



IPO and Public Company Readiness: Advance Planning for 2025 and 2026 IPOs

Corporate Governance and ESG Considerations

November 12, 2024

GIBSON DUNN

Today's Speakers



Aaron Briggs

Partner | Securities Regulation and
Corporate Governance

San Francisco



Hillary H. Holmes

Partner | Capital Markets (Co-Chair)

Houston



Lori Zyskowski

Partner | Securities Regulation and
Corporate Governance (Co-Chair)

New York

MCLE Information

The information in this presentation has been prepared for general informational purposes only. It is not provided in the course of an attorney-client relationship and is not intended to create, and receipt does not constitute, an attorney-client relationship or legal advice or to substitute for obtaining legal advice from an attorney licensed in the appropriate jurisdiction.

- This presentation has been approved for **1.0 General credit**
- Participants must submit the form by **Tuesday, November 19th** in order to receive CLE credit

CLE Form Link: https://gibsondunn.qualtrics.com/jfe/form/SV_77GVOhWgo6Y8MB0

Most participants should anticipate receiving their certificate of attendance in 4-6 weeks following the webcast

All questions regarding MCLE Information should be directed to CLE@gibsondunn.com

About this Webcast Series

IPO & Public Company Readiness: Advance Planning for 2025 & 2026

- This webcast: provides an overview of the key corporate governance decisions a company will need to make as it prepares for an IPO

- Previous webcast:

Executive Compensation & Employee Benefits (linked [here](#)) October 2024

- Upcoming webcasts:

Regulatory Compliance January 2025

Cybersecurity & Data Privacy January 2025

Private Equity Sponsor-Backed Portfolio Companies February 2025

Structuring & Tax Issues March 2025

Risk Management & Financial Systems April 2025

International Perspectives May 2025



Agenda

01 Introduction

02 Board Composition

03 Board Structure

04 Governance Structure

05 Corporate Compliance Policies

06 Other Considerations

07 So Now What?

Introduction

01

Overview of Governance Decision-Making

Basic Principle

A company generally has wide latitude to determine the appropriate board and governance structure to support execution of long-term strategy, particularly at IPO

Selected Considerations for Making Governance Decisions

- Flexibility: preserve board's ability to act in shareholders' best interests based on facts & circumstances
- Shareholder base: decision-making may differ depending on whether the company is controlled or otherwise has a significant shareholder, founder, etc.
- Activist defense: protect company from inappropriate threats for corporate control, particularly in the early stages of the company's life cycle
- Market practice: maintain alignment with peers or have good reason not to
- State law: shareholder rights, director responsibilities & board operations
- Stock exchange / SEC rules: director independence, committee composition & responsibilities, code of conduct and various disclosure requirements
- Investor / proxy advisor expectations: view anti-takeover protections as inhibiting shareholder rights; may vote against board or specific committee members at shareholder meetings based on certain IPO-related governance decisions
- Latest trends: consider board diversity as well as ESG strategies, cybersecurity, risk management & potential disclosures

Task List

Key Governance Action Items to Get Ready for the IPO

- ✓ Assemble public company board
- ✓ Decide on important structural points
- ✓ Draft key documents
- ✓ Identify executive officers
- ✓ Protect directors & officers
- ✓ Build out key public company functions
- ✓ Establish & augment controls
- ✓ Consider other regulations & stakeholder preferences
- ✓ Don't forget about other tasks

Board Composition

02

Board Composition Overview



Regulatory Independence

What?

- Basic idea: independent directors do not have any relationship with the company that would interfere with their ability to exercise independent judgment in carrying out their duties
- Key NYSE/Nasdaq tests to assess: (not exclusive, 3-yr lookback, look at both directors & family members)
 1. No employment with company
 2. No compensation from company >\$120k besides director fees
 3. No business relationship with company above materiality thresholds (NYSE: \$1m/2% rev | Nasdaq: \$200k/5% rev)
 4. No comp committee interlocks
 5. No employment with outside auditor
- Audit & Comp Committee members: subject to heightened independence standards (see next slide)

GIBSON DUNN

Why?

- Good governance: key role of board is to oversee management performance
- NYSE/Nasdaq requirements: (controlled companies generally exempt)
 - Majority independent board
 - Fully independent committees (audit, compensation, nominating)

Phase In	Requirement
At IPO	1+ independent director on each committee
90 days later	Majority+ independent committees
1 year later	Fully independent committees + majority independent board

- Certain investor expectations:
 - May expect substantially independent boards (e.g., 2/3)
 - In some cases have their own, more stringent definitions

How?

- Directors complete D&O questionnaires, including questions designed to assess independence
- Legal vets responses and conducts additional diligence if necessary
- Finance runs directors and their family members and affiliated entities through AR/AP systems to confirm no payments
- Board ultimately makes the determination as to each director's independence, considering all relevant facts and circumstances

Public Disclosure

Identifies who's independent + relationships considered by the board

Heightened Independence Standards for Committee Members

Independence Factor	Audit Committee	Compensation Committee
Receive other comp from company besides director fees	Prohibited	Board must take into account in assessing independence
Qualify as an affiliate of company (or affiliate of a large shareholder)	Prohibited	Board must take into account in assessing independence
Helped prepare company financials in past 3 years	Prohibited	N/A
Have a material interest in a related party transaction	N/A	Generally prohibited unless special procedures adopted to approve equity

Financial Expertise

What?

- Basic idea: all audit committee members are expected to be financially literate (i.e., can read & understand a balance sheet, income statement & cash flow statement), and one is expected to be a financial expert
- SEC requirements to be an expert:
 1. Understanding of GAAP & financials
 2. Ability to assess application of GAAP for estimates/accruals/reserves
 3. Experience preparing, auditing, analyzing & evaluating (or supervising) financials of same breadth/complexity as company's
 4. Understanding of internal control over financial reporting
 5. Understanding of audit committee functions

Why?

- Good governance: role of audit committee is to oversee preparation & integrity of the company's financials
- SEC requirements:
 - Must have at least one audit committee financial expert (or explain why not)
 - Must identify the expert & disclose whether they are independent and describe their experience if they qualify outside of traditional means
 - No impact on director duties/liability
- NYSE/Nasdaq requirements:
 - All audit committee members must be financially literate
 - One audit committee member must be a financial expert (SEC financial expert satisfies the requirement)

How?

- Directors complete D&O questionnaires, including questions designed to assess financial expertise
- Legal vets responses and conducts additional diligence if necessary
- Board ultimately makes the determination as to who qualifies

Ways to Qualify as an Expert

- Education & experience as CFO, CAO, Controller or Auditor
- Experience actively supervising one of the above (possibly CEO)
- Experience overseeing or assessing company performance with respect to preparation, auditing or evaluation of financials
- OR other relevant experience

Diversity

What?

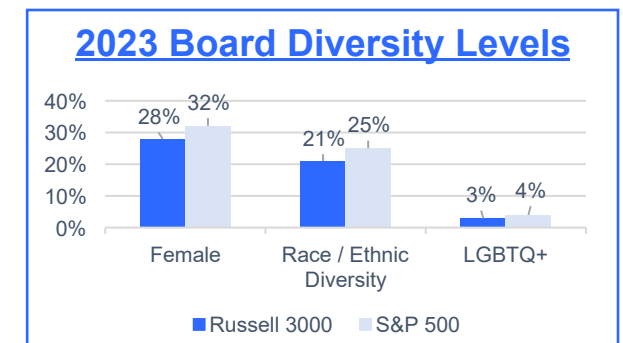
- Basic idea: boards generally should be diverse across a range of characteristics, backgrounds & perspectives
- No single definition, but key traits often looked at by boards include:
 1. Gender
 2. Race/ethnicity
 3. Nationality
 4. Cultural background
 5. Sexual orientation
 6. Age
 7. Veteran status
 8. Disability
 9. Education

Why?

- SEC requirements: must disclose policy on diversity, how the board assesses its effectiveness and whether diversity was considered in the selection of a director
- Nasdaq requirements: (no equivalent NYSE requirements)
 - Board composition: must have at least 1 female director & 1 director who is an underrepresented minority or LGBTQ+ or explain why not (subject to exceptions for smaller boards or companies)
- Disclosure: matrix showing board-level data on gender diversity and race/ethnicity/LGBTQ+ diversity
- Investor expectations: often have specific numerical expectations on board diversity (see next slide)

How?

- Directors complete D&O questionnaires, including voluntary questions for director to self-ID across various characteristics and indicate whether they consent to disclosure
- Board
 - Establishes policy on diversity & criteria for specific director searches
 - Sometimes adopts a “Rooney Rule” policy (i.e., commitment to include diverse candidates in the pool from which directors are selected)



Source: Conference Board, *How Board Diversity Can Contribute to Board Effectiveness* (Nov. 2023)

Current Policies on Board Diversity

(as of October 2024)

Institution*	Gender	Race/Ethnicity
Proxy Advisory Firms		
ISS	1+	1+ (S&P 1500/Russell 3k)
Glass Lewis	30%+	1+
Selected Institutional Investors		
BlackRock	2+ (plus 30% diverse overall)	1+ (plus 30% diverse overall)
Vanguard	Facts & circumstances based on sufficiency of progress	Facts & circumstances based on sufficiency of progress
Fidelity	2+ (10+ member boards)	1+
State Street	30%+ (Russell 3k)	1+ (S&P 500/FTSE 100)
JPMorgan	1+	1+

Investors may vote against the election of the nominating committee when these policies are not satisfied

*Policies for 2025 proxy season are not yet available

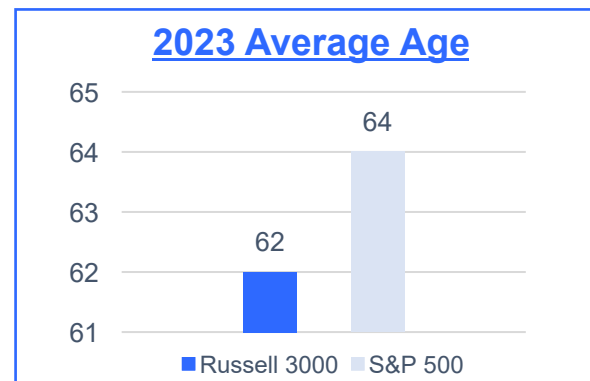
Other Characteristics

Skills and Experiences

- Basic idea: board should have a mix of skills and experiences to support board's role in overseeing strategy and major risks facing the company
- SEC requirements: for each director, must disclose experience, qualifications and skills that led to board's determination they should serve on the board, in light of the company's business and structure
- Commonly sought experiences:
 1. CEO / Leadership
 2. Industry / Operations / Global
 3. Regulatory / Government / Legal
 4. Technology / IT / Cyber
 5. Finance / Accounting / Investment
 6. Risk Management

Age

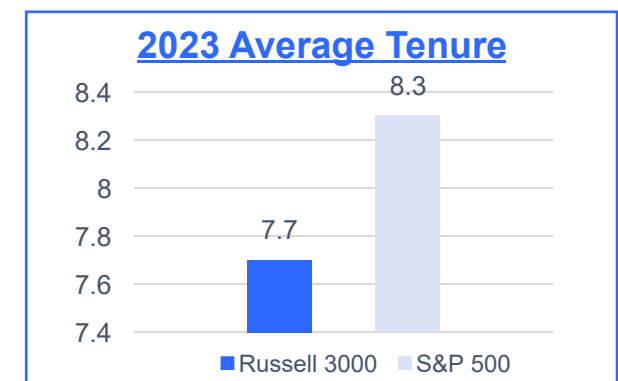
- Basic idea: directors should collectively represent a mix of ages, and boards may consider whether to institute a director retirement policy (e.g., must retire at age 72 or 75)
- SEC requirements: must disclose age of each director
- Investor expectations: not a significant focus area
- Market data:



Source: Conference Board, *Taking a Long-Term Approach to Board Composition* (Sept. 2023)

Board Tenure

- Basic idea: directors should collectively represent a mix of tenures; some boards have term limits, but those are not common
- SEC requirements: must disclose how long each director has served
- Investor expectations: generally look for a mix of tenures & refreshment; some assess average tenures
- Market data:



Source: Conference Board, *Recent Trends in Board Composition and Refreshment in the Russell 3000 and S&P 500* (Dec. 2023)

Overboarding

What?

- Basic idea: there often is an expectation – whether general or specific – that directors will limit (to varying degrees depending on the director’s other commitments) the number of public company boards on which they serve
- Heightened scrutiny and/or stricter expectations often applied to directors in the following categories:
 1. CEOs of a public company
 2. Officers of a public company
 3. Board Chairs or Lead Independent Directors
 4. Audit Committee members

Why?

- Good governance: directors should have sufficient capacity to devote to company matters, and this has become even more critical as board oversight obligations have continued to increase (e.g., risk, cyber, ESG)
- SEC requirements: must disclose for each director all pubco boards on which they serve, as well as identify any director who attended <75% of board/committee meetings
- NYSE requirements: audit committee members limited to 3 pubco audit committees absent a board determination + additional disclosure (no equivalent Nasdaq requirements)
- Investor expectations: often have specific numerical expectations on when they consider a director to be overboarded (see next slide)

How?

- Directors complete D&O questionnaires, including questions designed to assess current obligations and compliance with any company policies
- Board
 - Establishes a policy on overboarding (ranging from a general statement to specific numerical limits)
 - May require nominating committee approval (or at least notice) before directors can join additional boards
 - Monitors compliance in connection with annual nomination process

Current Policies Around Overboarding

(as of October 2024)

Institution*	PubCo CEO / Officer (max # of pubco boards)	Other Directors[†] (max # of pubco boards)
<i>Proxy Advisory Firms</i>		
ISS	3 (2 + own board)	5
Glass Lewis	2 (1 + own board)	5
<i>Selected Institutional Investors</i>		
BlackRock	2 (1+ own board)	4
Vanguard	2 (1+ own board)	4
Fidelity	2	5
State Street	2	4
JPMorgan	3 (2 + own board)	4

Investors may vote against the election of any director who does not satisfy these policies

*Policies for 2025 proxy season are not yet available

[†]Does not include separate policies for board leadership positions

Managing Conflicts and Antitrust Issues

Conflicts of Interest

- Basic idea: boards must manage conflicts of interest that could impair a director's ability to make decisions that are in the best interests of shareholders
- NYSE/Nasdaq requirements: companies must have codes of conduct addressing actual and apparent conflicts, and any waivers granted to directors must be disclosed within 4 business days
- Examples of conflict situations:
 - Director or family member does business with a competitor
 - Company does business with a director's or family member's business
 - Director stands on both sides of a company transaction

Antitrust Issues

- Basic idea: antitrust laws prohibit interlocking director & officer roles that could be anti-competitive
 - Clayton Act: directors are prohibited from serving as a director or officer of a competitor of the company (subject to de minimis thresholds)
 - Sherman Act: certain director affiliations with a competitor or supplier of the company may require firewall procedures
- Process for managing:
 - D&O questionnaire process
 - Notification/approval requirements to nominating committee
 - Director training
 - Potential director recusal

Board Structure

03

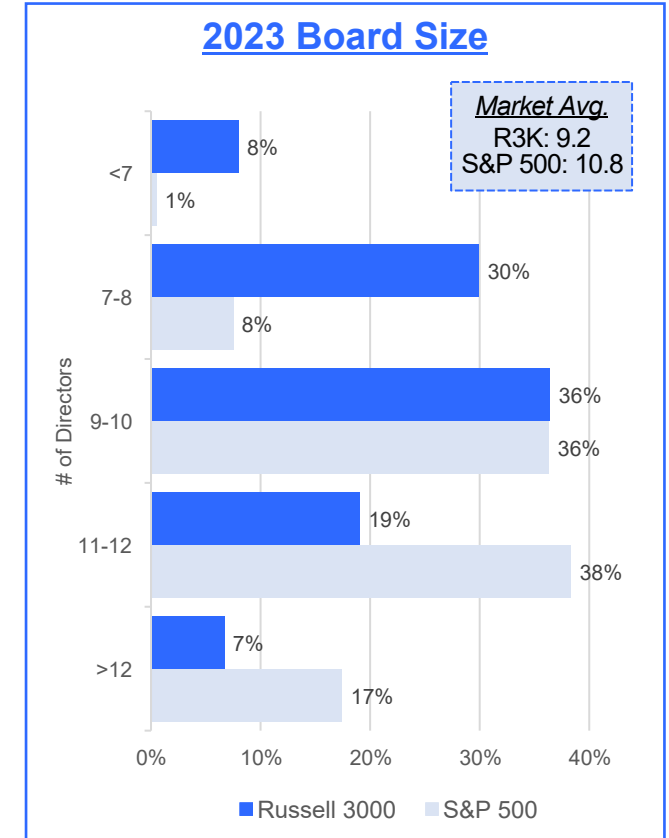
Board Size

Basic Principles

- No legal or regulatory requirements around board size
- Boards have flexibility to determine appropriate size for the company
- Generally not a significant issue for the investment community, but Glass Lewis generally says optimal board size is 5 to 20

Finding the Sweet Spot

- Need enough directors to support the board's oversight of strategy and risk management as well as to staff the key committees
- But, avoid having too many directors, which can lead to complexity and inefficient decision-making and board processes



Source: Conference Board, *Taking a Long-Term Approach to Board Composition* (Sept. 2023)

Board Leadership Structure

3 Options

1. Combined Chair & CEO

- What this is: same person serves as both chair and CEO
- Positives: CEO viewed as well-positioned to focus board on key issues, promotes more efficient governance processes
- Negatives: CEO distraction, conflicts due to lack of independent oversight by chair, some investor pushback

2. Separate Executive Chair

- What this is: separate person who is not independent (e.g., Founder, former CEO) serves as chair
- Positives: allows CEO to focus on the business, provides some independent oversight
- Negatives: less efficient governance processes due to duplication & blurred lines of responsibility

3. Separate Independent Chair

- What this is: separate person who is independent serves as chair
- Positives: allows CEO to focus on the business, provides greatest independent oversight
- Negatives: less efficient governance processes due to duplication & blurred lines of responsibility

Lead Independent Director

- Basic idea: if chair is not independent (options 1 or 2), investment community expects LID appointment for independent board oversight
- ISS has specific expectations around LID responsibilities:
 - Preside at board meetings when chair isn't present
 - Preside at executive sessions of independent directors
 - Call meetings of independent directors
 - Review/approve information sent to board
 - Review/approve board meeting schedules/agendas
 - Available to meet with major investors upon request

Board Committee Structure

3 Key Committees + Any Other Committees Helpful for Board Oversight

	Audit*	Compensation*	Nominating*
Committee Size	Required to have at least 3	Required to have at least 2	No specific requirements
Meeting Frequency	4x+/year	Depends on company	Depends on company
Key Third Parties	Independent auditor	Independent comp consultant	Director search firm
Traditional Oversight Areas	<ul style="list-style-type: none"> Accounting & financial reporting processes Internal controls & disclosure controls Compliance & conflicts of interest Performance of outside auditors Risk oversight processes 	<ul style="list-style-type: none"> Compensation philosophy & programs CEO goal-setting, evaluation & comp Executive officer evaluation & comp Equity plan admin/grants Incentive & director comp Executive succession planning 	<ul style="list-style-type: none"> Board composition & structure Director succession planning/recruitment Committee composition & leadership structure Corporate governance practices Board operations, including evaluations
Newer Focus Areas	<ul style="list-style-type: none"> Cybersecurity 	<ul style="list-style-type: none"> Human capital management 	<ul style="list-style-type: none"> Sustainability & ESG

*Committee charter publicly disclosed

Examples of potential additional committees
 EHS, Executive, Finance, Public Policy, M&A, Risk, Sustainability, Technology

Key Board Oversight Processes

Critical to Establish Appropriate Operating Rhythms

Board Oversight of Strategy / Execution

- Basic idea: to fulfill their fiduciary duties, boards should establish robust processes to oversee company strategy and monitor execution to help maximize shareholder value
- Strategy: typically done in a separate, dedicated board meeting (sometimes off-site) to focus on long-term strategy development
- Execution: typically monitored at every regular board meeting through updates from the CEO and other members of management, but updates in between meetings may be appropriate as well

Board Oversight of Risk

- Basic idea: to fulfill their fiduciary duties, boards should establish robust processes to oversee the most significant risks facing the company, including implementing an appropriate reporting system
- Why this is important: although there is generally a high bar under DE law for directors to be liable for failures of risk oversight, recent cases show it's not an impossible standard to satisfy
- What this entails:
 - Clear roles & responsibilities: who on the board (full board vs. committee) and in management is responsible for each risk?
 - Robust reporting system: what's the appropriate frequency and substance of the reporting?
 - Alignment with ERM framework: does the reporting system capture all of the key risks facing the company? Is there a built-in mechanism to revisit this periodically?
 - Engaged directors: are directors sufficiently engaged, asking questions & monitoring follow-ups?
 - Appropriate delegations of authority: what can management approve without going to board?

Governance Structure

04

Positioning the Company Generally

- Wide latitude pre-IPO to adopt the post-IPO certificate of incorporation and bylaws
- No single governance structure appropriate for all IPO co's, and will depend on factors like size, industry, investor base, desired positioning on governance issues
- Common for IPO co's to start with a more protective governance structure (much more difficult to add later on), which then evolves and becomes less protective over time in response to investor engagement

Key Factors Impacting Rate of Change

- **Company growth:** as market cap grows, company will increasingly be a target for shareholder proposals and other investor campaigns – for example, of the total # of proposals submitted to companies each year, roughly:

~5%

Small-caps

~10%

Mid-caps

~85%

Large-caps

- **Evolving shareholder base:** as large asset managers take bigger positions and the base shifts away from venture/hedge/PE funds, proxy advisor (ISS/Glass Lewis) influence is likely to grow
- **Voting/reputational concerns:** certain practices may generate criticism from investors and negative votes for directors; level of responsiveness/proactivity will depend on philosophical approach
- **Changing peer practices:** while company's existing practices at IPO may be in line with market, as company grows, at some point that may no longer be the case

Director Elections / Vacancies

Decision Point	Basic Idea	Activism Considerations	Investment Community View	Typical Approach for IPO Companies
Classified vs. Declassified Board	<p><u>Classified</u>: directors are placed into 3 different classes, with only 1 class elected at each annual meeting (3-yr terms)</p> <p><u>Declassified</u>: all directors elected annually (1-yr terms)</p>	Classified board viewed as providing strong anti-takeover protection since potential acquirer can't replace a majority of the board at once (plus under DE law classified directors can be removed only for cause)	<p>Classified boards generally are disfavored; often a standalone basis for votes against directors</p> <p><i>~85% support for shareholder proposals</i></p>	<p>Classified board, coupled with director removal only for cause per state law (but different considerations for controlled companies)</p> <p><u>Hybrid approach</u>: include with built-in sunset</p>
Plurality vs. Majority Vote to Elect Directors	<p><u>Plurality</u>: means those with the most votes elected</p> <p><u>Majority</u>: directors must receive more votes "for" than "against"</p>	Plurality is an easier standard to get directors elected, but this generally isn't a concern in a proxy contest (plurality applies no matter what)	<p>Plurality voting outside a proxy contest generally is disfavored</p> <p><i>~50% support for shareholder proposals</i></p>	<p>Plurality vote standard</p> <p><u>Hybrid approach</u>: include coupled with director resignation policy if fail to get majority vote</p>
Vacancies Filled Only by the Board	Provides that any vacancies on the board can be filled only by the board (not by shareholders)	Prevents an activist from taking action to increase the size of the board and then filling the resulting vacancy	Does not receive significant focus	Vacancies filled only by board

Shareholder Action / Voting

Decision Point	Basic Idea	Activism Considerations	Investment Community View	Typical Approach for IPO Companies
Shareholders Act by Written Consent	Allows shareholders to act by written consent between shareholder meetings	May facilitate activism in between annual meetings, particularly without appropriate guardrails	Generally favor a shareholder right to act by written consent <i>~40% support for shareholder proposals</i>	Prohibit (but different considerations for controlled companies)
Shareholders Call Special Meetings	Allows shareholders to call special meetings in between annual meetings; may facilitate takeovers	May facilitate activism in between annual meetings, particularly without appropriate guardrails	Generally favor a shareholder right to call special meetings <i>~50% support for shareholder proposals</i>	Prohibit (but different considerations for controlled companies)
Supermajority Voting Provisions	Greater-than-majority vote required to remove directors and/or amend bylaws & certain charter provisions	Makes it more difficult for an activist to change the board or governance documents	Generally disfavored; often a standalone basis for votes against directors <i>~65% support for shareholder proposals</i>	Include, often at 66% (but different considerations for controlled companies) <u>Hybrid approach</u> : include with built-in sunset
Dual-class Common Stock	Can be used to provide lower voting rights for different share classes (high-vote / low- or no-vote stock)	Concentrates voting power in the founders/management team post-IPO	Generally disfavored; often a standalone basis for votes against directors <i>~30% support for shareholder proposals</i>	Not typical, but more common in founder-led co's <u>Hybrid approach</u> : include with built-in sunset

Other Key Governance Structure Items in Formation Documents

Certificate of Incorporation*

- Blank-check preferred stock: allows board to issue preferred stock and set rights without shareholder approval, which can facilitate adoption of a shareholder rights plan down the road
- Exclusive forum: designates specific court(s) as exclusive venue(s) for certain shareholder lawsuits, both at the state level (internal corporate claims) and federal level (Securities Act claims)
- Exculpation of directors and officers: eliminates monetary damages for breach of fiduciary duty of care (subject to certain exceptions); DE law recently amended to permit this for officers
- Statutory freeze for “interested shareholder” transactions: default provision in DE that, subject to certain exceptions, restricts tender offers by 15%+ shareholders for 3 years, unless company opts out in the charter (not typical to opt out)

Bylaws*

- Advance notice of shareholder business: sets forth timing, informational and other procedural requirements for shareholders that want to nominate directors or submit other business to be considered at the annual shareholder meeting
- Proxy access: permits shareholders that meet certain ownership and holding requirements to nominate directors and have them included in the company’s proxy materials (not typical to include for IPO companies)

Choosing Legal & Regulatory Regimes

State of Incorporation

Key Considerations

- Legal system: varies in terms of depth and breadth of established case law precedents, experience and specialization of the courts in handling corporate disputes
- Fiduciary duties: varies in terms of whether focused on maximizing shareholder value vs. permitting broader stakeholder focus
- Standard for court review of board decisions: varies in terms of level of deference to the board's business judgment vs. application of enhanced scrutiny or entire fairness standards
- Exculpation of directors from liability: varies in terms of scope of elimination of liability for directors, including whether it is limited to duty of care or also applies to duty of loyalty
- Books and records inspection rights: permit shareholders to inspect the company's books and records, which can be a precursor to litigation
- Fees and taxes: annual franchise fees and taxes owed in different jurisdictions at different rates

Choosing Legal & Regulatory Regimes

Stock Exchange Listing:

NYSE vs. Nasdaq

Key Considerations

- Quantitative initial and continued listing standards: e.g., minimum requirements for number of holders, shares outstanding, trading price, market value of publicly held shares, income, market cap
- Cost: initial listing fee and annual fee
- Packages offered: market services and IR products
- Corporate governance requirements: similar, but some notable differences...

Requirement	NYSE	Nasdaq
Director independence	<u>Business test</u> : greater of \$1M or 2% of revenues	<u>Business test</u> : greater of \$200k or 5% of revenues
Committee independence	No hardship exemption	Hardship exemption (permit non-independents in limited circumstances)
Nominating committee	Required	Not required (can be done by independent directors)
Internal Audit function	Required	Not required
Governance guidelines	Required	Not required
Board diversity	Not required	Comply or explain
Related party transactions	Stricter on prior approval	Less strict on prior approval
Annual CEO certification	Required	Not required

Corporate Compliance Policies

05

Audit Committee-Related Policies

Auditor Services Approval*

- Legal requirement: all audit and non-audit services performed by independent auditor must be pre-approved by audit committee
- What the policy does: sets forth procedures for handling the pre-approval process, including reporting and documentation requirements
- Key decisions: delegation threshold to the chair to handle approvals in between committee meetings

Auditor Employee Hiring

- Legal requirement: to prevent impairing the independence of the independent auditor, companies are restricted from hiring certain current and former employees of the auditor into certain financial reporting oversight and accounting roles, unless various conditions are satisfied (e.g., no operational influence or financial ties with auditor, cooling-off period)
- What the policy does: sets forth the various hiring conditions and identifies the financial reporting oversight roles at the company

Whistleblower Procedures

- Legal requirement: audit committees must establish procedures for handling complaints regarding controls, accounting and auditing matters, including allowing employees to submit anonymously
- What the policy does: sets forth who handles at management level, when complaints get escalated to committee, and how investigations are handled
- Key decisions: broadening of policy to cover complaints of misconduct generally, criteria for escalating to committee

Compensation Committee-Related Policies

For more info
check out our
[exec comp](#)
[webcast](#)

Compensation Clawback*

- Legal requirement: NYSE and Nasdaq require policy for mandatory no-fault recoupment of incentive comp from officers in the event of a financial statement restatement
- What the policy does: sets forth procedures for assessing whether recoupment is triggered and calculating recoverable amount
- Key decisions: whether to broaden policy to cover additional people, types of compensation, types of triggers (e.g., misconduct)

GIBSON DUNN

*Publicly disclosed

Equity Grant Timing*

- Legal requirement: companies must disclose practices around timing of granting option awards in relation to the disclosure of MNPI and disclose certain info about NEO option grants made close in time to MNPI release; companies may adopt policy to facilitate this disclosure
- What the policy does: identifies when and under what circumstances equity awards can and cannot be granted
- Key decisions: timing of annual equity grants, how to handle closed trading windows

*Described in proxy

Stock Ownership Guidelines*

- Legal requirement: not required, but common for companies to adopt to ensure D&Os have “skin in the game” and further align D&O interests with shareholders
- What the guidelines do: set forth the required holdings levels, phase-in schedule and how holdings are calculated
- Key decisions: ownership levels, how far down into the organization to go, treatment of outstanding equity awards, any retention features

*Described in proxy

Nominating/Governance Committee-Related Policies

Governance Guidelines*

- Legal requirement: NYSE requires corporate governance guidelines
- What the guidelines address: board operations, director qualifications, responsibilities, compensation, performance evaluations, access to management & advisors, orientation & continuing ed, management succession
- Key decisions: overboarding limits, director changes in jobs/boards, diversity policy, age/term limits, categorical independence standards

Code of Conduct*

- Legal requirement: NYSE and Nasdaq require code of conduct for directors/officers/employees
- What the code must address: conflicts of interest, corporate opportunities, confidentiality, fair dealing, proper use of assets, legal/regulatory compliance, reporting of illegal or unethical behavior, code enforcement, accurate & timely SEC reporting, amendments/waivers
- Typical additional topics: gifts, dealing with governmental officials, FCPA compliance, environmental/health/safety

Related Party Transactions*

- Legal requirement: company transactions >\$120k in which 5% holders, directors, officers or family members have a material interest must be approved by a committee and disclosed
- What the policy does: sets forth procedures for escalating to committee and approval criteria
- Key decisions: delegation threshold to the chair to handle approvals between committee meetings; categories of pre-approved transactions; escalation thresholds to committee

Other Key Policies

Insider Trading*

- Legal requirement: employees and directors are prohibited from trading in company securities when they have MNPI, and companies are required to maintain reasonable controls to help prevent
- What the policy does: sets forth procedures for when and how trading can occur (e.g., blackout periods, pre-clearance)
- Key decisions: who is covered, whether other companies' securities are covered, hedging, pledging, 10b5-1 plans

Investor Communications

- Legal requirement: under Reg FD, company officials cannot selectively disclose MNPI to the investment community without disclosing to the market at the same time (e.g., 8-K, PR)
- What the policy does: identifies who is authorized to speak for the company and sets forth procedures for how and when they can speak and policies around dealing with analysts, market rumors and guidance
- Key decisions: designated spokespersons, quiet periods, use of social media

Discl. Committee Charter

- Legal requirement: must have controls designed to ensure info that's required to be disclosed is timely disclosed, and CEO/CFO required to certify quarterly as to effectiveness; as part of this, companies often form a management-level disclosure committee
- What the charter does: sets forth committee membership, responsibilities and operation
- Key decisions: scope of committee's role; membership; delegation/sub-committee procedures

Other Considerations

06

Impact of Recent U.S. Elections on the SEC

- Background: SEC has 5 commissioners who are presidential appointees serving staggered 5-year terms; by design, no more than 3 can belong to same political party
- Current SEC: 3-2 Democratic-led majority under Chair Gensler, with an aggressive enforcement agenda focused on large penalties in several areas as well as a rulemaking agenda largely focused on investor protection/ESG – e.g.:
 - Compensation clawbacks
 - Insider trading / 10b5-1 plans
 - Cybersecurity
 - Climate change
 - Beneficial ownership reporting
- What typically happens upon a change in presidential administration:
 - Resignation of SEC Chair & division directors
 - Designation of Acting Chair from incoming President’s party
 - Appointment (and confirmation by Senate) of new Chair
 - Announcement of new SEC rulemaking & enforcement priorities

Commissioner	Party	Term*
Gary Gensler (Chair)	D	2026
Caroline Crenshaw	D	2024**
Jaime Lizárraga	D	2027
Hester Pierce	R	2025
Mark Uyeda	R	2028

*Can serve up to 18 months beyond term expiration

**Renominated, subject to confirmation

Back to the future with a Clayton-style SEC?

- Greater focus on efficient capital formation?
- Greater focus on reducing regulatory burdens?
- Shift away from ESG rulemaking priorities? E.g., climate change, human capital, board diversity
- Shift in enforcement priorities?
- New views on cryptocurrency?

Evolving Landscape

- Anti-ESG: following years of rapid adoption globally, a growing anti-ESG movement in the US has significantly affected the ESG & DEI landscape
- Broad divergence in approach emerging among U.S. states, such as California & Florida, in the U.S. federal government & globally
 - Europe and UK have continued to advance legislation and other pro-ESG initiatives, including CSRD, that could apply to U.S. companies
 - But in the US, the SEC stayed its long-awaited climate disclosure rules after they were challenged in court, raising uncertainty
- Engagement on ESG continues among some institutional shareholders and other vocal shareholders, including through shareholder proposals (though E&S proposal support is declining)
- Increasing regulation and litigation targeting ESG issues, including greenwashing, as companies release more information & stakeholders scrutinize disclosures
- Board oversight and governance of ESG remains a key consideration across boardrooms, but complicated by evolving ESG & DEI landscape

Regulatory Requirements

SEC Climate Rules

- Background: SEC adopted rules in March 2024, in a 3-2 vote along party lines
- Overview of required climate-related disclosures in Form S-1 registration statement for IPO or annual report on Form 10-K:
 - Governance: board and management governance and practices for climate-related risk identification, assessment, management, and oversight, and related risk processes
 - Risk: climate risks with actual or potentially material impacts on financials, strategy, outlook and business model (but no need to disclose climate expertise on board)
 - GHG emissions: for larger companies, Scope 1 & 2 emissions, if material (but not Scope 3), with independent third-party assurance required on a phased-in basis
 - Targets/goals: climate-related targets or goals established by the company if materially or reasonably likely to materially affect financials, with annual progress updates
 - Transition plans: company-adopted transition plans, scenario analyses, and internal carbon pricing if used to assess material climate risks, plus related material expenditures
 - Financial statement footnote: reporting expenditures and costs of >1% due to “severe weather events,” “other natural conditions,” and certain carbon offsets and RECs
- Legal challenge: rules were challenged and stayed while subject to ongoing multi-district litigation in 8th Circuit

Stay tuned for further developments given change in administration

Regulatory Requirements

Other ESG Rules

California Climate Laws






- Background: in October 2023, California adopted three wide-reaching bills that impose climate reporting requirements for public & private companies doing business or engaging in certain activities in CA
 - GHG emissions reporting: annual disclosure of Scope 1, 2 & 3 emissions + 3rd party assurance (SB 253)
 - Climate risk reporting: biennial disclosure of climate risks and risk management (SB 261)
 - Anti-greenwashing: new disclosures for companies making certain sustainability claims (e.g., net zero, carbon neutral, significant emissions reductions) or deal in voluntary carbon offsets (AB 1305)
- Who's in scope for SB 253/SB 261: among others, companies organized under CA law or meeting sales, property or payroll thresholds in CA, with global annual revenues >\$1B (SB 253) or >\$500M (SB 261)
- Legal Challenge: rules were challenged in the CA Central District, but have not been stayed

EU Laws

- Corporate Sustainability Reporting Directive (CSRD): requires EU & non-EU enterprises with significant EU operations to report material environmental, social and governance matters (using a double materiality framework) in their annual report, including forward-looking, retrospective, qualitative and quantitative information
- Corporate Sustainability Due Diligence Directive (CSDDD): requires EU & non-EU enterprises with significant EU operations to identify and assess adverse human rights and environmental impacts, take steps to prevent/mitigate these impacts, and adopt a Paris Agreement-aligned climate change mitigation transition plan

Stakeholder Expectations

Proxy Advisor & Institutional Investor Policies for 2024

	Climate Change	Human Capital Management	Board Oversight
	<ul style="list-style-type: none"> TCFD-aligned disclosure for significant GHG emitters Disclosure of GHG reduction targets 		<ul style="list-style-type: none"> Disclosure of board oversight of mitigation of climate risks (part of TCFD disclosure)
	<ul style="list-style-type: none"> TCFD-aligned disclosure for S&P 500 in industries w/material GHG risk per SASB Disclosure of GHG reduction targets 	<ul style="list-style-type: none"> Disclosure of human capital risk management and mitigation 	<ul style="list-style-type: none"> Clear disclosure of board-level oversight of E&S issues
	<ul style="list-style-type: none"> ISSB-aligned disclosure Disclosure of Scope 1/2 and material Scope 3 emissions Disclosure of GHG reduction targets (Scope 1/2) & Net Zero-aligned business plan 	<ul style="list-style-type: none"> Disclosure of how approach to HCM is aligned with strategy & biz model Disclosure of steps to advance DEI Disclosure of EEO-1 report 	<ul style="list-style-type: none"> Disclosure of board-level oversight of material risks, including sustainability-related factors
	<ul style="list-style-type: none"> TCFD-aligned disclosure Disclosure of Scope 1/2 (and 3 if appropriate) GHG emissions & reduction targets Enhanced disclosure for carbon-intensive industries 	<ul style="list-style-type: none"> Disclosure of HCM approach and link to strategy; comp & benefits, engagement, and DEI efforts and targets Disclosure of EEO-1 report 	<ul style="list-style-type: none"> Disclosure of board oversight of climate-related, HCM, and D&I risks & opportunities
	<ul style="list-style-type: none"> Suggests use of investor-aligned frameworks like ISSB 		<ul style="list-style-type: none"> Will hold directors accountable for material failures of risk oversight related to E&S issues

Stakeholder Expectations

Shareholder Proposals

- Basic idea: SEC rules allow shareholders of public companies to submit proposals to be voted on at the annual shareholders meeting and included in the company's proxy materials if certain conditions are met, including satisfying low stock ownership thresholds (\$2k-\$25k, depending on holding period)
- Why it matters: proposals are non-binding, but those receiving majority support or even significant minority support can trigger proxy advisor / investor board responsiveness policies where they may vote against directors if company response not deemed sufficient
- Trends in recent years: proposals historically focused on traditional governance issues (e.g., classified board), but in recent years there's been focus on environmental and social topics (including anti-ESG topics)
- Key stats over last 3 years:
 - >50% of all proposals submitted focused on E&S issues in each year
 - ~30 E&S proposals received majority support (but overall declining support for E&S)
 - #1 climate change was the most popular proposal topic in each year

Environmental Topics

- Climate reporting, lobbying, risks, transition planning, GHG goals
- Plastics, recycling, packaging
- Renewable energy
- Environmental impact

Social Topics

- Discrimination and diversity issues (e.g., racial equity audits)
- Employment, compensation & workplace issues (e.g., pay gap)
- Societal issues (e.g., human rights, animal welfare)

Governance Topics

- Independent board leadership
- Shareholder rights (e.g., special meetings, majority voting)
- Executive compensation issues
- Political contributions & lobbying activities

So Now What?

07

Task List

Key Governance Action Items to Get Ready for the IPO

- ✓ **Assemble public company board:** identify qualified independent directors and establish required board committees
- ✓ **Decide on important structural points,** including positioning generally on governance issues, board oversight structure & shareholder rights
- ✓ **Draft key documents:** certificate of incorporation, bylaws, governance guidelines, committee charters, code of conduct and other policies
- ✓ **Identify executive officers** who will be subject to public company restrictions (e.g., clawback, loan prohibition) and public disclosures (e.g., biographical, compensation, stock ownership, related party transactions)
- ✓ **Protect directors & officers** by adopting exculpation provisions, entering into indemnification agreements, purchasing D&O insurance
- ✓ **Build out key public company functions:** financial/SEC reporting, investor relations, public relations, internal audit, compliance, sustainability
- ✓ **Establish & augment controls:** disclosure controls and procedures, internal control over financial reporting, controls for voluntary disclosures
- ✓ **Consider other regulatory requirements & relevant stakeholder preferences,** as applicable
- ✓ **Don't forget about other tasks:** e.g., select state and exchange, build-out IR website, consider a board portal, identify a compensation consultant, etc.

Speaker Bios

08



Aaron Briggs

Partner / San Francisco

One Embarcadero Center, Suite 2600, San Francisco, CA 94111-3715

+1 415.393.8297

abriggs@gibsondunn.com

Aaron Briggs is a partner in Gibson Dunn’s San Francisco, CA office, where he works in the firm’s Securities Regulation & Corporate Governance practice group. Mr. Briggs’ practice focuses on advising public companies of all sizes (from pre-IPO to mega-cap), with a focus on technology and life sciences companies, on a wide range of securities and governance matters.

Before rejoining Gibson Dunn, Mr. Briggs served for five years as Executive Counsel - Corporate, Securities & Finance, at General Electric Company. His in-house experience—which included responsibility for SEC reporting and compliance, board governance, proxy and annual meeting, investor outreach and executive compensation matters, and included driving GE’s revamp of its full suite of investor communications (proxy statement, 10-K, earnings releases, and integrated report)—provides a unique insight and practical perspective on the issues that his clients face every day.

In 2023, Mr. Briggs was elected a Fellow of the American College of Governance Counsel, an organization of leading corporate governance lawyers from the US and Canada, and was inducted into the *Governance Intelligence* Hall of Fame. In 2016, *Corporate Secretary Magazine* named Mr. Briggs Governance Professional of the Year. Mr. Briggs’ work has also been recognized by Financial Executives International, ReportWatch, Sustainability Investment Leadership Council, and TheCorporateCounsel.net.

Mr. Briggs serves as Co-Chair of the Certified Corporate Governance Professional Oversight Commission for the Society for Corporate Governance and has been named a Transparency Advocate by RealTransparentDisclosure.com.

Mr. Briggs received his Juris Doctorate from the University of Chicago Law School in 2007, where he was a Kosmerl Scholar. He received his Bachelor of Arts with high honors from the University of Notre Dame in 2004.

EDUCATION

University of Chicago
Juris Doctor

University of Notre Dame
Bachelor of Arts



Hillary H. Holmes

Partner / Houston

811 Main Street, Suite 3000, Houston, TX 77002-6117

+1 346.718.6602

hholmes@gibsondunn.com

Hillary Holmes is Co-Chair of the firm's Capital Markets practice group and a member of the firm's Securities Regulation & Corporate Governance, Mergers & Acquisitions, and Energy & Infrastructure practice groups. Hillary also serves as co-partner-in-charge of the Houston office and as a member the firm's Executive Committee.

Hillary advises corporations, investment banks and institutional investors on long-term and strategic capital raising. She counsels boards of directors, special committees and financial advisors in M&A transactions, take privates and complex situations. She also regularly advises companies on securities laws, corporate governance and ESG issues. Hillary brings a deep expertise in the energy industry.

Chambers repeatedly ranks Hillary in the top tier for both energy capital markets and energy M&A / transactions, and as a premier lawyer for corporate counseling. *Law360* has twice selected her as an Energy MVP nationwide, *Hart Energy* named her one of the 25 Most Influential Women in Energy, *The National Law Journal* recognized her as a Capital Markets Trailblazer, *LawDragon 500* identifies her as a Leading Dealmaker in the US, *Texas Lawyer* named her a Most Effective Dealmaker and the Leading Woman in Energy, the *Houston Business Journal* named her a leading businesswoman, and her peers selected her as Corporate Lawyer of the Year in Houston.

Hillary is a member of the American Bar Association's Corporate Laws Committee, an officer of the Houston Chapter of the Society for Corporate Governance, an editor of Insights – The Corporate & Securities Law Advisor, a member of the Executive Council of the KBH Energy Center at the University of Texas, among other leadership positions.

Hillary received his Juris Doctorate from the University of Pennsylvania Law School in 2003, where she also received a Certificate in Public Policy from the Wharton School. She received her Bachelor of Arts, cum laude, from Duke University in 2003.

EDUCATION

University of Pennsylvania
Juris Doctor

Duke University
Bachelor of Arts



Lori Zyskowski

Partner / New York

200 Park Avenue, New York, NY 10166-0193

+1 212.351.2309

lzyskowski@gibsondunn.com

Lori Zyskowski is a partner in Gibson Dunn's New York office and Co-Chair of the firm's Securities Regulation & Corporate Governance practice group. Ms. Zyskowski advises public companies and their boards of directors on corporate governance matters, securities disclosure and compliance issues, shareholder engagement and activism matters, shareholder proposals, environmental, social and governance matters, and executive compensation practices.

Ms. Zyskowski advises clients, including public companies, their boards of directors, and board committees on corporate governance and securities disclosure matters, with a focus on fiduciary duties, oversight of enterprise risks, director independence, Securities and Exchange Commission reporting requirements, proxy statements, annual shareholders meetings, proxy advisory services, and executive compensation disclosure best practices. Ms. Zyskowski also advises on board succession planning and board evaluations and has considerable experience advising nonprofit organizations on governance matters. She was recognized as one of the 2024 *Lawdragon 500 Leading Dealmakers in America* and has been named by *Chambers USA* as a top Securities: Regulation attorney.

Before joining Gibson Dunn, for over a decade Ms. Zyskowski served as internal securities and corporate counsel at several large, publicly traded companies. Her in-house experience provides a unique insight and perspective on the issues that her clients face every day.

Ms. Zyskowski is a Fellow of the American College of Governance Counsel, an organization of leading corporate governance lawyers from the U.S. and Canada. She is a frequent speaker on governance, proxy and securities disclosure panels and is very active in the corporate governance community. She is a former member of the board of directors of the Society for Corporate Governance and previously served as the President of its New York Chapter.

She graduated from Columbia University School of Law in 1996 and was a Harlan Fiske Stone Scholar. Ms. Zyskowski received her undergraduate degree from Harvard University.

EDUCATION

Columbia University
Juris Doctor

Harvard University
Bachelor of Arts

GIBSON DUNN