, 2021)

A discussion of new regulations adopted by the New York State Department of Law imposing registration and exam requirements on investment adviser representatives, principals and supervisors of investment advisers, solicitors, and representatives and principals of solicitors.

Sidley Austin LLP
Chicago, IL (312-853-7000)

FINRA Issues 2021 Report on Examination and Risk Monitoring Program (February 8, 2021)

A discussion of FINRA's 2021 Report on its Examination and Risk Monitoring Program that provides a roadmap for member firms to use to prepare for examinations and to review and assess compliance and supervisory procedures related to business practices, compliance and operations.

Corporate Transparency Act (February 17, 2021)

A discussion of the Corporate Transparency Act passed as part of the 2021 National Defense Authorization Act that establishes new federal beneficial ownership reporting requirements and a federal database for the beneficial ownership information collected.

Skadden, Arps, Slate, Meagher & Flom LLP
New York, NY (212-735-3000)

ESG: Many Demands, Few Clear Rules (February 3, 2021)

A discussion of the demands for increased disclosure of environmental, social and governance (ESG) metrics both by institutional investors and governments.

2021 Compensation Committee Handbook (February 2021)

A comprehensive handbook to assist compensation committee members understand their responsibilities and how best to discharge them.

Sullivan & Cromwell LLP
New York, NY (212-588-4000)

BlackRock and State Street Update Proxy Voting Guidelines (February 8, 2021)

A discussion of updates to the proxy voting policies of BlackRock Investment Stewardship and State Street Global Advisors.

SEC Again Separates Consideration of Enforcement Settlements and Waivers of Collateral Consequences (February 12, 2021)

A discussion of the announcement by the SEC Acting Chair that the SEC would no longer permit parties to request the SEC simultaneously consider enforcement settlements and requests for waivers from resulting collateral consequences.

Troutman Sanders LLP
Atlanta, GA (404-885-3000)

Raising Capital during Periods of Extreme Price Volatility (February 9, 2021)

A discussion of the guidance issued by the SEC's Division of Corporation Finance for issuers seeking to raise capital during times when an issuer's own securities are experiencing extreme price volatility.

White & Case LLP
New York, NY (212-819-8200)

A Survey and In-Depth Review of Sustainability Disclosures by Small- and Mid-Cap Companies (February 2021)

A discussion of a survey and in-depth review of ESG Website disclosures of 80 small- and mid-cap US public reporting companies.

Wilmer Cutler Pickering Hale and Door
Washington, DC (202-663-6000)

The SEC Issues Statement and Requests Comment Regarding the Custody of Digital Assets Securities (February 2, 2021)

A discussion of the SEC's issuance of a statement regarding the custody of digital assets that are "securities" under the federal securities laws and seeking comment on specific questions related to the custody of digital asset securities.

Insider Trading Case to Watch (February 17, 2021)

A discussion of the Supreme Court's vacating of the Second Circuit's 2019 decision in *Blaszczak*, and what it means for insider trading going forward.

Wilson, Sonsini Goodrich & Rosati
Palo Alto, CA (650-493-9300)

2021 Reporting Season—Form 10-K Reminders (February 12, 2021)

A discussion of rule changes, guidance and disclosure considerations related to annual reports on Form 10-K to be filed in 2021.

INSIDE THE SEC

Senate Banking Committee Questions Gary Gensler on His Nomination to Be SEC Chair

By Veronica Callahan, Michael Trager, Daniel Hawke, and Stephanna Szotkowski

On March 2, 2021, the Senate Committee on Banking, Housing, and Urban Affairs held a three-hour virtual nomination hearing for Gary Gensler, President Biden's nominee for Chair of the US Securities and Exchange Commission (SEC).[1] Gensler has a reputation for being an aggressive regulator with a research-oriented approach, and his nomination has received praise from progressives. Gensler's nomination has been relatively uncontroversial to date, and it is anticipated that he will be confirmed. At that point, Gensler will succeed former SEC Chair Jay Clayton—who led the agency in favor of a deregulatory policy during the Trump Administration—and take over for current Acting Chair Allison Herren Lee. *(Editor's note: on March 10, 2021, the Senate Banking Committee narrowly (14-10) endorsed Gensler's nomination to chair the SEC.)*

Veronica Callahan, Michael Trager, Daniel Hawke, *and* **Stephanna Szotkowski** *are attorneys at Arnold & Porter Kaye Scholer LLP. Arnold & Porter attorneys Mark Epley, Jonathan Green, John Hindley, Paul Howard, Arthur Luk, Marne Marotta, Joshua Martin, Aaron Miner, Kathleen Reilly, and Adam Reinhart also contributed to this column.*

Gensler's Background

Gensler has extensive experience in the private sector, government, and academia, and is considered to be a leading finance expert and a proponent of reform and transparency in the financial markets. Gensler earned a BA in economics in 1978 and an MBA in 1979, both from the Wharton School of the University of Pennsylvania. He began his career at Goldman Sachs and spent 18 years there. At various points during his time at Goldman, Gensler was a partner in the firm's mergers and acquisition department, headed its media group, led fixed income and currency trading in Asia, and ultimately became co-head of finance.

In the late 1990s, Gensler moved into public service and served in the US Trade Department as Assistant Secretary for Financial Institutions from 1997 to 1999 and as Undersecretary for Domestic Finance from 1999 to 2001. Gensler also served as senior advisor to Sen. Paul Sarbanes, then-chair of the Senate Banking Committee, during the development of the Sarbanes-Oxley Act, passed in 2002. Gensler, along with Gregory Baer, coauthored a book in 2002 titled "The Great Mutual Fund Trap" in which the authors concluded that actively managed mutual funds with higher fees generally perform worse than "passive" low-fee index funds.

Gensler is perhaps best known for his role as Chair of the Commodity Futures Trading Commission (CFTC) from 2009 to 2014 during the Obama Administration. As head of the CFTC, Gensler recommended greater oversight of the financial derivatives market and helped implement the Dodd-Frank Wall Street Reform and Consumer Protection Act passed by Congress in 2010, which, among other things, overhauled derivatives trading. During his tenure, the CFTC also brought charges against five financial institutions that it claimed had been manipulating the London Inter-Bank Offered Rate (LIBOR), resulting in over $1.7 billion in penalties.

In 2018, Gensler became a faculty member at the MIT Sloan School of Management, where he has been a professor of global economics and management, co-director of MIT's Fintech@CSAIL program and a senior advisor to the MIT Media Lab Digital Currency Initiative. He has taught classes on blockchain, digital currencies and other financial technologies. Gensler won the MIT Sloan Outstanding Teacher Award for the 2018-19 academic year.

Gensler's nomination has received support from the Consumer Federation of America and the North American Securities Administrators Association.

Recent Market Volatility

Banking Committee Chairman Sen. Sherrod Brown (D-OH) opened the hearing with a reference to one of the most highly-anticipated topics of the hearing, the recent buying restrictions put in place by the trading app Robinhood Markets, Inc. and other online brokerages during the market volatility of recent weeks involving GameStop Corp. and certain other "meme" stocks. Chairman Brown stated that Gensler's confirmation was being considered "at a time when it's become more and more obvious to most people that the stock market is detached from the reality of their lives." Gensler responded that recent events have caused him to consider the areas in which the SEC could step in to ensure that customers are receiving the best execution on trades that brokers sell to market makers and that they will have access to markets when certain "apps may at times fall short of needed margin funds." Gensler added:

> In some ways [this is] a story as old as the markets themselves, a clash between buyers and sellers with opposing views, but in other ways this story is about this new technology . . . that's constantly changing finance.

In response to questions from Sen. Jack Reed (D-RI), Sen. Mark Warner (D-VA) and Sen. Cortez Mastro (D-NV), Gensler also discussed the business model of some online brokers, which offer commission-free transactions while selling clients' orders to high-frequency market makers, a practice called payment for order flow. Gensler briefly touched on the new challenges for the SEC in terms of how to protect retail investors when apps "gamify" the investing process: "I think technology has provided greater access but also raises interesting questions" like

> what does it mean when balloons and confetti are dropping and you have behavioral prompts to get investors to do more transactions on what appears to be this free trading app, but then there's this payment behind the scenes, this payment for order flow?

He added: "I think we're going to need to study that and see what it means for our marketplace."

Enforcement Agenda

Though Gensler's enforcement agenda at the SEC is widely expected to be more aggressive than that of his predecessor, this topic received comparatively little focus by the Senate Banking Committee—and, when raised, it generally was done in a less partisan manner.[2] For example, in response to questions from Sen. Steve Daines (R-MT) asking for clarification about when enforcement, as opposed to guidance or rulemaking, would be appropriate, Gensler said: "If there's a rulemaking, that's very different than enforcement. [Enforcement's] about using the facts of the law and limited resources to change market behavior." Gensler further observed: "If there's a bunch of small fraud shops, you got to go after them, but after the first four, five or six you go after, maybe the others start to clean up their behavior."

Climate Risk Disclosures

Much of the discussion during the hearing addressed corporate climate risk disclosures, which Democrats have sought to enhance under the Biden

Administration.[3] During the hearing, Chairman Brown said he expects Gensler to focus on "upgrading climate-risk disclosure requirements that are out of date, punishing misconduct, and enforcing protections on the books." Republicans, for their part, generally have argued against such climate risk disclosures, characterizing them as an attempt to inject politics into securities regulation. Sen. Pat Toomey (R-PA), the panel's senior Republican (Ranking Member), for example, stated: "The SEC has historically administered the federal securities laws on a bipartisan basis" and that, while at the CFTC, Gensler "had a history of pushing the legal bounds of the [CFTC's] authority" and "there are some who want the SEC to stray from its tradition of bipartisanship by using its regulatory powers to advance a liberal social and cultural agenda."

In response to questions about climate risk disclosures, Gensler did not make any specific commitments, but rather stated that any new disclosures would be based on the concept of materiality, meaning that, while a single piece of information may not be material by itself, it may nonetheless be significant in the context of the total mix of information made available to investors. Gensler elaborated: "The courts have helped define that it's the investor community that gets to decide what's material to them; it's not a government person like myself." He also stated: "It's all about that reasonable investor, and if they think it's significant in the mix of information, I'm going to be guided by that."

Nonetheless, Gensler recognized that "increasingly, investors really want to see climate risk disclosures" when weighing potential investment opportunities and the "SEC has a role to play to help bring some consistency and comparability to those guidelines." He added:

> I think issuers would benefit from such guidance, so I think through good economic analysis, working with the staff, and putting it out to the public to get public feedback on this, this is something the Commission, if I'm confirmed, would work on.

In response to questions from Sen. Cynthia Lummis (R-WY) about what effect disclosure rules would have on energy companies' ability to raise capital in particular, Gensler answered that climate risk disclosure rules could be "pro-issuer, pro-corporation and pro-investor" and provide companies with "some consistency, comparability, and some clear rules." While Gensler did not describe in detail the contours of what these disclosures would entail, when asked by Sen. Elizabeth Warren (D-MA) whether there is any reason why companies should be able to hide their climate risks from investors, Gensler replied simply, "No, they should not."

Diversity Disclosures

During the hearing, Ranking Member Toomey addressed a proposal released by Nasdaq in December 2020 that would require companies on its exchange to publicly disclose diversity information about their board of directors and push them to have at least "one [board member] who self-identifies as female and one who self-identifies as either an underrepresented minority or LGBTQ." This proposal has largely received support from Democrats, who have said that the SEC should require publicly listed companies' financial disclosures to include more information about diversity. Some Republicans have publicly opposed requiring such disclosures, saying that it interferes with board members' duty to govern companies in the best interests of the shareholders.

Ranking Member Toomey observed that it is not Nasdaq's place to "use its quasi-regulatory authority to impose social policies" and asked Gensler if he thought companies should be "forced or pressured to comply with some kind of quota with respect to race, gender and sexual orientation." In response, Gensler did not say whether he would support Nasdaq's proposal, but rather indicated his focus was on looking for ways for companies to disclose information on workforces more generally. He said that "human capital is a very important part of the value proposition in so many companies" and that diversity on boards and senior leadership "benefits decisionmaking." He committed to "look at what information investors want" in disclosures in terms of demographic data about firms' employees. Referencing the former SEC Chair, Gensler elaborated:

> Clayton took up some approaches to human capital, but I think it's always evolving, and we will look at what information investors want in this broad arena about the human capital, including diversity, at the companies they're investing in.

Corporate Political Spending Disclosures

Another disclosure topic discussed during the hearing involves political contributions by public companies. Although the federal securities laws impose no specific requirement to disclose political expenditures, investor advocates and others have urged more transparency from companies when it comes to political spending, and Democrats have introduced legislation to require such disclosures. At the hearing, Sen. Bob Menendez (D-NJ) asked Gensler if corporate political spending is material information that should be disclosed to investors. Gensler replied that, if confirmed, he would be "grounded" in the "materiality standard that drives all those decisions on disclosure." Gensler also emphasized, however, that shareholders "want to see what the companies they own are doing in the political arena," and that this is something that he thinks the SEC "should consider in light of the strong investor interest."

Cryptocurrency and Digital Assets

Given Gensler's experience in the cross-section of cryptocurrency and regulation, he was asked about the SEC's role in this space. Gensler praised cryptocurrency technology at various points in the hearing and noted that it could provide cheaper cross-border or domestic transactions and that the underlying blockchain technology could be applied to medical records, trade finance, or other forms of data collection. He elaborated: "Bitcoin and other cryptocurrencies have brought new thinking to payments and financial inclusion, but they've also raised new issues of investor protection that we still need to attend to." Gensler also stated: "If confirmed at the SEC, I'd work with fellow commissioners to both promote the new innovation, but also at the core to ensure investor protection."

Conclusion

While the hearing touched on several hot-button topics, including the recent market volatility and climate risk and diversity disclosures, it was not particularly revealing about Gensler's priorities if confirmed as Chair of the SEC, which we expect to take place in the near-term. That said, it is widely-anticipated that Gensler is likely to take a more aggressive approach than that of his predecessor, as well as focus more on research and collaboration. Gensler echoed this sentiment during the hearing: "We'll have some differences from time to time . . . I just hope that when we differ, we disagree agreeably, but I'm going to look to see where we can work together."

Notes

1. This hearing also included consideration of President Biden's nominee for Director of the Consumer Financial Protection Bureau (CFPB), Rohit Chopra.
2. This is not to say that Republican members of the Committee did not express concerns about "regulation by enforcement" at this hearing—but, when such concerns were raised, they were generally directed at CFPB nominee Chopra rather than at Gensler.
3. For more information about climate-related risk management, please see Arnold & Porter's previous Advisory on this topic.

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