1. Corporate Governance Policies

- **Commonsense Principles of Corporate Governance**: The heads of thirteen large corporations and investing firms outlined core principles of corporate governance in an open letter, including: corporate boards that are not beholden to the CEO or management; diverse boards; independent directors with defined authorities and responsibilities; one share, one vote structures; optionality of providing earnings guidance; prominent disclosure of GAAP-reported results; inclusion of stock-based compensation in non-GAAP measures; and constructive engagement between a company and its shareholders. Interestingly, the principles suggest that it may be appropriate for market proxy access terms for smaller capitalization companies to be different from those for large-cap companies.

- **CalSTRS Corporate Governance Principles**: The California Teachers' Retirement Board Investment Committee updated its Corporate Governance Principles in July. The amended Corporate Governance Principles emphasized: increasing board competency and expertise in climate change risk management; increasing accountability (including by voting against directors) for lack of board diversity; increasing accountability for unilateral actions that disenfranchise shareholders without a shareholder vote; and encouraging companies to move to the one share, one vote structure.

- **Business Roundtable Principles of Corporate Governance**: In August, the Business Roundtable issued a revised version of its Principles, which were last updated in 2012. The revised Principles reflect an enhanced focus on shareholder engagement and long-term, sustainable value, while expressing concerns over the costs and inefficiencies of shareholder activism with an often short-term focus. The Principles also note concern over the use of the SEC disclosure regime as a vehicle for Congressionally-mandated disclosures that are not material to security holders.

- **Council of Institutional Investors**: In September, the Council of Institutional Investors adopted two new policies: (1) encouraging companies to resist both internal and external short-term pressure and thinking, to prioritize creating sustainable value over the long run through long-term investment and to engage with shareholders with long-term ownership and investment horizons, and (2) clarifying that shareholders’ “participation” in fundamental decisions affecting corporate viability, such as those that would significantly dilute existing shareholders’ equity, means shareholders should be able to vote on such matters. This clarification was triggered by recent discussion in the public policy sphere that stock exchanges were considering amending long-standing rules defining the circumstances under which a vote is required for listed companies.

- **ISS Policy Survey**: The results of ISS’s policy survey for the 2017 proxy season were released in August. This year’s survey focused on: director tenure and board refreshment; overboarding for executive chairs; IPO companies with dual-class capital structures; metrics used in executive compensation; cross-border executive pay; and the frequency of say-on-pay votes. The survey results indicated, among other things, that: two-thirds of institutional investors support holding annual say-on-pay at all companies (note that in 2017 most companies will have their second say-on-frequency vote); nearly 70% of investors think that having a high proportion of long-tenured directors is a cause for concern; and most institutional investors recommend taking action against the directors of IPO companies with multiple classes of stock.
2. Proxy Access

- **Numbers:** As of the end of September, 49% of S&P 500 companies had adopted a proxy access bylaw.

- **Developing Market Consensus on Terms:** The “3/3/20/20” standard has emerged as the most common at the primarily large-cap companies that have adopted proxy access to date; this includes the following key terms: the shareholder(s) seeking proxy access must have continuously owned 3% or more of the issuer for at least three consecutive years; the shareholder(s) typically can nominate either two directors or 20% of the total number of directors, whichever is greater; and shareholders can aggregate up to 20 shareholders in a group in order to reach the 3% ownership threshold.

- **SEC No-Action Relief:** Most shareholder proposals seek a bylaw at 3%/3 years, with a director cap of 25% of the board or two directors, and with no limit on group size. The SEC staff has granted no-action relief based on substantial implementation under Exchange Act Rule 14a-8(i)(10) to several issuers who responded to proxy access shareholder proposals by adopting a 3/3/20/20 bylaw, even though the adopted bylaws differed from the proposals on certain ancillary terms. Most recently, in Cisco and WD-40, the staff permitted exclusion even where the company bylaw did not conform to certain terms that the proposal italicized and expressly flagged as “essential elements for substantial implementation.” However, the SEC decided in H&R Block and Microsoft to decline issuance of no-action relief on substantial implementation grounds where the shareholder was seeking to amend the ancillary terms of a previously enacted proxy access bylaw rather than seeking a new proxy access bylaw, and the company did not propose to make any changes. The S&C memorandum discussing the recent SEC no-action positions is available here.

3. Board and Committees

- **CEO and CFO Liability under Exchange Act Rule 13a-14 and Sarbanes-Oxley 304:** In SEC v. Jensen, the United States Court of Appeals for the Ninth Circuit held that: (1) Exchange Act Rule 13a-14 provides the SEC with a cause of action against both CEOs and CFOs who provide false certifications pursuant to Rule 13a-14 and, (2) the disgorgement remedy authorized by Sarbanes-Oxley Section 304 applies regardless of whether an accounting restatement is caused by the personal misconduct of an issuer’s CEO or CFO. The S&C memorandum explaining the Jensen decision is available here.

- **SEC Approves Nasdaq Rule Requiring Disclosure of Third-Party Compensation to Director Candidates:** The SEC approved a Nasdaq Stock Market Rule requiring all Nasdaq-listed U.S. companies to disclose annually, either on their website or in their annual proxy statement, any agreements or arrangements between any third party and a director or nominee providing for compensation or other payments in connection with the person’s candidacy or service as a director. The disclosure will be required no later than the date of the proxy statement or information statement for the next shareholders’ meeting at which directors are elected (or, if the listed company does not file proxy or information statements, no later than the company’s next Form 10-K or Form 20-F filing). Companies should examine their most recent director questionnaires to confirm that they are worded broadly enough to elicit the information required to be disclosed by the new Rule. The S&C memorandum discussing the new Rule is available here.

- **New York Department of Financial Services Issues Proposed Cybersecurity Regulations:** On September 13, 2016, the New York State Department of Financial Services (the “DFS”) issued proposed regulations requiring banks, insurance companies, and other financial services institutions regulated by the DFS
“Regulated Institutions”) to establish and maintain a cybersecurity program designed to ensure the confidentiality, integrity, and availability of the Regulated Institution’s information systems (the “Proposed Regulations”). The Proposed Regulations would also require Regulated Institutions to implement and maintain a written cybersecurity policy setting forth policies and procedures for the protection of their information systems and the non-public information stored therein. Starting January 15, 2018 and annually thereafter, Regulated Institutions would be required to submit a certificate, of the Board chairperson or a senior officer to the DFS attesting compliance with the Proposed Regulations. The S&C memorandum discussing the Proposed Regulations is available here.

- **Indemnification and Advancement:** In Narayanan, the Delaware Court of Chancery addressed the issue of whether corporate bylaws and an indemnification agreement should be read together or separately when both documents provide for advancement rights, but where the scope of the advancement right is different. The court concluded that in the absence of evidence to the contrary, multiple documents with advancement provisions must be read separately. The thrust of the court’s holding is that an indemnification agreement can expand an employee’s advancement right(s) beyond those contained in a company’s bylaws, unless there is evidence that the two instruments were intended to be read in conjunction with one another.

- **Special Litigation Committees in Delaware Corporate-Style LLCs:** In Obeid, the Delaware Court of Chancery held that a corporate-style LLC could not use a special litigation committee structure that would be unavailable to a Delaware corporation. Specifically, the corporate-style LLC in Obeid could not appoint a non-director to its special litigation committee.

- **Director Access to Privileged Communications:** In Del Giudice, the United States District Court for the Southern District of New York held that directors of Delaware corporations have the right to access all communications between an attorney and the corporation during the director’s tenure, even if the director is litigating against the company.

- **Environmental and Social Shareholder Proposals:** Recent data reveal that while the total number of environmental and social policy shareholder resolutions filed in 2016 was lower than in 2015, more went to votes than ever before. In addition, fewer were withdrawn than at any point in the last ten years. The proposals particularly focused on climate change, corporate political spending, lobbying, and election spending. In almost all cases, such proposals fail. Nonetheless, more of these proposals passed in 2016 than in any recent year (nine, compared to zero in 2015). The S&C 2016 proxy season review is available here.

- **Citrix Shareholder Derivative Suit:** Last month, the Delaware Court of Chancery approved a settlement in Calma v. Templeton, a shareholder derivative suit that alleged that non-employee directors received excessive compensation from Citrix. One key settlement term requires Citrix to amend its omnibus plan such that non-employee directors are limited to annual equity compensation with a value of $795,000, valued as of the grant date.
4. **Activist Investor Strategies: Corvex Management LP/Williams Cos Inc**

- **Prior to withdrawing its plans** to replace pipeline operator Williams Cos Inc’s entire board, activist investor Corvex Management LP had employed a **novel tactic** in its fight against Williams management in which Corvex attempted to nominate director candidates (all of whom were Corvex employees) who agreed to resign after the election once Corvex found its desired long-term directors. While the company’s decision to add two new directors and remove three current directors prompted Corvex to withdraw its plans to replace the board, the proposed plan highlighted a new activist investor strategy. One option that may be available to companies seeking to pre-empt this strategy is to adopt a bylaw provision specifying that nominated directors must intend to actually hold the position of director if elected.

5. **SEC Developments**

- **Modernizing Reg S-K**: The SEC has invited comments, due by October 31, 2016, regarding the **modernization and update of Reg S-K**, which requires disclosures about a registrant’s management, executive compensation, beneficial ownership and corporate governance matters. This is part of the SEC’s disclosure review mandated by the JOBS Act of 2012 and the FAST Act of 2015.

- **Non-GAAP Financial Measures**: On May 17, 2016, the SEC staff issued new C&DI regarding the use of **non-GAAP financial measures**, signaling a turn away from 2011 C&DI in which the staff took a more liberal stance toward the use of such financial measures. The new C&DI note several uses of non-GAAP financial measures that the SEC staff views as potentially misleading; interpret expansively the “equal or greater prominence” requirement applicable to SEC filings and earnings releases included in a Form 8-K Report; and provide restrictive new guidance on the use of certain per share measures. The S&C memo discussing the updated C&DI is available [here](#). In the months following the release of the C&DI, the SEC staff has intensified its monitoring of reporting companies’ use of non-GAAP financial measures and has indicated its willingness to act through enforcement. Since May 17, the SEC staff has issued a significant number of comments identifying non-GAAP disclosure practices in SEC filings and earnings releases pre-dating the C&DI that it viewed as inconsistent with the C&DI. More recently, various sources have reported that the SEC’s Division of Enforcement has sent inquiries to some reporting companies regarding potential violations of Item 10(e) of Regulation S-K in earnings releases that pre-date the C&DI. The S&C update on the SEC staff’s increased scrutiny of non-GAAP disclosure is available [here](#).

- **Contractual Interference with SEC Whistleblowers**: The SEC continues to dole out penalties for **severance provisions** that implicitly preclude former employees from using SEC whistleblower mechanisms.

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