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WHAT NOMINATING/GOVERNANCE COMMITTEES SHOULD KNOW ABOUT RECENT SEC RULEMAKING

The SEC has made significant changes affecting public company governance in recent years. Nominating/governance committees in particular need to be mindful of these changes. This article provides an overview of the SEC's rules and suggests how committees and their counselors can navigate these changes.

By David R. Fredrickson *

During the tenure of Chair Gary Gensler, the U.S. Securities and Exchange Commission has engaged in significant rulemaking affecting public company governance. This article examines that regulatory record as it relates to public company directors, with a particular emphasis on lessons for nominating/governance committee members. That record has sparked controversy and provoked court challenges — all the dust has yet to settle. Some bullets have been dodged for nominating/governance committees, but challenges still lie ahead.

Upon being sworn in as the 33rd Chair of the SEC on April 17, 2021, few expected Chair Gensler to pursue a regulatory agenda so focused on corporate governance. He had most recently focused on the interplay of technology and markets, and showed interest in the role of private funds and their advisers, the effect of artificial intelligence on investment advice, and the regulation of digital assets. Agency rulemaking agendas, however, are seldom driven solely by the current chair's interests. Regulatory projects begun under prior Chair Jay Clayton and Acting Chair Alison Lee, as well as some long overdue Dodd-Frank rulemakings, have played an

important role in the SEC's rulemaking agenda during Chair Gensler's tenure to date.

These SEC rulemakings sometimes bump up against state corporate law. In the traditional recitation of black letter corporate law, shareholders elect directors who hire and oversee management who run the day-to-day operations. Directors owe duties to the corporation and its shareholders, and their decisions are generally given wide latitude by courts. In contrast, the federal securities laws generally rely on disclosure requirements. The SEC has long required information about directors and director nominees, including details about their names and ages, positions held, terms of office, and any arrangements or understandings regarding their selection as directors. Companies also must disclose their business experience, other directorships, and involvement in certain legal proceedings, along with particularized disclosure about the activities, membership, and independence of key board committees, including the nominating committee. Finally, the SEC requires information about board meetings, whether the chief executive officer is also the

* DAVID R. FREDRICKSON is senior of counsel in Covington & Burling LLP's Washington, DC office. His e-mail address is dfredrickson@cov.com.

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