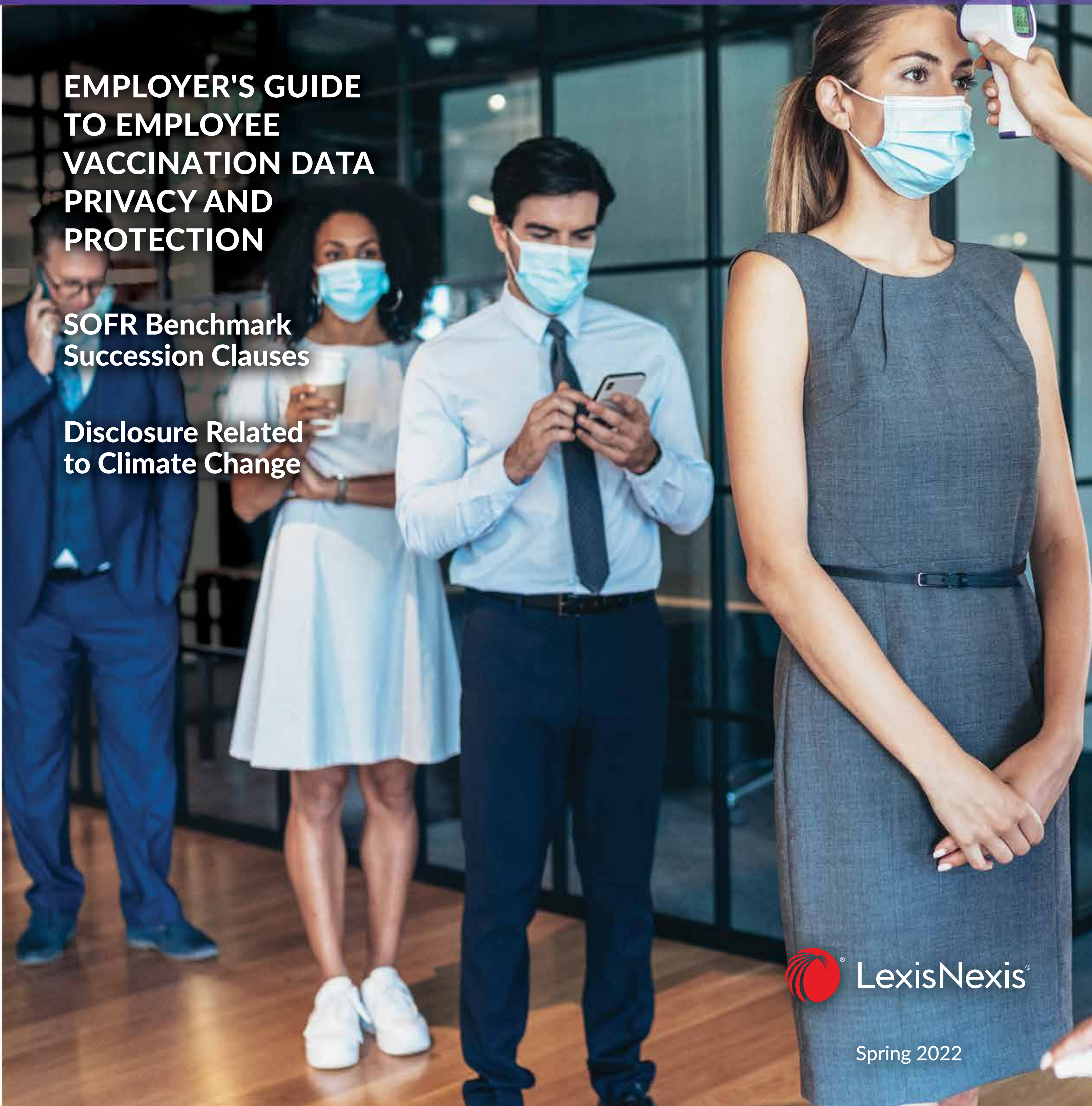
The PRACTICAL GUIDANCE Journal



EMPLOYER'S GUIDE TO EMPLOYEE VACCINATION DATA PRIVACY AND PROTECTION

SOFR Benchmark Succession Clauses

Disclosure Related to Climate Change

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Spring 2022

The PRACTICAL GUIDANCE Journal
SPRING 2022
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Contents SPRING 2022

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The
PRACTICAL GUIDANCE Journal

Spring 2022 (Volume 7, Issue 1)

MANAGING EDITOR Lori Sieron
DESIGNER Jennifer Shadbolt
MARKETING Adrian Green

CONTRIBUTING EDITORS

Banking Law	Matthew Burke
Bankruptcy	Mark Haut
Capital Markets	Victor Cohen
Corporate Counsel	Carrie Wright
Employee Benefits & Executive Compensation	Bradley Benedict
Finance	Robyn Schneider
Financial Services Regulation	Celeste Mitchell-Byars
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Real Estate	Kimberly Seib
Tax	Rex Iacurci
ASSOCIATE EDITORS	Maureen McGuire
	Mia Smith
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Introduction

SOME OF THIS YEAR'S TRENDIEST topics continue to be those that have been dominating the news for several years. LIBOR replacement, COVID-19 impacts, and climate change are topics continuing to make headlines as new developments in these important areas keep them in the forefront.

Now entering its third year, the coronavirus (COVID-19) pandemic means more adjustments for employers as they adapt workplaces and reinvent the way business is handled in safer ways for employees and customers. Learn more about the vaccine and testing rules promulgated by the Biden Administration, as well as health, safety, and return-to-work concerns, plus related wage and hour issues.

Determining whether to require vaccines or testing, then protecting that data, adds a new layer of responsibility and complexity for companies and employers. From classrooms to family rooms, the need for and efficacy of COVID-19 vaccine mandates pose serious questions. In the boardroom, the issues become even more complicated. Whether an employer voluntarily implements a mandate or does so to comply with government dictates, a host of privacy concerns come along with such actions. Read more about employer obligations and potential liabilities arising from the collection and storage of vaccination-related information.

Companies are embracing Environmental, Social, and Governance (ESG) trends in an effort to garner favor with consumers and investors and implement change for the better. Review these market trends relating to disclosures of climate change risks and mitigation by public companies, learn how companies disclose the ways in which climate change affects their operations, and get tips on preparing and enhancing those disclosures.

For years, the London Interbank Offered Rate (LIBOR) was the predominant benchmark interest rate used in credit agreements. LIBOR's reign essentially ended at the close of 2021, and now the Secured Overnight Financing Rate (SOFR) is the heir-apparent benchmark. Read about trends in benchmark succession clauses in recent credit agreements using SOFR and benchmark rates other than LIBOR.

Also in this edition, we bring you Market Trends information on post-employment restrictive covenants and de-SPAC transactions (acquisitions involving Special Purpose Acquisition Companies,) along with tips for using mediation to resolve construction disputes. We also introduce our first class of African Ancestry Network and Rule of Law Foundation fellows and the important projects they completed, designed to address systemic racism in the legal system while advancing the rule of law.

Our mission

The Practical Guidance Journal is designed to help attorneys start on point. This supplement to our online practical guidance resource, Practical Guidance, brings you a sophisticated collection of practice insights, trends, and forward-thinking articles. Grounded in the real-world experience of our 850+ seasoned attorney authors, The Practical Guidance Journal offers fresh, contemporary perspectives and compelling insights on matters impacting your practice.

The Practical Guidance Finance Team

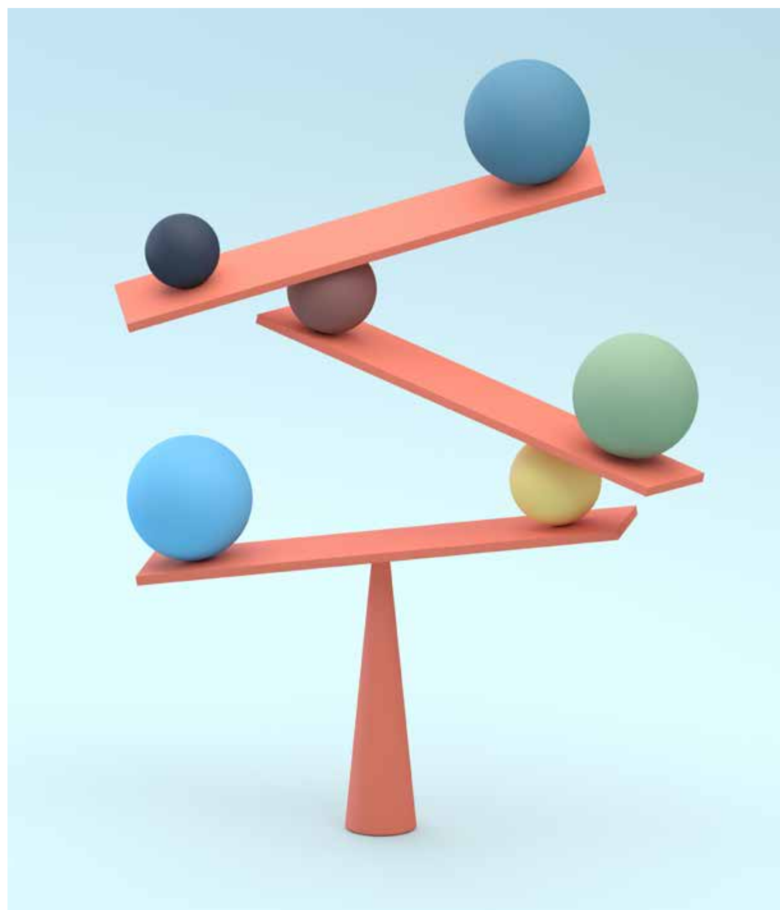
Determining Spread Adjustments for **SOFR Loans**

This article discusses credit spread adjustments related to the differential in rates between the London Interbank Offered Rate (LIBOR) and the Secured Overnight Financing Rate (SOFR).

WHILE LIBOR AND SOFR HISTORICALLY TREND TOGETHER, LIBOR is generally higher than SOFR. Due to the difference in these rates, the Alternative Reference Rates Committee (ARRC) has recommended that a credit spread adjustment be added to SOFR to compensate for the difference between the two rates. This article includes links to related practical guidance.

As LIBOR (also referred to as the Eurodollar Rate) began to be discontinued at the end of 2021, the ARRC established by the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York recommended SOFR term rates (Term SOFR) as a replacement for LIBOR. Since LIBOR rates have tended to be higher than SOFR rates, the ARRC recommended a spread adjustment based on the five-year historical median difference between LIBOR and SOFR. The problem is, with current interest rates near zero in the wake of the COVID-19 pandemic, the current actual or spot spread is much lower than the ARRC's recommended historical spread calculation. This has created a dilemma as to determining the credit spread adjustment for Term SOFR in a manner that is fair to both lenders and borrowers. A number of methods are being considered besides the ARRC-recommended spread adjustment, each with its own economic and operational pros and cons.

For credit agreements that include the ARRC-hardwired fallback language, when replacement occurs, generally LIBOR will be replaced with Term SOFR plus the ARRC historically based spread adjustment. However, for credit agreements that include an amendment approach to LIBOR replacement, do not include LIBOR succession provisions, or are for newly originated loans based on SOFR, the SOFR spread adjustment is now a point of negotiation. The spread



determination may be a holdup for lenders to shift from originating new loans using LIBOR to using SOFR. The ARRC spread adjustment may be fair based on historical LIBOR-SOFR spreads and may become fair in the future if the market normalizes.

Different approaches to pricing SOFR loans have emerged, including various methods of determining a credit spread adjustment or avoiding the spread and including any adjustment into the interest rate margin.

Currently, however, the ARRC's spread is significantly more than the spot spread between LIBOR and SOFR. Therefore, some borrowers are hesitant to enter into new loans based on SOFR and pay more in the present, hoping the spread will become fair down the road. The Loan Syndications and Trading Association (LSTA) and other market experts have analyzed a number of alternative approaches to determining the SOFR spread adjustment with considerations as to the impact on lenders on the one hand and borrowers on the other. With certain tenors of LIBOR ending at year-end 2021, followed by all tenors by June 30, 2023, the market needs to shift away from originating or continuing LIBOR loans, and determining the SOFR spread adjustment seems to be standing in the way of this shift.

Background

With LIBOR cessation beginning at the end of 2021, lenders and borrowers have incorporated alternative benchmark interest rate provisions into existing credit agreements and have begun to use alternative interest rates for new loans. SOFR has emerged as the front-runner interest rate for the replacement of LIBOR. To make it more conducive to replacing LIBOR, Term SOFR became available in July 2021 for one-, three-, and six-month tenors to parallel some LIBOR tenors. While LIBOR is a rate that is based on bank credit risk submitted by a panel of banks, SOFR is a risk-free rate based on banks' cost of borrowing. Accordingly, LIBOR is generally higher than SOFR. Due to this difference, a credit spread adjustment is needed to make SOFR-based loans more economically equivalent to LIBOR-based loans.

The ARRC obtained and studied input from various sources as to the methodologies for determining the spread adjustment. The ARRC settled on using the five-year historical median difference between LIBOR and SOFR, set on March 5, 2021, which includes the following recommended spreads:

- 11.448 basis points for one-month tenor
- 26.161 basis points for three-month tenor
- 42.826 basis points for six-month tenor

While LIBOR and SOFR have historically trended together, in times of market disruption, the difference between the two rates may widen or narrow. For example, during the 2008 financial crisis, the gap was as wide as 100 basis points. With current interest rates historically low, the spot spread for three-month LIBOR and Term SOFR is only approximately seven basis points. For new loans or amendments, borrowers may object to the ARRC-recommended spread given that it currently is considerably higher than the spot spread. While market experts predict that the spot spread will trend closer to the ARRC-recommended spread over time, this may not satisfy today's borrowers.

Recent Developments

Different approaches to pricing SOFR loans have emerged, including various methods of determining a credit spread adjustment or avoiding the spread and including any adjustment into the interest rate margin. The methodologies each have varying economic impact on lenders or borrowers and may or may not be operationally feasible for the parties to administer. The LSTA has published information and commentary on some of these approaches.[1] The ARRC also has published details regarding its recommendations.[2] The following is a brief summary of the main credit spread adjustment approaches under consideration.

ARRC-Recommended Spread Based on Five-Year Historical Median

The ARRC recommendation uses spreads for respective tenors based on the five-year historical median difference between LIBOR and SOFR set on March 5, 2021, by the ARRC:

- **Pros**. Historically, economically fair to lenders and borrowers over the long term and the predicted future
- **Cons**. Currently favors lenders economically, which may deter borrowers from entering new Term SOFR-based loans for now

1. *See* these LSTA publications and presentations: SOFR Spread Solutions: The Price of Imperfection; In Search of "Fair" Spread Adjustments for New SOFR Loans; and LIBOR-SOFR Spread Adjustments: Historical vs Current Levels Podcast. 2. *See* Summary of the ARRC's Fallback Recommendations, October 6, 2021.

Static Spot Spread at Point in Time

A spot spread is locked in based on the LIBOR-SOFR spread or a negotiated spot spread amount set at the current point in time (separate from the interest rate margin):

- **Pros**. May encourage borrowers to agree to base newly originated loans on Term SOFR to move away from LIBOR in a timely manner
- **Cons**. Favors borrowers economically, possibly for a term longer than the time for interest rates to normalize

Related Content

For an overview of the issues related to replacing LIBOR as the benchmark interest rate in loan documents, see

LIBOR REPLACEMENT RESOURCE KIT

For a description of how to draft or amend a credit agreement to replace LIBOR as the baseline reference interest rate, see

LIBOR TRANSITION TO SOFR IN CREDIT AGREEMENTS

For assistance in responding to a client's inquiry about the cessation of LIBOR, see

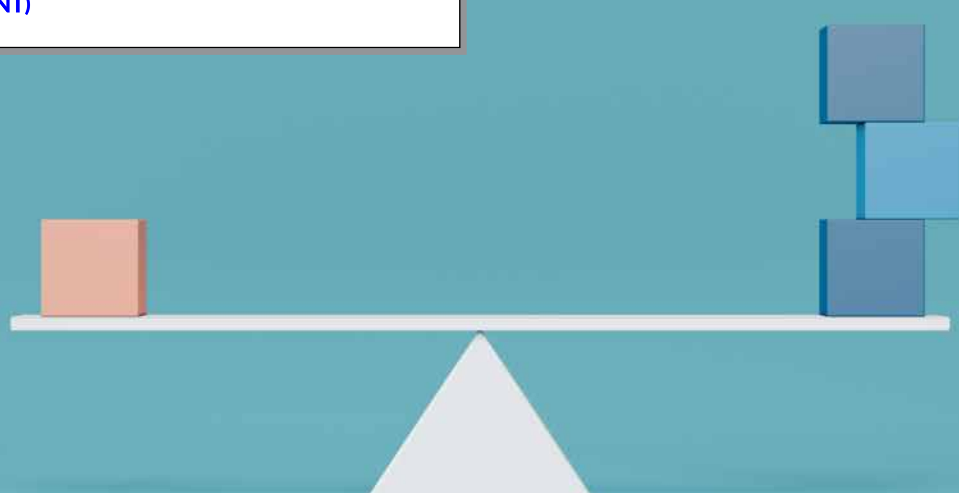
THE CLIENT ASKS: WHAT HAPPENS WHEN LIBOR ENDS?

For a discussion of provisions in credit agreements that allow for a transition to a replacement reference interest rate upon the cessation of LIBOR, see

MARKET TRENDS 2020/21: LIBOR SUCCESSION CLAUSES

For sample LIBOR replacement clauses, see

LIBOR REPLACEMENT CLAUSE (HARDWIRED), LIBOR REPLACEMENT CLAUSE (BILATERAL, HARDWIRED), and LIBOR REPLACEMENT CLAUSE (AMENDMENT)



No Spread Adjustment

Lenders may replace LIBOR with SOFR without any spread adjustment. The lenders and borrower may or may not negotiate an adjustment to the interest rate margin:

- **Pros.** Operationally simple to calculate by switching rates with no separate spread adjustment and may be economically neutral depending on negotiated interest rate spread
- **Cons**. Not likely to remain economically neutral over time as the market changes

Gradually Transition or Flip from Spot Spread to ARRC-Recommended Spread

The parties may begin with the spot spread and incorporate a transition to the ARRC-recommended five-year median spread, with the transition either gradually over time (i.e., one year) or flipping at complete LIBOR cessation in June 2023:

- **Pros**. Should not favor lender or borrower economically
- **Cons**. May be inconsistent and too operationally complex to administer and track, particularly if not adopted on a market-wide basis

Dynamic Spread

A dynamic spread changes with the real-time spread between LIBOR and SOFR:

- **Pros**. May be more economically fair as it would track with market reality
- **Cons.** Operationally may be difficult to administer, requiring decisions as to frequency of change, calculation methodology, and how to hedge

Action Items

Counsel should ensure that the documentation contains fallback rate provisions prior to discontinuation of LIBOR. Most credit agreements should already have provisions using either the hardwired approach or amendment approach to LIBOR succession with an alternate benchmark rate. If the documentation uses the ARRC-recommended spread adjustment to SOFR, the borrower may consider negotiating to delay when such rate will come into effect until June of 2023—when the ARRC-recommended spread is predicted to more closely track the difference between LIBOR and SOFR.

For existing loans providing an amendment approach to LIBOR succession having Term SOFR replacing LIBOR, or for newly originated loans based on Term SOFR, the issue of the credit spread adjustment for SOFR may be up for negotiation. The parties may be contemplating the approaches discussed in this article.

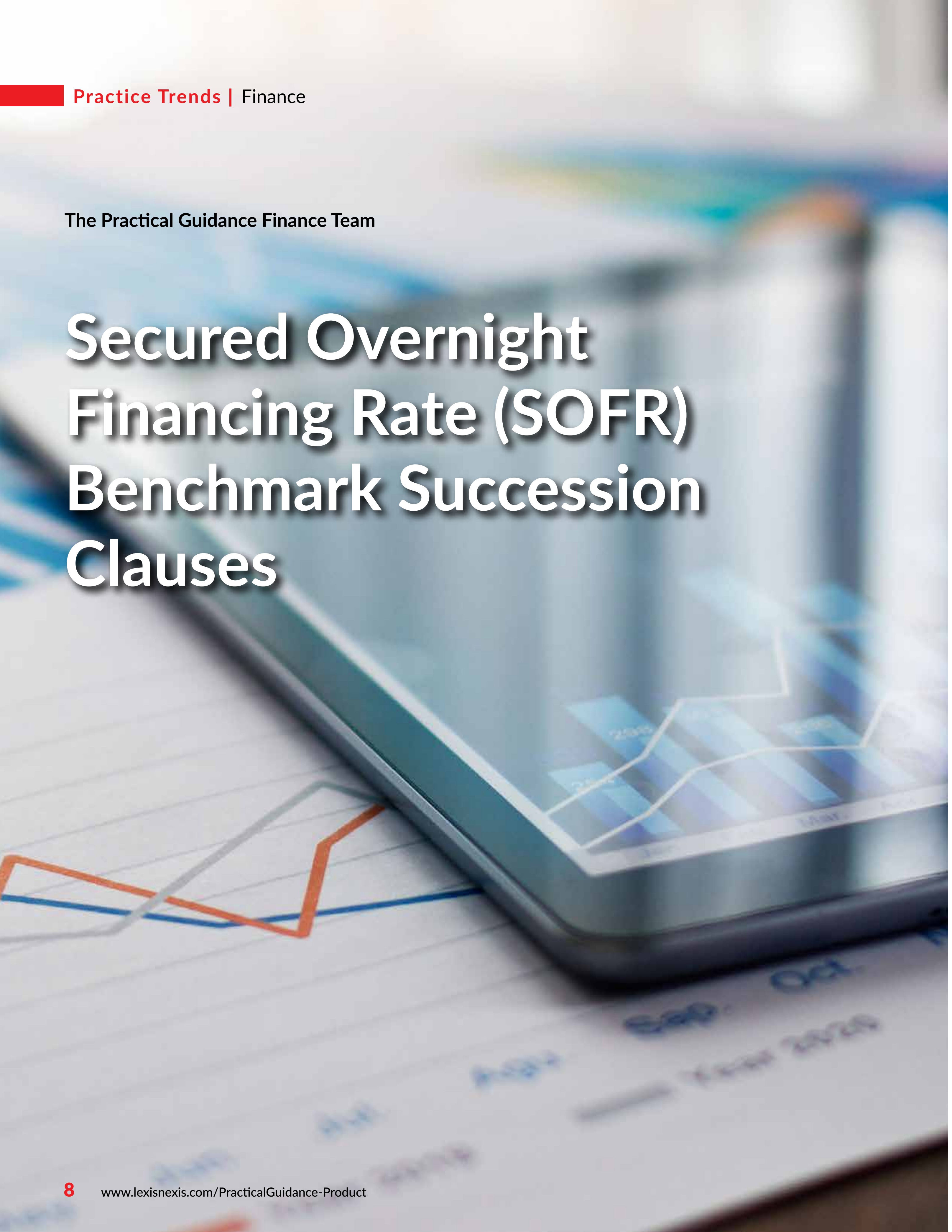
In addition, counsel should consider whether the ARRC-recommended spread adjustment or an alternate method for determining the spread adjustment is appropriate for the transaction, whether it will result in an economically equivalent rate, and whether it is operationally feasible to administer the parties' preferred method. Certain large lenders may have additional concerns regarding the impact its approach has on the overall market or other aspects of its business.

Finally, counsel should monitor the market and determinations of interest rates and spread adjustments, particularly over year-end 2021.

Looking Ahead

With the push to transition away from LIBOR and to stop originating new loans using LIBOR as of year-end 2021, lenders and borrowers need to resolve how they will determine the SOFR spread adjustment—assuming SOFR remains the front-runner rate for replacing LIBOR. Perhaps the market will overwhelmingly decide to use one methodology or use the ARRC-recommended spread more or less by default. Or, perhaps, multiple methodologies will be used throughout the market in the near future during the transition, which may create other issues due to a lack of market convention. The market may change or normalize prior to the final cessation of LIBOR in June 2023, which could render the spread determination less of an issue. In any event, practitioners should continue to monitor the approach to determining the SOFR spread adjustment to best advise their lender and borrower clients.

RESEARCH PATH: *Finance > Trends & Insights > Articles*



The Practical Guidance Finance Team

Secured Overnight Financing Rate (SOFR) Benchmark Succession Clauses

This article discusses trends in benchmark succession clauses in recent credit agreements using benchmark rates other than the London Interbank Offered Rate (LIBOR). Credit agreements typically provide for replacing the benchmark interest rate used in the agreement under certain circumstances.

CREDIT AGREEMENTS ORIGINATED AT THE END OF 2021 and into 2022 are using benchmark interest rates other than LIBOR, with the Secured Overnight Financing Rate (SOFR) being the frontrunner for replacing LIBOR. These credit agreements contain benchmark replacement setting clauses (also sometimes referred to as reference rate replacement clauses) in the event the SOFR term rates (Term SOFR) or the current benchmark needs to be replaced for various reasons.

Benchmark replacement clauses in credit agreements typically set forth the triggers for replacement of the benchmark rate, the replacement rate or waterfall of potential replacement rate options, the required level of consent of the parties, a provision for making conforming changes to the loan documents, a clause allowing changes to an interest rate tenor without changing the benchmark, and definitions needed to implement the benchmark replacement clause. Such clauses generally provide for replacing the benchmark interest rate in the event the benchmark administrator ceases publication of such rate or such benchmark is no longer representative of the market. If a replacement rate is not implemented, loans at the affected rate convert to the base rate. The base rate has been historically always higher and not desired by borrowers for other than short-term financing.

In the years leading up to the cessation of LIBOR, benchmark replacement setting clauses were focused on replacing LIBOR. The triggering events were based on the cessation of LIBOR, and the provisions were typically either hardwired (automatic upon the trigger) or required an amendment. With new credit agreements containing SOFR or other alternative rates as the benchmark, the benchmark replacement setting clauses have also shifted to provisions not involving LIBOR. While not as critical as when replacing LIBOR due to cessation, benchmark replacement clauses remain relevant in the event that SOFR, or whatever rate is used in a credit agreement, does not turn out to be an available or representative benchmark.

Background

With the cessation of some tenors of LIBOR at the end of 2021 and all tenors by July 1, 2023, lenders and borrowers have had to transition from LIBOR to another rate. The Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York established the Alternative Reference Rate Committee (ARRC) to recommend and promulgate an alternative rate. The ARRC has settled on SOFR as the recommended replacement for LIBOR.

Initially, SOFR was offered as a daily rate, but as of July 2021, Term SOFR is a forward-looking term rate that more closely matches the tenors of LIBOR.

LIBOR succession clauses in credit agreements operated to replace LIBOR with a new benchmark either automatically without further consent (hardwired approach) or through agreement on an amendment (amendment approach). Through the operation of LIBOR succession clauses, most existing credit agreements have shifted to SOFR as the new benchmark. Likewise, new credit agreements are emerging with Term SOFR as the benchmark. So rather than LIBOR succession clauses, new credit agreements contain benchmark replacement setting clauses or reference rate replacement clauses, with Term SOFR as the initial benchmark or reference rate. These clauses address the circumstances under which the benchmark needs to be replaced and the procedure for replacing the benchmark or reference rate.

Recent Developments

Despite the shift away from LIBOR and the critical importance of benchmark replacement setting clauses, these clauses remain important in the event the market does not embrace SOFR or other rates now being used in credit agreements, or if the availability of such rates or their tenors changes. New credit agreements at the end of 2021 and into 2022 contain benchmark replacement settings clauses that begin with Term SOFR (or another agreed rate) as the benchmark.

The Loan Syndications and Trading Association (LSTA) has promulgated a concept credit agreement using Term SOFR as the interest rate rather than LIBOR. The LSTA's Term SOFR Concept Document dated August 25, 2021, offers example language for a benchmark replacement setting provision with Term SOFR as the initial benchmark. The LSTA's benchmark replacement clause offers two options, depending on the benchmark replacement rate alternatives—one is an amendment approach and the other is a hybrid hardwired approach with a negative consent amendment provision. The first option, upon a benchmark transition event, permits the administrative agent and the borrower to amend the credit agreement with a benchmark replacement and adjustment that they agree upon, considering recommendations of any relevant governmental authority and market conventions. In the second option, upon a benchmark transition event, the benchmark automatically switches to daily simple SOFR without any amendment, action, or consent. However, if daily simple SOFR

is not available, then the benchmark replacement is a rate and adjustment agreed upon by the administrative agent and the borrower through an amendment, considering recommendations of any relevant governmental authority and market conventions. Under the latter part of the second option, notice is given to the lenders of such benchmark replacement and the credit agreement is amended with the new rate unless the required lenders object in writing within the time specified.

The LSTA definition of benchmark transition event for purposes of triggering a benchmark replacement means the occurrence of one or more of the following events:

- The administrator of the benchmark publicly announces that it will cease to provide all tenors of the benchmark rate (and there is no successor administrator).
- A regulatory body that has authority over the administrator publicly announces that the administrator will cease to provide all tenors of the benchmark (and there is no successor administrator).
- The administrator or regulatory body that has authority over the administrator publicly announces that all tenors of such benchmark will no longer be representative, in compliance with, or aligned with the International Organization of Securities Commissions Principles for Financial Benchmarks.

The remaining terms and definitions of the LSTA benchmark replacement settings provision cover conforming changes to the loan documents, the standards for the administrative agent in making determinations, unavailability of a tenor of the benchmark, and procedure during a benchmark unavailability period.

The following are some terms that are common to many of the recent benchmark replacement setting clauses appearing in new credit agreements.

Triggering Events

Benchmark replacement typically is triggered upon the occurrence of certain events that are commonly enumerated in the definition of benchmark transition event or a similar term. Trigger events include:

- A public statement or publication that the administrator of the benchmark has or will cease to provide all available tenors of such benchmark, permanently or indefinitely, and there is no successor administrator
- A public statement or publication by the regulatory body with authority over the administrator of the benchmark, the Federal Reserve Board, the Federal Reserve Bank of New York, an insolvency official, resolution authority, court, or entity with insolvency or resolution authority with jurisdiction over the administrator states that the administrator will cease to provide all tenors of the benchmark and there is no successor administrator
- A public statement or publication by the regulatory body over the administrator of such benchmark announces that all available tenors of such benchmark are no longer representative of the market

Typically, benchmark replacement setting clauses include a provision permitting the administrative agent to make changes to the credit agreement or other loan documents to effect the benchmark replacement.

If one of the enumerated benchmark transition events occurs, it gives rise to the benchmark replacement.

Benchmark Replacement

The operative part of the benchmark succession setting clause is the provision for replacing the benchmark rate. This occurs upon one of the triggering events, as discussed above. The benchmark replacement terms vary as to which rate will be the replacement and whether replacement occurs automatically or requires an amendment and/or some level of consent. For credit agreements using an amendment approach, the credit agreement defines the benchmark replacement as a rate to be agreed upon between the administrative agent and the borrower, considering recommendations of any relevant government authority or market conventions. Such an amendment may then require a certain level of consent of the lenders, as for any credit agreement amendments. Other credit agreements will provide a waterfall of potential replacement rates in a specified order, with the first rate that the administrative agent can determine being the effective replacement. These credit agreements are using a hardwired approach, provided that the waterfall typically includes a general rate to be agreed upon by amendment as the last potential rate. In such event, the amendment may require some level of consent of the required lenders under the credit agreement, which may be negative consent as provided in the LSTA's option in the concept credit agreement. For credit agreements having Term SOFR as the initial benchmark and using the waterfall approach, daily simple SOFR is commonly the first alternate benchmark rate. And, if daily simple SOFR cannot be determined by the administrative agent, then an amendment is needed.

As a side note, a replacement benchmark may require a spread adjustment to make the replacement rate equivalent to the benchmark being replaced. The ARRC has recommended spread adjustments for the initial transition from LIBOR to Term SOFR. In addition, there may be a need for a spread adjustment between Term SOFR and daily simple SOFR, or any benchmark and its replacement. The spread adjustment should be included in the benchmark succession setting clause or its related definitions.

Benchmark Replacement Conforming Changes

Typically, benchmark replacement setting clauses include a provision permitting the administrative agent to make changes to the credit agreement or other loan documents to effect the benchmark replacement. The changes include technical, administrative, or operational changes, such as to definitions that may be needed to implement the change in the benchmark rate. Such changes are made by the administrative agent without the requirement of any consent or action of any other party.

Standards for the Administrative Agent

Most benchmark replacement setting clauses contain a provision addressing the notice requirements and standards for decisions and determinations of the administrative agent. Since the administrative agent may be exercising discretion in the benchmark replacement process, this type of provision sets forth the standards for such discretion by the administrative agent. The administrative agent typically must give notice of benchmark replacement and conforming changes. In addition, the decisions, determinations, or elections of the administrative agent under the benchmark replacement setting provision, including with respect to a tenor, rate, spread adjustment, occurrence of an event, or decision to act or not, typically are conclusive and binding absent manifest error and may be made in its sole discretion, without consent, except as expressly required in the provision.

Unavailability of a Tenor of a Benchmark

Benchmark replacement setting clauses commonly include a provision allowing the administrative agent to change the definition of interest period if a particular tenor of a term rate becomes unavailable, but other tenors are still available. A tenor may become unavailable (1) if the tenor for the benchmark is not displayed on a screen or information service used by the administrative agent to determine the benchmark or (2) if the regulatory supervisor for the administrator of the benchmark publicly announces that any tenor for the benchmark will not be representative of the market. This allows the administrative agent to revise the offered interest periods with respect to a term rate (including Term SOFR) without needing further consent of the other parties and without replacing the benchmark rate in its entirety.

Definitions Relating to Benchmark Replacement

The benchmark replacement setting clause may include some terms that are not already defined in the credit agreement and need to be added with appropriate definitions for use in the clause. Such defined terms may include "Benchmark," "Benchmark Replacement," "Benchmark Replacement Date Adjustment," "Benchmark Transition Event," and "Benchmark Unavailability Period." These defined terms are fairly standard but should be tailored to the specific transaction.

The terms "Benchmark" and "Benchmark Replacement" should be defined as the initial benchmark, currently predominantly Term

SOFR, and then either a replacement that is to be agreed upon between the administrative agent and the borrower or a waterfall of replacements in the order that they may be determined. The term "Benchmark Transition Event" is key to defining the triggering events, as described above, for when the benchmark rate will be replaced. Additional terms may be needed or revised to accommodate the initial benchmark rate and any spread adjustment and to fit the transaction.

One additional consideration, many credit agreements expressly exclude swap agreements from the definition of loan documents for purposes of the benchmark replacement provisions. The parties may determine that the swap agreements should have their own fallback rate provisions, rather than using the benchmark replacement from the credit agreement.

Action Items/Looking Ahead

When amending existing credit agreements, practitioners should amend the benchmark succession clause to reflect Term SOFR or another rate as the new initial benchmark under the credit agreement and to shift away from the focus on LIBOR succession. For new credit agreements, consider the appropriate benchmark replacement setting clause to include and reference the initial benchmark for the agreement. The parties may want the amendment approach to allow flexibility and have input in the event that the benchmark must be replaced. Or, if more certainty is desired, the hybrid hardwired approach, as discussed in the LSTA's second option, may be included for an automatic replacement with a fallback to an amendment needing negative consent of the required lenders. In any event, it is still important to include a benchmark succession clause in credit agreements, even now that most agreements have shifted away from LIBOR, to cover potential events resulting in the benchmark becoming unavailable or nonrepresentative of the market. L

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Related Content

For an overview of replacing LIBOR as the benchmark interest rate in loan documents, see

LIBOR REPLACEMENT RESOURCE KIT

For a video highlighting the transition of LIBOR clauses in credit agreements and its implications in the market, see

LIBOR TRANSITION VIDEO

For a comparison of the base rate and the LIBOR/Eurodollar rate, see

INTEREST RATE PROVISIONS IN CREDIT AGREEMENTS

For sample definitions clauses to be used in credit agreements, see

DEFINITIONS CLAUSES (CREDIT AGREEMENT)

For a description of how to draft or amend a credit agreement to replace LIBOR as the baseline reference interest rate, see

LIBOR TRANSITION TO SOFR IN CREDIT AGREEMENTS

For more information on credit spread adjustments related to the differential in rates between LIBOR and SOFR, see

DETERMINING SPREAD ADJUSTMENTS FOR SOFR LOANS

For a discussion of provisions in credit agreements that allow for a transition to a replacement reference interest rate upon the cessation of LIBOR, see

MARKET TRENDS 2020/21: LIBOR SUCCESSION CLAUSES

Richard D. Glovsky LOCKE LORD LLP

Guidance for Employers on **Vaccination and Testing Rules**

This article addresses the COVID-19 vaccine and testing rules promulgated by the Biden Administration. It is an excerpt from the practice note Pandemic Flu/Influenza/Coronavirus (COVID-19): Key Employment Law Issues, Prevention, and Response.

PRACTICAL GUIDANCE SUBSCRIBERS MAY VIEW THE full guidance, which answers health and safety related return-to-work questions for employers, and includes information on wage and hour issues, telecommuting guidance, traveling employees, labor-management relations, and summarizes recent related legislation.

Vaccination Requirements under the Biden Administration for Federal Contractors and Subcontractors

On September 9, 2021, President Biden issued Executive Order 14042,[1] after which the Safer Workplace Task Force issued its COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (Guidance).[2] However, on November 30, 2021, a federal district court blocked the COVID-19 vaccine mandate for federal contractors from taking effect in Kentucky, Ohio, and Tennessee.[3] On December 7, 2021, a federal judge issued a nationwide injunction blocking the COVID-19 vaccine mandate for federal contractors from going into effect, ruling the Biden administration had likely exceeded its procurement authority.[4]

The Guidance required covered federal contractors and subcontractors to ensure that by December 8, 2021, their covered employees were fully vaccinated for COVID-19.

Exceptions are limited to valid requests for medical or religious exemptions. Federal contractors and subcontractors also are required to make sure that employees and visitors adhere to masking and social distancing rules.

The Guidance does not apply to contracts existing prior to October 15, 2021, though it does apply when options are exercised or extensions are granted. Contract solicitations between October 15 and November 14, 2021, must include Guidance requirements. Contracts awarded after November 14, 2021, must include the requirements set out in the Guidance. Contracts and subcontracts of $250,000 or less are excluded as are contracts for the provision of products, among others.

The definition of a covered contractor is a broad one, including those with employees who work in connection with a covered contract or at a covered contractor's workplace. An entire workplace location may be covered even if the contractor or subcontractor only occupies a portion of the facility.

All non-exempt employees had to be vaccinated by December 8, 2021. In addition, all employees and others on contractor or subcontractor premises must comply with the CDC's masking and social distancing guidance. Fully vaccinated individuals are not required to socially distance. Employers may avoid the masking and social distancing mandates by being located in a moderate or low transmission rate location for two successive weeks. However, even in locations of moderate or low transmission rates, everyone on premises in close contexts (e.g., open floor plan spaces) must wear masks. Exceptions apply in several contexts, including when eating or drinking, in closed offices with floor to ceiling walls, or when employees have difficulty breathing. Contractors and subcontractors are required to designate one or more employees as Designated COVID-19 Coordinators to manage compliance.

OSHA COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS)

On November 4, 2021, OSHA issued its COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS) effective the next day.[5]

KEY UPDATE: On January 13, 2022, a six-justice majority of the United States Supreme Court ruled that OSHA's ETS exceeded its statutory authority and therefore stayed the implementation of the ETS finding that the Secretary of Labor, who oversees OSHA, lacked the authority to issue the ETS.[6] Quoting from a 2021 opinion of the Court, it reasoned that "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." Noting that the OSHA mandate affecting employers with more than 100 employees (except those subject to other mandates such as federal government employees and those subject to the Centers for Medicare & Medicaid Services (CMS) mandate issued by the Secretary of Human Services applicable to facilities that receive Medicaid and Medicare funding) would impact approximately 84 million Americans, the majority concluded that when Congress enacted the Occupational Safety and Health Act in 1970, it did not clearly express that OSHA could issue an ETS of that magnitude. While it recognized that OSHA may regulate "occupation-specific risks," the Court noted that it had never previously adopted a "broad public health regulation of this kind."

Three members of the majority (Justices Gorsuch, Thomas, and Alito), in a concurring opinion, offered that the major questions doctrine lent further support to the majority's ruling. In other words, those three justices expressed the view that in a matter of the magnitude of the OSHA vaccination and testing emergency mandate, not only must Congress speak definitively, but, if it does not, the matter is left to state and local governments to determine.

The dissenters (Justices Sotomayor, Breyer, and Kagan) feverishly pointed to the toll COVID-19 had leveled on the country, contending that the ETS "perfectly fits the language of the applicable statutory provision" and that the Court should defer to the agency's deep-seated wisdom. It pointed to the "legal standard governing a request for relief pending appellate review" (i.e., that the "applicant must show (1) that 'their claims are likely to prevail,' (2) 'that denying them relief would lead to irreparable injury,' and (3) 'that denying them relief would not harm the public interest'"), suggesting that in this instance the public interest is paramount.

Now the OSHA ETS is stayed pending a ruling on the merits on an appeal from the U.S. Court of Appeals for the Sixth Circuit and a possible writ of certiorari on the merits of the case to the Supreme Court to review again. Even if the matter continues to be litigated, it is unlikely that the decision on the merits will be any different than the January 13, 2022, Supreme Court decision to stay the OSHA ETS. Certainly the merits will not be reached in the near future, and a more narrow ETS along the lines the majority suggested it would permit is unlikely to surface soon, if at all, meaning for the unforeseen future, most large employers will not need to concern themselves with OSHA's ETS.

Below is a review of the caselaw on the OSHA vaccination or testing ETS prior to the Supreme Court's decision.

On the effective date of the OSHA ETS, the U.S. Court of Appeals for the Fifth Circuit issued a stay, grinding the ETS to a halt at least within the jurisdiction of that circuit in Mississippi, Louisiana, Texas, and the Canal Zone.[7] On November 12, 2021, the Fifth Circuit issued an order staying enforcement

1. *See* 3 C.F.R. Executive Order 14042. 2. https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf. 3. Commonwealth v. Biden, 2021 U.S. Dist. LEXIS 228316 (E.D. Ky. Nov. 30, 2021). 4. *See* Ga. v. Biden, 2021 U.S. Dist. LEXIS 234032 (S.D. Ga. Dec. 7, 2021).

5. *See* 86 Fed. Reg. 61,402 (Nov. 5, 2021). 6. Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661 (2022). 7. BST Holdings v. OSHA, 2021 U.S. App. LEXIS 33117 (5th Cir. Nov. 5, 2021).

and implementation of OSHA's ETS pending further judicial review.[8] At the time, proceedings in all but one of the U.S. Courts of Appeals raised similar issues. Shortly after the Fifth Circuit's action, all of those various cases were consolidated in the U.S. Court of Appeals for the Sixth Circuit. On December 17, 2021, a three-judge panel of the Sixth Circuit, in a 2-1 decision, vacated the Fifth Circuit's hold on the mandate.[9] OSHA then promptly gave companies until January 10 to comply with the Biden Administration's COVID-19 vaccinate-or-test rule and until February 9 before issuing citations for violating the regulation's testing requirement. According to the Labor Department's statement that followed the Sixth Circuit appeals court decision reviving the measure, the enforcement grace period hinges on employers "exercising reasonable, good faith efforts to come into compliance with the standard."

On December 20, 2021, the Supreme Court received appeals asking it to freeze the Sixth Circuit's decision or to bypass the normal appeals process and immediately hear arguments on the case.

Coverage

If upheld by the courts, the ETS would apply to employers with 100 or more employees at any time after November 5, 2021. All employees, including seasonal and temporary ones, count. Workplaces covered by the federal contractor vaccination mandate[10] or the June 2021 ETS for healthcare providers[11] generally are exempt from the ETS, but only at covered worksites. Exclusions otherwise are narrow: workplaces where there are no other co-workers or customers, employees who work remotely, or employees who work exclusively outdoors.

8. *See* BST Holdings v. OSHA, 2021 U.S. App. LEXIS 33698 (5th Cir. Nov. 12, 2021) ("It is further ordered that OSHA take no steps to implement or enforce the Mandate until further court order."). 9. Mass. Bldg. Trades Council v. United States DOL (In re MCP No. 165), 2021 U.S. App. LEXIS 37349 (6th Cir. Dec. 17, 2021). 10. *See* COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors. 11. COVID-19 Healthcare ETS.

Employers must provide up to four hours of paid time off per vaccination dosage and reasonable paid leave to recover from vaccination side effects. Paid time off does not apply to non-working hours during which an employee chooses to be vaccinated.

Requirements

If effective, covered employers are required to adopt a policy that mandates vaccinations for all employees except those granted a religious belief or disability exemption. Alternatively, employers may pronounce a policy permitting anyone not vaccinated by January 4, 2022, to provide proof of regular testing for COVID-19. The ETS permits employers to apply either policy option to different locations. OSHA has posted policy templates on its ETS webpage.[12]

The ETS also requires confidential recordkeeping of proofs of vaccination and an employee roster with each employee's vaccination status. An employee who has lost his or her vaccination card may satisfy the proof requirement with an attestation including mandatory representations.

Employers must provide up to four hours of paid time off per vaccination dosage and reasonable paid leave to recover from vaccination side effects. Paid time off does not apply to non-working hours during which an employee chooses to be vaccinated. OSHA presumes two days is reasonable. Employers may require employees to utilize sick leave or paid time off (PTO) if they have a PTO policy.

If an employer elects to allow testing, employees who attend the worksite at least once in a seven-day period must be tested once every seven days. Employees who report less frequently must be tested within seven days prior to returning to the workplace. Self-administered tests are unacceptable unless observed by the employer or a telehealth provider. The ETS does not require employers to pay for testing, but some states (e.g., California and Illinois) do.

12. COVID-19 Vaccination and Testing ETS.

Unvaccinated employees are required to mask unless alone in a closed room, while eating or drinking, or for identification purposes.

Employers are required to advise employees, *inter alia*, about the ETS, the policies and procedures to implement it, protections against retaliation, and information about criminal penalties for providing false information. Employers also are required to report to OSHA COVID-19 hospital admissions within 24 hours of becoming aware of them and fatalities within eight hours.

The ETS preempts conflicting state laws.

CMS Emergency Regulations

The CMS released emergency regulations on November 4, 2021, requiring covered healthcare facilities to establish a policy ensuring staff had received the first dose of a two-dose vaccine or a one-dose vaccine prior to providing any care, treatment, or other services by December 5, 2021. All staff had to be fully vaccinated by January 4, 2022. There are exemptions based on recognized medical conditions or religious beliefs, observances, or practice.[13]

KEY UPDATE: On January 13, 2022, a majority of five justices of the U.S. Supreme Court upheld CMS's emergency regulations, finding that there was ample authority for it to issue the emergency regulation, essentially clearing the way for it to apply nationwide.[14] Unlike in the Court's determination that the OSHA ETS applicable to most U.S. employers of 100 or more employees was invalid, the majority in this case found that statutory enactment of the Medicare and Medicaid programs provided ample context for the CMS's vaccination mandate issuance. It went on to emphasize that the Secretary of Health and Human Services' edict was nor arbitrary or capricious and that he was not required to have conferred with the states beforehand.

The dissenters (Justices Thomas, Gorsuch, Alito, and Barrett), in two opinions, contended that the statutory authority upon which the majority relied was not sufficiently specific and because the CMS's mandate was an interim rule, the government was compelled to follow the ordinary notice and comment procedure "before placing binding rules on millions of people . . . ."

13. *See* 86 Fed. Reg. 61,555 (Nov. 5, 2021).

Related Content

For additional information and analysis on developments on this issue, see

THE FEDERAL ROW OF VACCINATION AND TESTING IN THE WORKPLACE STATE LAW SURVEY

For an overview of materials on COVID-19 covered in many practice area offerings in Practical Guidance, see

CORONAVIRUS (COVID-19) RESOURCE KIT

For guidance as to whether an employer may require its workforce to be vaccinated for COVID-19 and whether employees can properly avoid being vaccinated, see

COVID-19 VACCINATION: KEY EMPLOYMENT LAW ISSUES

For a checklist that highlights key considerations for private employers to prepare for and respond to COVID-19, influenza, and other future pandemic outbreaks, see

PANDEMIC FLU/INFLUENZA/CORONAVIRUS (COVID-19) PREVENTION, RESPONSE, AND RETURN TO WORK CHECKLIST (BEST PRACTICES FOR EMPLOYERS)

For a COVID-19 testing policy that governs employee testing and the consequences of a positive test result, see

COVID-19 TESTING POLICY

For employer policies requiring or strongly encouraging employees to obtain the COVID-19 vaccine so as to minimize transmission of the virus in the workplace, see

CORONAVIRUS (COVID-19) VACCINE POLICY (MANDATORY) and CORONAVIRUS (COVID-19) VACCINE POLICY (NON-MANDATORY)

For a collection of federal, state, and major local employment laws addressing the COVID-19 pandemic, see

CORONAVIRUS (COVID-19) FEDERAL AND STATE EMPLOYMENT LAW TRACKER

Unlike the vaccine and testing ETS issued by OSHA, the CMS mandate remains the law of the land. Accordingly, all entities that receive Medicare and Medicaid funding now must comply. It remains to be seen when CMS will require the first dose of a two-dose vaccine or a one-dose vaccine to be administered and the date by which all staff must be fully vaccinated.

Below is a review of the caselaw on the CMS mandate prior to the Supreme Court's decision.

On November 29, 2021, a federal court in the Eastern District of Missouri blocked CMS from enforcing the mandate in 10 states: Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming.[15] However, on December 15, 2021, the U.S. Court of Appeals for the Fifth Circuit[16] stayed a nationwide injunction put into place by the Western District of Louisiana[17] on Nov. 30, 2021. Although 14 states were parties to the case, the district court had applied its injunction as to any state not a party to the lawsuit that had not been enjoined by the Eastern District of Missouri's Nov. 29 decision. The Fifth Circuit's ruling trimmed the injunction to those 14 states. Thus, the prohibition on enforcement of the CMS vaccine mandate remains in effect in Louisiana, Montana, Arizona, Alabama, Georgia, Idaho, Indiana, Mississippi, Oklahoma, South Carolina, Utah, West Virginia, Kentucky, and Ohio. The CMS vaccine mandate is also still enjoined for the time being in the 10 states litigating in the Eastern District of Missouri: Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming.

Practical Guidance subscribers may access the full practice note, Pandemic Flu/Influenza/Coronavirus (COVID-19): Key Employment Law Issues, Prevention, and Response, for additional guidance.

***Richard D. Glovsky** handles significant employment-related litigation, including class actions, wage and hour issues, and discrimination and retaliation claims. Most significantly, he has become a trusted adviser and general counsel to various companies and their senior executives, including conducting numerous training programs. He also prosecutes cases for financial services, healthcare, hospitality companies, and other businesses to protect their trade secrets and to prevent former employees from violating non-competition and non-solicitation obligations. Mr. Glovsky has developed a niche advising clients on Enterprise Risk Management programs and Own Risk and Solvency Assessment reports.*

14. Biden v. Missouri, 142 S. Ct. 647 (2022). 15. Missouri v. Biden, 2021 U.S. Dist. LEXIS 227410 (E.D. Mo. Nov. 29, 2021). 16. Louisiana v. Becerra, 2021 U.S. App. LEXIS 37035 (5th Cir. Dec. 15, 2021). 17. Louisiana v. Becerra, 2021 U.S. Dist. LEXIS 229949 (W.D. La. Nov. 30, 2021).

Karen Mandelbaum, RyAnn M. Hooper & Susan Gross Sholinsky
EPSTEIN BECKER GREEN, P.C.

Employer's Guide to Employee Vaccination Data Privacy and Protection

This article will explore the privacy concerns created when implementing a mandatory vaccine policy and collecting vaccination status information from employees and others.

Introduction

The return-to-work race is well underway. While many employees grapple with their level of tolerance for a hybrid or full in-person workplace model, employers are seeking ways to entice employees back to the workplace safely. Some employers are electing a vaccination-only workforce, whether required by government mandates or not. Others are endeavoring to manage a mixed workforce of vaccinated and unvaccinated workers.

As noted above, one of the most common questions U.S. employers are pondering at the present time (beyond physical solutions for reducing the spread of COVID-19) is whether an employer can, should, or must implement a mandatory vaccine policy for returning employees. For the most part, mandatory vaccine policies are permissible and, many would argue, necessary to reduce the spread of COVID-19 in the workplace; however, implementation of a mandatory vaccine policy creates myriad considerations, including those around privacy and data security.

For example, once you ask an employee about their vaccination status, should (or must) the company then request proof of vaccination? Should the company request the same information from visitors, such as clients, customers, and vendors? If an employer collects vaccination records, what does the company do with the data collected? How does the company store the data? What safeguards does the company need to have in place to protect the data? Can the company share this data to make customers, visitors, and potential recruits to the business more comfortable about the safety of its work environment?

Employment Law Considerations for Mandatory Vaccine Policies

Equal Employment Opportunity Commission (EEOC) Guidance and the Americans with Disabilities Act (ADA)

Under the ADA,[1] as amended by the Americans with Disabilities Amendments Act[2], covered employers may not make disability-related inquiries or require employees to get a medical examination unless the inquiry or examination is "job-related and consistent with business necessity."[3] On March 17, 2020, the EEOC released *What you Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws*.[4] This guidance addresses several topics, including return to the workplace and vaccinations, stating that federal Equal Employment Opportunity laws do not prevent an employer from requiring that all employees that physically enter the workplace be vaccinated against COVID-19.[5] The ADA, however, restricts when and how much medical information an employer may obtain from employees. Further, the guidance makes clear that simply requesting proof of vaccination from an employee is not a disability-related inquiry under the ADA.[6] Consequently, absent any state or local law providing otherwise, an employer may permissibly request or require production of documentation that validate employees' vaccination status.

As for non-employees who seek to enter an employer's premises, several legal obligations and restrictions could be implicated. First, with respect to individuals such as vendors, contractors, and consultants, certain of the employment-related protections discussed below may be applicable to such individuals, depending on the state or city in question. Further, some states have passed bans on businesses from requiring proof of vaccination (e.g., vaccine passport bans), which preclude businesses from denying access or services to customers who are not vaccinated. So, depending on the nature of an employer's business, while requesting proof of vaccination, in and of itself, may not violate employee privacy or disability-related laws, employers may be limited in their ability to maintain a vaccinated-only workplace or to take action based on the individual's vaccine status.

Privacy, Employee Overshare, and Asking One Question Too Many

Any inquiry beyond a request for production of documents verifying vaccination status may run afoul of the ADA's rules about disability-related inquiries, turning a lawful request for proof of vaccination into a disability-related inquiry, which could, depending on when it is asked, be unlawful. For example, an inquiry into why an employee has not received a COVID-19 vaccine may elicit information about the employee's health or medical condition and cannot be asked prior to an offer of employment.

Likewise, employers may wish to limit the type of employee-provided documentation they will accept as proof of vaccination status. Documentation that the employer plans to rely on, keep, and potentially use, ideally should not contain any additional information that speaks to the employee's health or medical conditions. Consequently, as we begin to consider the data privacy issues at play, the manner and form in which a company solicits this data becomes a central focus.

1. 42 U.S.C.S. § 12101 et seq. 2. Pub. L. No. 110-325, 122 Stat. 3553 (Sept. 25, 2008). 3. *See* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 et seq.; Federal Sector Equal Employment Opportunity, 29 C.F.R. pt. 1614 et seq. 4. *See* EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws. Accessed, (Oct. 14, 2021) (hereinafter, EEOC Guidance), available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws. 5. EEOC Guidance, supra note 4; *see also* 29 C.F.R. pt. 1630 et seq.; 29 C.F.R. pt. 1614 et seq. 6. EEOC Guidance, supra note 4.

Considerations for Receipt and Storage of Proof of Vaccination Status

A company should be mindful of the type of information and the source from which it requests an employee provide documentation in support of their vaccination status. For example, requesting a copy of an employee's vaccination card may trigger a heightened data-privacy and document-retention requirement as a health-related employment record. However, requesting lab results from a medical provider may trigger the requirement for a valid Health Insurance Portability and Accountability Act[7] (HIPAA) authorization. In its guidance on vaccination, the EEOC takes the position that although a request for vaccination status is not a medical examination or disability-related inquiry under the ADA, any documents reflecting employee vaccination status are considered confidential medical records and should be maintained separately from personnel records pursuant to the ADA.[8]

Method of Vaccine Record Collection

An employer may collect paper copies of vaccination records and store medical information related to COVID-19 in existing medical files (separate from the personnel file). Where an employer requests or receives a copy of a vaccination record via electronic mail (email), other considerations come into play, such as the security of the company's email server and the risk of a potential data breach. Beyond this, questions regarding who will have access to the email records, where the email records will be stored (as well as any supporting metadata), if the email records will be printed and converted to a paper file, and the company's data-retention policy will also come into play. For example, a California employer is required to maintain medical records separately from the employee personnel file. Under Cal/OSHA Emergency Temporary Standards (ETS), an employer is not compelled to use any specific method of documenting their employees' vaccination status.[9] However, the method used should ensure that the information is kept confidential. Some acceptable options include requesting employees provide a copy of their vaccine card or an image of their vaccine card or health care document showing vaccination status, and a copy is maintained by the employer. An alternative is for an employee to sign an attestation or for the employer to maintain a record of which employees self-attested. With respect to how long vaccination records must be maintained, there is some ambiguity under the Cal/OSHA ETS as to whether vaccine record collection triggers the length of employment plus 30-year retention period placed upon employers for employee medical records or if the records can be maintained for a shorter period of time.[10] Whether California employers under the Cal/OSHA ETS have to maintain vaccination records for 30 years after termination of employment or for some shorter length of time, an employer should not use their email system as their method for storing vaccination records, given the vulnerabilities to phishing attacks and other mistakes that are made sending, receiving, and deleting emails.

If electronic storage is used, files should be secure and separate, with limited access available and need-to-know principles in place. Consideration must be given to whether the company will rely on physical data centers for data storage or a cloud platform, and in which jurisdictions the information may be transferred or stored. In both scenarios, location of the data center or the cloud, involvement of third-party companies to service said storage method, and whether that third party is a controller or processor of data will dictate what notice of data processing or use, disclosure of data breach, waiver, and/or employee consent the company must obtain. It may further dictate specific language addressing duty-of-care obligation within the respective vendor agreements for employee sensitive data. Finally, an inquiry into whether there are country, federal, state, or other local laws applicable that may impose a stricter data privacy structure must also occur.

Applicability of HIPAA to Employer Vaccine Record Collection

Generally, the HIPAA Privacy Rule does not regulate what information an employer can request from employees and does not apply to employers or employment records. HIPAA only applies to entities that qualify as HIPAA-covered entities—healthcare providers, health plans, and healthcare clearinghouses.[11] Even if an employer is a covered entity, HIPAA still does not apply to health information contained "in employment records held by a covered entity in its role as an employer."[12] While HIPAA may apply to health information employers acquire in their capacities as covered entities, it does not apply to health information they acquire in their roles as employers.

Privacy law principles still come into play, because even though HIPAA does not apply to health-related employment records, employers still have other legal obligations to protect the confidentiality of employee health information in their possession.

The HIPAA Privacy Rule does come into play if an employer requests that employees provide proof of vaccination through the disclosure of medical records from their healthcare providers. The Privacy Rule requires covered entities responding to a request to disclose an individual's protected health information (e.g., information about whether the individual has received a vaccine, such as a COVID-19 vaccine; the individual's medical history or demographic information) to a third party to obtain authorization from the individual prior to making the disclosure.

Reliance on International SMART Health Card and Locality Verifier Applications

As an alternative to storage of electronic or paper files, an employer can verify an employee's vaccination status by asking to see a vaccination digital passport. While universal technology has yet to be adopted, the SMART Health Card framework developed by the Vaccine Credential Initiative (VCI) is already in use by several states, universities, and corporations.[13] The VCI framework boasts that it is based on international standards and open technologies that are interoperable across countries and regions, transparency, privacy that protects the health data of an individual, and a design compatible with stringent privacy regulations.[14] Notably, the technology can present a QR code that can be displayed digitally on a smart phone or can be downloaded and printed in paper form (no smart phone required). When the employee pulls the QR code up, only the individual's name, date of birth, and vaccination information is shared. This code is also digitally signed to ensure that the card was issued from a verified location to prevent forgery. Employees can also use their SMART Health Card credential to obtain access to other venues, since it has been integrated into other apps, like the Excelsior App, the LA Wallet, and VaccineCheck, to name a few. Consequently, an employer could scan the QR code, verify an employee's vaccination status and avoid the storage, privacy, and potential liability issues for maintaining employee vaccination data.

Relying on the VCI technology, Apple recently announced that it is adding verifiable COVID-19 vaccination cards to the Apple Wallet as part of a future iPhone software update.[15] The feature will take advantage of the VCI international SMART Health Cards standard to produce proof of vaccination, sign it with a private key, and create a public key to verify individual information. The portability of the SMART Health technology for safe return to work is promising. However, in certain jurisdictions, where requiring verification and the technologies to track vaccination status have been banned, an employer would not be permitted to share the list of vaccinated employees who are working onsite with the state or local public health authorities as evidence that the worksite is in compliance with local law.

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7. Pub. L. No. 104-191, 110 Stat. 1936 (Aug. 21, 1996) (codified, as amended, in scattered sections of 18, 26, 29 and 42 U.S.C.S.). **8.** *See* EEOC Guidance, supra note 4. **9.** *See* California Department of Industrial Relations (DIR), COVID-19 Emergency Temporary Standards Frequently Asked Questions (hereinafter "ETS FAQs"), available at https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html#vaccines.

10. *See* ETS FAQs, supra note 8. ("Stating vaccination records created by the employer under the emergency standards need to be maintained for the length of time necessary to establish compliance with the regulation, including during any Cal/OSHA investigation or appeal of a citation. In order to encourage documentation using vaccination records, Cal/OSHA has determined that it would not effectuate the purposes of the Labor Code to subject such records to the thirty (30) year record retention requirements that apply to some medical records"); *see also* Cal. Code Regs. tit. 8, § 3204(c)(5)(D). **11.** *See* 45 C.F.R. § 160.103; *see also* U.S. Dep't of Health and Human Services, HIPAA Covered Entities and Business Associates available at https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html. **12.** 45 C.F.R. § 160.103. **13.** Tom Frieden, I Ran the CDC Here's How to Prove that Americans are Vaccinated, Sept. 21, 2021, available at https://www.nytimes.com/2021/09/21/opinion/cdc-coronavirus-vaccine.html. **14.** Vaccine Credential Initiative, The VCI Charter, available at https://vci.org/about. **15.** John Fingas, Apple Wallet is Getting Verifiable COVID-19 Vaccination Cards, Sept. 21, 2021, available at https://techcrunch.com/2021/09/21/apple-wallet-is-getting-verifiable-covid-19-vaccination-cards/.

> ... businesses are within their rights to require that anyone wishing to enter their premises provide proof of vaccination. That includes employees, contractors, consultants, vendors, or customers/patrons.

Collecting and Maintaining Vaccination Information from Contractors, Consultants, Vendors, and Customers/Patrons

On September 9, 2021, President Joseph Biden issued Executive Order No. 14042, *Ensuring Adequate COVID Safety Protocols for Federal Contractors*, raising awareness of the subject and complexity of the role that contractors play in keeping workplaces and employees safe from exposure to COVID-19.[16] The Executive Order directed executive departments and federal agencies to require federal contractors to implement COVID-19 safety protocols, including mandatory vaccination policies through clauses in FAR contracts and contract-like instruments. Under the Executive Order and guidance published by Office of Management and Budget,[17] all covered contractors are required to review the documentation of covered contractor employees to prove vaccination status. Contractors can rely on immunization records of a hospital or pharmacy; COVID-19 Vaccination Record Cards; medical records documenting vaccination; immunization records from a public health or state immunization system; or other official documentation verifying vaccination containing information on the vaccine, date of administration, and the name of the healthcare professional/clinic site administering the vaccine, as proof of vaccination. However, an attestation of vaccination or proof of prior COVID-19 infection and antibody testing do not qualify as sufficient proof. Vaccination status can be verified electronically, digitally, or with a scanned copy. While contractors are required to verify proof of vaccination, there is no requirement for contractors to maintain such proof of vaccination.

As noted above, businesses are within their rights to require that anyone wishing to enter their premises provide proof of vaccination. That includes employees, contractors, consultants, vendors, or customers/patrons. If a business decides to impose such a restriction on their contractors, consultants, or vendors, the parties may need to review and renegotiate their contracts to include that only workforce members of a contractor, consultant, or vendor who have been vaccinated are allowed to work on site. Absent an express term in an agreement to the contrary, the respective employers would likely be the responsible party to collect and maintain the vaccination records. With respect to customers or patrons, businesses may require proof of vaccination upon entry and turn away anyone who has not been vaccinated. The CDC still recommends that vaccinated individuals should take precautions (e.g., testing and masking indoors) if they have had close contact with someone who tests positive for COVID-19. Therefore, depending on the venue and any state or local requirements, a business that is collecting proof of vaccination may want to consider whether to retain proof of vaccination beyond the date of collection in case they become aware of any breakthrough cases of COVID-19.[18]

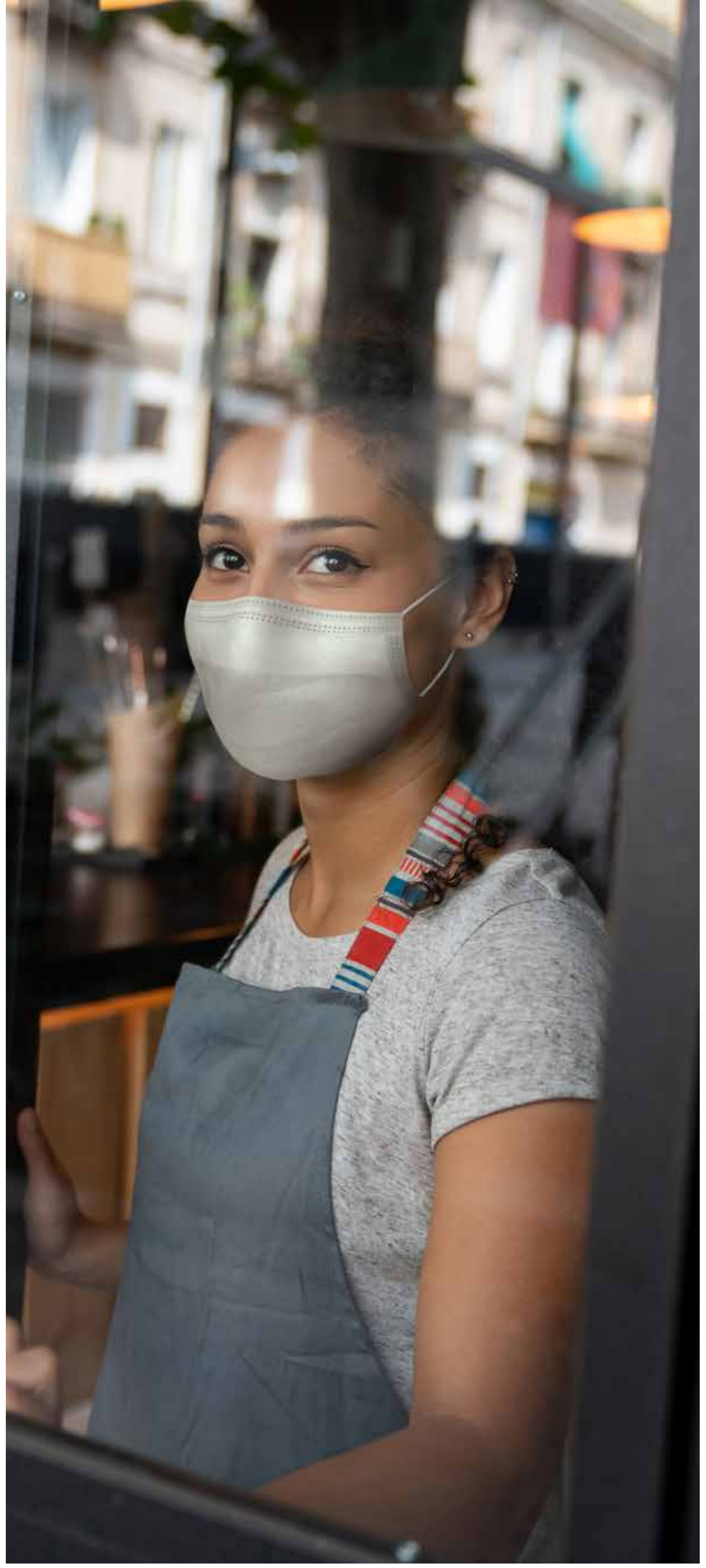
Maintaining Confidentiality of Vaccination Information, State Specific Considerations, and Future Data Use

Maintaining Confidentiality

Paper or electronic documentation concerning an employee's vaccination status provided by an employee will constitute confidential medical information under both the ADA and state-specific regulations such as the California Confidentiality of Medical Information Act (CMIA).[19] As previously mentioned, employers are still subject to the confidentiality requirements of both the ADA and the CMIA even if they are not considered covered entities within the meaning of HIPAA. Both statutes impose strict statutory obligations related to the protection and preservation of confidential medical information.

Under the ADA, employers must keep confidential medical information in a file that is separate and distinct from the employee's personnel records. When collecting a new kind of sensitive health information, best practice is for a business to conduct a review of its privacy and retention policies regarding storage and use of such medical information to ensure compliance with those existing policies. Use of security measures such as password protection, encryption, and limiting access to the separately stored file to those employees or third parties who need to have access to the information are a starting point for protecting this sensitive employee health data.

16. Briefing Room, The White House, Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors, (Sept. 9, 2021), available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/. 17. Jason Miller, Office of Management and Budget, New Guidance on COVID-19 Workplace Safety for Federal Contractors, (Sept. 24, 2021), available at https://www.whitehouse.gov/omb/briefing-room/2021/09/24/new-guidance-on-covid-19-workplace-safety-for-federal-contractors/. 18. *See* Guidance, Centers for Disease Control (CDC), When You've Been Fully Vaccinated How to Protect Yourself and Others (updated Oct. 15, 2021), available at https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated_archived.html. 19. Cal. Civ. Code §§ 56-56.16.



California's Heightened Data Privacy Requirements: California Consumer Protection Act (CCPA), California Privacy Rights Act (CPRA), CMIA

The CMIA is more stringent than HIPAA in imposing more rigorous confidentiality obligations, requiring that employers "establish appropriate procedures to ensure the confidentiality and protection from unauthorized use and disclosure of [employees' confidential medical] information." These procedures may include instructions to handlers of the confidential medical information and implementation of security safeguards. Furthermore, upon receipt of a vaccination health record, the employer cannot further disclose that employee health information to another third party (e.g., a public health authority) unless the employer receives written authorization from the employee to further disclose that information.[20]

As a general rule, employers who operate in California may collect certain health information from job applicants and employees. That said, in order to fully analyze whether or not an employer must take an additional step to obtain employee consent, a review of the notice that employees receive under the CCPA[21] during onboarding is required. The notice described in the CCPA and its regulations[22] requires employers to provide applicants and employees who are residents of California with a notice, at the time that any data collection takes place, that includes:

- A list of the categories of personal information that will be collected. Examples of the categories of information that an employer maintains about employees may include:
  - New applicant/onboarding information (e.g., resumes, employee applications, background checks, IRS Forms W-4 (withholding), etc.) collected
  - Payroll/financial information (may include employee bank account numbers for direct deposit) collected
  - Health/health-related information: vaccination records, drug test results, documents requesting sick leave, FMLA leave, maternity/paternity leave collected
- Online activity on employer-furnished equipment (browsing history, search history, and information regarding the employee's interaction with an internet website or application)
- The business reason for which the information is being collected
- Information on how to opt out of the sale of personal information (if information is being sold)
- Information on how to find the company's complete privacy notice

20. The Confidentiality of Medical Information Act (CMIA) sets forth certain requirements for an employee authorization to be considered valid. Pursuant to the CMIA, the authorization must satisfy each of the following requirements: It must be handwritten by the employee, or else typed in at least 14-point font; be clearly separate from any other language on the page and executed by a signature that serves only to execute the authorization; be signed and dated by the employee; state the limitations, if any, on the types of medical information to be disclosed; state the names or functions of both the person(s) authorized to make disclosures and the persons or entities authorized to receive disclosures of the medical information; state a specific date after which the employer may no longer disclose the medical information; state the limitations, if any, on the use of the information; and advise the employee that he or she may receive a copy of the authorization. 21. Cal. Civ. Code § 1798.100 et seq. 22. See Cal. Code Regs. Tit. 11 § 999.305(b).

After January 1, 2023, the CPRA[23] will expand the information required in a notice of collection to include:

- Whether that information is sold or shared
- The length of time that the business intends to retain each category of personal information

Unless the employer expects to disclose the vaccination records, a clear notice provided to employees with the elements enumerated above should be sufficient to collect and retain vaccination records. If the notice includes information about the potential for the employer to further disclose the vaccination records to third parties (e.g., local, state, or federal public health authorities), the notice should be affirmed either with a wet signature or electronically in a manner that complies with the California Uniform Electronic Transactions Act (UETA)[24] and the Electronic Signatures in Global and National Commerce Act.[25] There was some ambiguity as to whether the California UETA applied to medical records. However, that ambiguity was resolved when the California Health and Safety Code related to Medical Records was recently amended to authorize a health care provider to honor a request to disclose a patient record.[26]

Other State Privacy Considerations

Several states have recently enacted data security and privacy laws that impose notice and records retention requirements as methods to protect the vaccination records that employers are maintaining.

Two states highlight the slight variance in state law which can make an employer's approaches nuanced—particularly where a company operates and has employees in multiple locations.

Connecticut

Connecticut's data privacy law tracks closely with the requirements imposed by HIPAA. However, with respect to an employer's responsibility to maintain employee medical records, Connecticut General Statutes require employers to maintain any medical records for at least three years following the termination of employment and that the medical records must be kept in a separate file that is not part of any personnel file.[27] In contrast to the CMIA, Connecticut law allows personal health information to be disclosed without a patient's consent to certain state agencies and other entities in certain circumstances.[28]

Oregon

Under Oregon's Protected Health Information law,[29] patients have the right to expect that their medical records will be safeguarded from unlawful disclosure. However, the law does not provide broader protections to employee health information like the CMIA. The Oregon Consumer Identity Theft Protection Act, however, provides protection for personally identifiable information and medical information in an employer's possession, requiring businesses in Oregon to implement and maintain certain security safeguards to protect personal information and to report data breaches of personal information.[30]

23. Cal. Civ. Code § 1798.100 et seq. 24. Uniform Electronic Transactions Act, Cal. Civ. Code § 1633.1 et seq. 25. Pub. L. No. 106-229, 114 Stat. 464 (June 30, 2000). 26. The amendment became effective January 1, 2021. See California Department of Public Health, Vaccine Records Guidelines and Standards (Aug. 25, 2021), available at https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Vaccine-Record-Guidelines-Standards.aspx. 27. Conn. Gen. Stats., Ch. 563, § 31-128a. 28. Katherine Dwyer & Brandon Seguro, OLR Research Report, Personal Health Information Disclosure, available at https://www.cga.ct.gov/2016/rpt/2016-R-0050.htm. 29. See Protected Health Information, Or. Rev. Stat. Ann. §§ 192.553 through 192.581. 30. Oregon Identity Theft Protection Act, Or. Rev. Stat. Ann. § 646A.600. Oregon Administrative Rule – Identity Theft, Or. Admin. R. 441-646-0010 through 0040.

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For an overview of data privacy and cybersecurity issues that companies typically address regarding COVID-19, see

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Virginia, Colorado, and Oklahoma are all states that also recently enacted data-privacy laws; however, unlike the CCPA, each of these laws carved out employees and employment records from their reach. The Virginia Consumer Data Privacy Act (VCDPA) is similar to the CCPA, in that HIPAA-covered entities and their business associates are exempt from the new Virginia law. However, the VCDPA excludes employment information from the definition of consumer information and even though the definition of consumer includes Virginia residents, it expressly excludes "any person acting in a commercial or employment context." The Colorado Privacy Act (CPA) also does not grant the new law's data privacy rights to all Colorado residents; the CPA expressly exempts individuals acting in the commercial or employment context, including job applicants. Finally, similar to Virginia, the Oklahoma Computer Data Privacy Act defines consumer as Oklahoma residents, but does not include an employee or contractor of a business acting in their role as an employee or contractor.

Consequently, employers should be nimble and prepared to revise their policies to reflect the changing data privacy landscape. Notably, there are currently more than 20 states that maintain data breach notification laws, requiring that employers stay on top of changes to the privacy law and report when there has been an unauthorized disclosure of personal medication information.[31]

Conclusion

The regulatory landscape regarding COVID-19, return to work, and the collection of vaccination records is evolving. As more employers adopt mandatory vaccine policies, and technology becomes available for the universal management of vaccine data, employers must become familiar with the changing regulatory obligations related to the privacy and use of vaccination records. Ensuring that companies implement policies that are sufficiently transparent; provide proper notice regarding how vaccination information will be used, with whom it will be shared, and for how long it will be maintained; and that security safeguards are in place to protect any sensitive information, will serve as the framework for navigating compliant collection and maintenance of such data as employees return to the in-person work environment. L

***Karen Mandelbaum** is Senior Counsel in the Privacy, Cybersecurity & Data Asset Management practice at Epstein Becker Green in Washington, D.C.*

***RyAnn M. Hooper** is Senior Counsel in the Labor Management Relations practice at Epstein Becker Green in New York.*

***Susan Gross Sholinsky** is a Member of Epstein Becker Green and works for the firm's Employment Compliance Counseling practice in the New York office.*

RESEARCH PATH: ***Data Security & Privacy > Trends & Insights > Articles***

31. The U.S. Senate Committee on Commerce, Science and Transportation recently launched privacy hearings aimed at enhancing the enforcement authority for the Federal Trade Commission (FTC) and enacting comprehensive federal privacy legislation with strong consumer rights. A national privacy law or agency rulemaking at the FTC aimed at protecting consumer data (like confidential medical/vaccine records) could go into effect at some point in the future.

Leonard M. Kessler CONSTRUCTION ATTORNEY, ARBITRATOR, AND MEDIATOR

Using Mediation to Resolve **Construction Disputes and Adjusting for Pandemic Impacts**

1. What is mediation and how does it differ from litigation and arbitration?

Mediation is a private dispute resolution process in which the disputing parties work with a mediator to negotiate a settlement to their dispute. The mediator is a neutral party who has no vested interest in the outcome and is trained to facilitate a settlement between the parties. In addition, for construction disputes, the mediator usually has experience in the construction industry.

A mediator cannot bind the parties to any outcome. In mediation, the parties are the decision makers and only they can reach a mutually satisfactory agreement and find solutions that facilitate the resolution of a dispute regarding a completed project or a dispute regarding completion of a project still under construction, while preserving relationships for future construction projects. This contrasts with litigation and arbitration, where control of the dispute is relinquished to a court or arbitrator that has no interest in facilitating timely completion of a project or preserving relationships.

2. Mediations are traditionally conducted in person. Given the frequent social distancing requirements, how are mediations being conducted during the COVID-19 pandemic?

Mediations continue to be held during the pandemic using video conferencing technology, which allows the parties, their counsel, and the mediator to individually participate from the safety of their home or office. Zoom video conferencing appears to be the most prevalent and widely accepted video conference system. In particular, Zoom's breakout room feature allows the mediator to assign each party and its counsel to a private breakout room, which acts like a separate conference room in an in-person mediation. The mediator can then move back and forth between each party's breakout room to have a private caucus with the parties. When the mediator leaves a breakout room, a party and its counsel remain in the breakout room and can have confidential conversations among themselves. Upon reaching a point in the mediation when the parties have to draft the settlement agreement, the mediator can close the breakout rooms, resulting in a joint session with the parties, counsel, and the mediator all appearing on the video screen. As with an in-person mediation, the mediator can decide to start the mediation with a full joint session, abbreviated joint session, or immediately go to private caucuses.

3. Do you think that after the COVID-19 pandemic abates, mediations will return to being held largely in person or that some parties will continue to conduct their mediations remotely? Do you see any downside to conducting mediation remotely?

Some mediators and attorneys prefer in-person mediations. They think it is more effective when the parties are face to face. However, I believe a mediator who is skilled in managing video conference technology can conduct an effective and successful mediation. Also, if the parties and counsel are in different states or cities, the avoidance of travel is one less hurdle to overcome if the mediation is held by video. Lastly, for the more complicated disputes, which may require multiple mediation sessions, it may be helpful and economical to have the early mediation sessions by video conference and the later mediation sessions held in person. The initial mediation sessions may involve the trading of information between the parties under the guidance of the mediator, and the later mediation sessions would involve the trading of settlement offers and be in person. In summary, I think remote mediations will continue to be an effective tool to get the parties together to talk. I do not see any downside to conducting mediations remotely other than a party or counsel preferring an in-person mediation. Since you want to make both parties comfortable during the mediation, in that instance I would have the mediation in person.

4. Why is mediation so prevalent in the construction industry, and when does mediation take place in a construction dispute?

Disputes among owners, contractors, and subcontractors are very common on construction projects and a construction dispute can be mediated while litigation or arbitration is ongoing or while the project is still being constructed. As the construction industry has looked for ways to avoid or minimize disputes and the financial and time costs arising from litigation and arbitration, it has found mediation to be a very effective process for the resolution of these disputes.

Some construction projects take years to complete, and involve layers of contractors and subcontractors, and hundreds, if not thousands, of workers. Efficient conflict resolution is important in the construction industry because of the importance of maintaining the relationships between all those entities and people who must continue to work with each other on a project that may be midstream in its schedule when conflicts arise. In addition to

maintaining a good relationship on a project under construction, the parties want to maintain their relationship for future projects.

Mediation is also faster and less expensive than litigation or arbitration. Mediation sessions usually take no more than a day or two, compared to a court trial or arbitration hearing that can take weeks. Mediations can be scheduled as soon as the parties are ready, while arbitration hearings and court trials often take years to be scheduled. This time advantage is particularly important when the mediation takes place while a project is still under construction, because resolution of disputes clears the way for more cooperation between the project participants.

5. Are there other reasons why construction disputes are frequently mediated?

Recognizing the effectiveness of mediation in resolving construction disputes, many construction industry standard contracts require that the parties make a good faith attempt to settle their dispute through mediation prior to instituting litigation or arbitration.[1]

Some of the organizations that administer arbitrations have rules that require or encourage the use of mediation while the arbitration proceedings continue.[2] In addition, it is common for courts handling construction disputes to refer a case to court-administered mediation programs since many judges find the complexities of construction disputes amenable to mediation.

Notwithstanding its benefits, mediation is only effective if both parties want to settle the dispute. If one of the parties is only participating in the mediation because of contractual requirements, arbitration, or court rules and is not interested in settling the dispute, mediation will not be effective.

6. What kinds of construction disputes are most frequently mediated?

In my experience, the kinds of construction disputes that are most frequently mediated include:

- Contractor's or subcontractor's defective work
- Architect's defective plans and specifications
- Delays in project completion
- Payment issues
- Changes to the scope of work
- Differing site conditions
- Property damage to the project
- Disputes arising from termination of a contractor or subcontractor

However, this list is not exhaustive.

1. *See* AIA® Document A201™ — 2017 (Construction Contract General Conditions, Sample Form), Section 15.3 "Mediation." 2. *See* American Arbitration Association Construction Industry Arbitration and Mediation Procedures Rule 10 "Mediation," which requires mediation of all disputes in excess of 100,000. https://www.adr.org/sites/default/files/Construction%20Rules.pdf.

7. How does the mediation process work?

After the parties agree on a mediator, a pre-mediation conference call is held by the mediator and counsel for all the parties. The mediator and the parties set a date for the mediation and the mediator will request that each party submit to the mediator a confidential pre-mediation statement. The mediator and counsel also discuss who should attend the mediation.

Usually, at the beginning of the mediation, the mediator conducts a joint session with all the parties present. During this joint session, the mediator will introduce the parties and their counsel and explain the mediation process, including the purpose of joint sessions and private caucuses. The mediator will also discuss the confidential nature of the mediation process and explain that any information given during a private caucus will not be disclosed to the other party without permission.

Next, the mediator asks each party to make a presentation to the mediator and the other party to the dispute. The presentation is usually made by counsel. Sometimes a party will make its own presentation in addition to the one made by its counsel. Venting by a party during opening statements is not unusual in construction mediation. This gives the parties their day in court.

Based upon approach and style, some mediators do not hold an initial joint session with the parties and start the mediation with private caucuses only. Such mediators hold joint sessions only when the parties are close to a settlement. However, most mediators believe the ability of the parties to talk to each other and express their positions early in the mediation is important. Also, if the parties are hostile to each other, the mediator may eliminate the joint session and start the mediation with private caucuses. This is particularly true when animosity is so high and tempers are flaring that joint sessions will not work. Also, if the parties are hostile to each other, the mediator may eliminate the joint session and start the mediation with private caucuses.

If the mediator holds a joint session, the mediator will next conduct private caucuses. When conducting private caucuses, the mediator meets and discusses the case with each party in separate conference rooms. The mediator exchanges information and proposals that he or she has received from the other party, with the ultimate goal of narrowing the differences in proposals and ultimately reaching settlement of the dispute.

8. Is the mediation process private and is any settlement arising from the mediation private?

In general, mediations are private and confidential and (unless the parties agree otherwise) everything discussed during the mediation and any settlement offers that are exchanged cannot be used in court or in an arbitration if the parties do not settle their dispute. Since mediation is a facilitated settlement negotiation between the parties, mediation is covered by court evidentiary rules protecting communications between parties regarding settlement.

At the beginning of the mediation, the parties typically sign a confidentiality agreement. If the mediation is conducted pursuant to a court-sponsored mediation program, it is likely that the court's rules will require execution of a confidentiality agreement, and the mediator will not be permitted to discuss the mediation with the court. The only communication the mediator may have with the court is to advise the court if the case was settled or not.

In addition, if the parties settle their dispute, they can write a confidentiality clause into the settlement agreement.

> The mediator needs to provide his or her opinion about the strengths or weaknesses of a party's case and legal arguments if the case is going to be settled.

In contrast, court decisions resolving construction disputes are public. This is particularly important to an owner of a project who makes a payment to a contractor and does not want to appear to be an easy target for other contractors on future projects. Similarly, a contractor making a settlement payment to a subcontractor does not want to appear to be an easy target for other subcontractors it frequently hires.

9. What is the difference between a facilitative mediator and an evaluative mediator? Which type is better suited for a construction dispute?

All mediators in construction disputes are trained to facilitate a settlement and help the parties reach a mutually satisfactory resolution. However, in many instances the mediator must take an evaluative approach, particularly when a party has an unreasonable interpretation of the facts or unrealistic expectations about a settlement

outcome. The mediator needs to provide his or her opinion about the strengths or weaknesses of a party's case and legal arguments if the case is going to be settled. The mediator's opinion helps to manage that party's expectations about the outcome if the case is tried or arbitrated and can also help the party to understand what a reasonable and feasible settlement might look like.

Because of the complexities of construction disputes and the importance of understanding how construction projects work, I recommend that parties to a construction dispute retain an evaluative mediator who has a reputation of offering useful assessments of the parties' cases and can help develop realistic settlement proposals between the parties. For a mediator to take such an evaluative approach to mediating a construction dispute, the mediator should be knowledgeable of the construction industry. Without this frame of reference, I believe the mediator will not be able to properly evaluate the facts and suggest constructive solutions.

10. How is the mediator selected in a construction dispute?

If the parties choose to mediate a dispute that is not in litigation or arbitration, the parties' attorneys will usually suggest mediators that they have used before and who are experienced in the construction industry. Also, the American Arbitration Association, JAMS, and other dispute resolution entities maintain lists of mediators that have experience mediating construction disputes.

Courts have embraced mediation to reduce their backlog of cases. Many courts have mediation programs with a roster of trained and experienced mediators that are available to parties. The court employee responsible for administering the mediation program will assign the case to a mediator from the court's mediation panel who has expertise in construction disputes.

If the parties do not want to use the court-appointed mediator, they may use a mediator not affiliated with the court's mediation program. However, one advantage of using a court-appointed mediator is that, depending on the court's rules, the mediator may provide the first few hours of his mediation services for free and the mediator's hourly rate is often less than what a mediator might be paid outside the court's program.

11. What traits should a mediator for a construction dispute have?

In addition to being knowledgeable of the construction industry, I believe a mediator must have traits that are important for all kinds of disputes, such as:

- The ability to listen
- Impartiality
- The ability to explore solutions
- Flexibility
- Persuasiveness
- Patience
- The ability to explore and explain complex issues
- The ability to manage parties and their emotions
- Comfort with evaluating and discussing the parties' positions in caucus

12. Who should attend the mediation?

Counsel and a representative of the parties who is familiar with the facts in dispute and has full settlement authority should attend the mediation. Sometimes this requires a party to send two or more employees to the mediation, including project managers, project schedulers, accountants, and possibly experts who will not be testifying if the dispute is tried or arbitrated.

13. Should experts attend the mediation?

Experts that a party intends to use as testifying expert witnesses should not attend the mediation or review the other party's mediation statement. Courts have precluded experts from testifying at trial and stricken their expert reports on the grounds that such experts participated in the confidential mediation process and that the information provided by

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USING MEDIATION TO RESOLVE CONSTRUCTION DISPUTES

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CONSTRUCTION CONTRACT

the other party during the mediation may inadvertently be used during the expert's testimony or in the expert's report. To allow the expert to testify or their reports to be entered into evidence could prejudice a party who made a disclosure during the confidential mediation process.

14. What should a mediation statement contain?

In cases that I mediate, I request the parties to provide me with a memorandum that sets forth their understanding of the facts and what they believe is not in dispute. The memorandum should also state the party's position on liability and damages and how the case might be settled including at what dollar amount. This memorandum is confidential and is only for the mediator. It is not exchanged with the parties or the court or arbitrator. I usually ask that the memorandum not exceed 10 pages and that it be provided to me no later than 10 days before the scheduled mediation date. Of course, depending on the nature of the case, these limitations may vary.

15. Does mediation reduce or eliminate discovery?

Mediation will not eliminate discovery if a dispute is in litigation or arbitration, but it will reduce discovery. Limited discovery is needed for the parties to have a full grasp of the facts surrounding the dispute so they can better assess their vulnerability or chances of success in court or in an arbitration. In addition, with some discovery, the parties are better able to assess and clarify their positions and possibly will be more inclined to settle their case at the mediation. Court-sponsored mediation programs often have rules allowing the mediator to suggest that some limited discovery and exchange of documents occur prior to the first mediation session, to allow the parties to assess their positions better. Therefore, I recommend that parties exchange project documentation before the mediation of a construction dispute.

The mediation's timing is crucial because if the mediation is scheduled too early in the dispute process, the parties may not have sufficient information to make a good business decision. However, waiting too long to mediate can result in entrenched positions making a dispute difficult to settle.

16. By agreeing to limited discovery before the mediation, am I allowing a fishing expedition by my adversary?

No. Court rules allow liberal discovery. Anything that you would produce in a mediation would be provided under a court's discovery rules anyway.

17. How should an attorney prepare for a mediation of a construction dispute?

An attorney should prepare for the mediation and not just show up. Each attorney should be fully familiar with the facts in dispute and should bring any documents that may support a client's position. Such preparation does not have to be as thorough and time consuming as preparation for a trial or arbitration hearing but should be sufficient to explain the client's position to the mediator and the other party and have a meaningful discussion.

18. How does an attorney prepare his client for the mediation of its construction dispute?

Managing a client's expectations is an important part of preparing a client for mediation of a construction dispute. Experienced participants on construction projects are familiar with the inflammatory posturing and venting often taken by owners, contractors, and subcontractors during the course of a project. It is not unusual for such posturing to take place during a mediation. Particularly at the beginning of mediation, it is not unusual for a party to make an extreme offer to or demand of the other party. This posturing can also take the form of venting by the parties, despite efforts by the mediator to control it.

An attorney should prepare the client for these possibilities and explain that extreme early offers and demands and venting are just part of the mediation process and do not mean the dispute will not settle later that day or the next day. It is not unusual for a party to storm out of a mediation session after hours of frustrating negotiations and claim that the other party is not negotiating in good faith. I have seen this type of contentious behavior numerous times, and often the dispute is amicably settled in a few days or weeks as the mediator shuttles settlement offers back and forth between the parties by phone. However, the client should also be advised that if it should posture, vent, and make unreasonable demands, such conduct will likely result in an impasse prolonging the mediation and delaying a possible settlement.

19. Do you recommend a settlement agreement be signed before the parties conclude a successful mediation?

Particularly for a construction dispute, settlement terms can be more than a lump-sum dollar amount paid by a certain date. There can be payment schedules, agreements for work to be completed by a certain date, and other terms that can too easily be forgotten between the conclusion of the mediation and drafting the settlement agreement. Therefore, I recommend that, to the extent possible, the settlement agreement either be finalized and signed before the conclusion of mediation, or at least written in the form of a term sheet signed by both parties. L

__Leonard M. Kessler__ is an experienced attorney, arbitrator, and mediator with a background in complex construction and commercial disputes including cases involving contracts, torts, negligence, environmental matters, property damage, and professional liability. He also has a bachelor's degree in Electrical Engineering. Len has experience with disputes involving general contractors, trade contractors, suppliers, developers, architects, engineers, and sureties in connection with private and public (federal, state, and municipal) projects for the construction of office buildings, hotels, museums, casinos, roads, bridges, tunnels, condominiums and apartment buildings, hospitals, schools, shopping centers, stadiums, arenas, airport terminals, courthouses, power plants, paper mills, and other large-scale civil and mechanical construction projects. He has also been involved with disputes regarding environmental and hazardous waste remediation projects. In addition, Len has represented clients in contract drafting; negotiation and administration; and teaming agreements, joint ventures, and shareholder agreements.

RESEARCH PATH: *Real Estate > Construction > Owner and Contractor Agreement > Practice Notes*

Jamie Payne LEXIS PRACTICAL GUIDANCE

Market Trends: De-SPAC Transactions

This article discusses recent market trends in de-SPAC transactions (acquisitions involving Special Purpose Acquisition Companies (SPACs)) in 2021, covering notable transactions, deal structure and process, and other key market trends.

SPACs and De-SPAC Transactions

A SPAC is a public shell company that raises funds through an initial public offering (IPO) and uses the proceeds to acquire a private company. This business combination is commonly referred to as a de-SPAC transaction. While a SPAC cannot know its target company at the time of its IPO, SPACs typically focus on a particular industry or geography in seeking targets for the business combination.

A de-SPAC transaction must be consummated within a designated time frame, usually between 18 and 24 months from the date of pricing the IPO. If the SPAC is unable to consummate a merger in the designated time frame, the SPAC is required to liquidate and return the funds raised in the IPO (being held in an interest-bearing trust account) to investors or seek approval from stockholders for an extension. Most de-SPAC mergers require additional financing, such as through forward purchase agreements with the sponsor, or through private investment in public equity (PIPE) transactions, wherein the SPAC issues new securities to institutional accredited investors contingent upon the closing of the initial business combination.

In 2021, SPAC IPOs and de-SPAC transactions reached record-breaking numbers. The number of SPAC IPOs increased from 248 in 2020 to 613 in 2021. The total SPAC IPO proceeds also increased from approximately $83 billion in 2020 to more than $160 billion in 2021.

There was a corresponding increase in the number of de-SPAC mergers after SPAC IPOs, although many existing SPACs have yet to identify target companies and complete a de-SPAC transaction. In 2021, 267 de-SPAC mergers were announced and 199 were closed. SPAC activity in 2021 was the highest it has ever been, but 2021 fourth-quarter indicators show that the SPAC market is trending towards a decrease in activity.

The number of shareholders exercising redemption rights in connection with merger approval votes is expected to continue increasing in response to stockholder uncertainty.

The average size of de-SPAC transactions remained consistent between $2.2 billion and $2.8 billion in 2021 until a significant decline to $1.4 billion in the fourth quarter. The largest SPAC merger announced and closed in 2021, between Altimeter Growth Corp. and Grab Holdings Inc., was valued at $39.6 billion.

Many of the trends expected in de-SPAC transactions in 2022 will be related to both the high number of SPACs seeking acquisition targets in a competitive market and heightened regulatory scrutiny and oversight. At the end of 2021, 572 SPACs were in the market to complete a business combination, with an additional 270 SPAC IPOs still in registration. Although only one SPAC liquidated in 2021, as merger deadlines loom for SPACs that went public in 2020 and 2021, there may be an increase in liquidations if SPACs are unable to consummate a merger or obtain the required stockholder approval to extend the deadlines. While the acquisition opportunities become more competitive and the pressure to consummate de-SPAC mergers builds, the U.S. Securities and Exchange Commission (SEC) is warning of increased regulatory oversight. The number of shareholders exercising redemption rights in connection with merger approval votes is expected to continue increasing in response to stockholder uncertainty.

Recent Trends in De-SPAC Transactions

PIPE Financings

One key trend seen in de-SPAC transactions is the decreased use and size of PIPE financing in business combinations. The number of de-SPAC mergers involving PIPE financing has steadily declined throughout 2021 from 91% in the first quarter to 75% in the fourth quarter. This is a decrease from the fourth quarter of 2020 when de-SPAC transactions with PIPE financing peaked at 94% of transactions.

The end of 2021 was marked with a decrease in total dollar value of pending de-SPAC transactions to $233.6 billion, the lowest it was during the year. This indicates a continued decline in equity value of SPAC mergers. As the equity value of SPAC mergers decreases, the role of PIPEs may also decrease.

PIPE investments help to both fund redemptions and finance the merger itself. The funds raised in the IPO are held in a trust account, and the terms of a SPAC require that before a de-SPAC transaction, the SPAC must offer its public stockholders the right to redeem their shares for the original purchase price, which funds are paid from the trust account. Due to this redemption right, there is uncertainty as to how many stockholders will redeem out (stockholders have the right to both vote to approve the merger while also redeeming their shares) and the resulting amount of cash available in the SPAC's trust account at the closing of the de-SPAC transaction after redemptions are paid out. Obtaining PIPE financing helps to mitigate the risk that insufficient cash will be available for the de-SPAC transaction.

Earnouts

The use of earnouts in de-SPAC transactions continued in 2021. Nearly half of the de-SPAC transactions that closed in 2021 included earnouts as part of the merger consideration to target stockholders. In de-SPAC transactions, earnouts refer to the right of target company stockholders to receive additional equity if certain milestones are met, usually based on the combined company's post-closing public stock price.

Of the de-SPAC transactions with earnouts, over 90% of the earnouts were tied to stock price milestones, while the other earnouts were based on the target company achieving a specific business objective (i.e., building a facility) and, in a few deals, a combination of a business objective and stock price milestone. The de-SPAC earnouts typically have multiple tranches, with a certain percentage of shares becoming available when the stock price reaches a specific threshold. In the Ginkgo Bioworks, Inc. merger, for example, the target stockholders were entitled to receive 188.7 million shares divided into four equal tranches if the trading price per share of the merged company common stock was greater than or equal to $12.50, $15.00, $17.50, and $20.00 for any 20 trading days within any period of 30 consecutive trading days during the five-year earnout period. At each threshold, the target stockholders would receive 25% of the earnout consideration. It is uncommon for de-SPAC transaction earnouts to be in the form of cash.

Redemptions

An increasing number of stockholders are exercising redemption rights at the time of the de-SPAC merger approval vote. The average rate of redemption increased significantly in the third and fourth quarters of 2021. In the fourth quarter, stockholders in more than 60% of de-SPAC transactions exercised redemption rights at a level above 50%. And, in 10% of those de-SPAC transactions, the rate of redemption was 90% or more. As more SPACs enter an increasingly competitive market and companies seek stockholder approval to extend merger periods, stockholders may respond to uncertainties by exercising redemption rights more frequently.

SEC Scrutiny

As recently as December 2021, the SEC indicated that SPACs will be part of its enforcement agenda in 2022. In 2021, the average time between signing and closing of de-SPAC transactions increased slightly from three months to five months. The interim period has increased in part due to heighted regulatory scrutiny.

At an Investor Advisory Committee Meeting held on March 11, 2021, Commissioner Allison Herren Lee, as the acting commission chair, noted a growing concern about SPACs and the potential increased risks to investors. Lee's statements came one day after the SEC released an investor alert cautioning against investments in SPACs with celebrity involvement.

Then, in July 2021, the SEC announced its first notable enforcement action involving a SPAC, its sponsor, the target company, and the chief executive officers. The SEC announced charges against Stable Road Acquisition Corp., SRC-NI (the SPAC sponsor), Momentus Inc., and the chief executive officers of the SPAC and target company for misleading claims about the target company's technology and national security risks associated with the target company's CEO.

In December 2021, the announced de-SPAC mergers between (1) Digital World Acquisition Corp. and Trump Media Technology Group and (2) Churchill Capital Corp IV and Atieva, Inc. (d/b/a Lucid Motors), were each reported to be under regulatory investigation. The SEC cautioned it will continue to scrutinize de-SPAC transactions and consider additional regulation of SPAC activity.

Sponsor Lock-ups

A continuing trend in 2021 is the nontraditional treatment of the sponsor founder shares, which may be another reflection of the increased competition for target companies and the SPAC's intent to be an appealing merger partner. Traditionally, the sponsor pays a nominal amount (usually $25,000) for that number of founder shares equaling 20% of the total shares outstanding after the completion of the IPO, and the holders of these sponsor shares are restricted from selling these shares (i.e., their shares are locked up) for a period of one year from the date of the merger. However, if the combined company's public share price trades over $12.00 (20% higher than the $10 IPO price per share) for more than 20 days in a 30-day period, the lock-up is lifted and the sponsors are free to sell their shares, even before the one-year lock-up period expires.

SPACS, however, have provided for nontraditional treatment of the founder shares that set the de-SPAC transactions apart from the traditional SPAC structure, such as reducing the amount of founder shares purchased at a nominal price from 20% to 10%, or subjecting the founder shares to vesting based on certain stock price milestones, much like stockholder earnouts.

One of the key strategies in which sponsors are aligning their interests with those of the target stockholders is increasing the length of the sponsor's lock-up period or creating a tiered release of the transfer restrictions. For example, in the notable merger between Social Capital Hedosophia Holdings Corp. V and Social Finance, Inc., the sponsor agreed to a lock-up of 180 days or earlier based on stock price milestones, a longer lock-up period than the 30-day period for target stockholders. In the merger between Reinvent Technology Partners Y and Aurora Innovation, Inc., 25% of the sponsor shares could be transferred after the first anniversary of the closing while the remaining 75% of sponsor shares were separated equally into three tranches subject to price-based vesting after two, three, and four years from the closing date.

Key Provisions in Business Combination Agreements

Lastly, the 2020 trends relating to certain provisions within the business combination agreements continued in 2021. In de-SPAC transactions in 2021:

- Buyers agreed to limited representations and warranties.
- In nearly all transactions, there were no post-closing indemnification obligations of the target company.
- Parties did not obtain representations and warranties insurance, except in the case of a few transactions.
- Most of the transactions included a cap on D&O insurance premiums.
- Very few of the transactions included a termination fee.
- Post-closing purchase price adjustments and earnouts were used less frequently.

Traditionally, de-SPAC transactions have not included a fiduciary termination right in favor of the SPAC, and the transactions usually include force-the-vote provisions and an obligation by the sponsor to vote its shares in favor of the deal. As more SPACs go public and begin seeking targets, resulting in a more competitive market, we may see such fiduciary termination rights evolving.

Notable De-SPAC Transactions

The transactions in these charts link to Market Standards, the searchable database of publicly filed M&A deals from Practical Guidance that enables users to search, compare, and analyze more than 38,000 transactions using up to 150 detailed deal points to filter search results. For more information on Market Standards, click here.

Related Content

For an analysis of SPACs, including the process to create a SPAC, typical SPAC features, and SPAC limitations and restrictions, see

SPECIAL PURPOSE ACQUISITION COMPANIES

For a discussion on market trends regarding SPACs, covering notable transactions, deal structure and process, and future outlook for SPACs, see

MARKET TRENDS 2020/2021: SPECIAL PURPOSE ACQUISITION COMPANIES (SPACS)

For an overview of market trends in de-SPAC transactions, including notable transactions, deal structure and process, and other key market trends, see

MARKET TRENDS 2020/2021: DE-SPAC TRANSACTIONS

For additional information on the current state of the SPAC market and practical guidance for the formation of the SPAC and the issuance of its IPO, as well as the SPAC's follow-on acquisition, see

SPECIAL PURPOSE ACQUISITION COMPANIES: 2020'S BIGGEST CORPORATE DEVELOPMENT

For a list of practice points to assist counsel for a SPAC or its placement agent to execute a PIPE transaction alongside a SPAC business combination transaction, see

TOP 10 PRACTICE TIPS: PIPE TRANSACTIONS BY SPACS

SoFi Technologies, Inc.	
Date	June 1, 2021
SPAC Name	Social Capital Hedosophia Holdings Corp. V
Target	Social Finance, Inc.
Deal Size	$8.65 billion
Target Ownership Post-Closing (assuming no redemption)	Target stockholders: 74.2% SPAC stockholders: 9.3% SPAC sponsors: 5.5% PIPE investors: 11.0% The percentages reflect the director restricted stock unit award settlement and repurchase.
Lock-up Period	Target stockholders are subject to lock-up period of 30 days after closing, subject to certain customary exceptions. Certain other key holders of the sponsor, certain SoFi holders, the sponsor, and SoFi Technologies are subject to transfer restrictions for 180 days (subject to the granting of early release following the closing with respect to SoFi Technologies shares).
Board Composition Post-Closing	SPAC: Two members Target: Four members Investors: Seven members
SPAC Duration	IPO: October 8, 2020 Merger Agreement signed: January 7, 2021 Business combination closed: June 1, 2021
Other – Change to Class Structure	The authorized capital stock was changed via the organizational documents in connection with the closing.

Lucid Group, Inc. (d/b/a Lucid Motors)	
Date	July 23, 2021
SPAC Name	Churchill Capital Corp IV
Target	Atieva, Inc. (d/b/a Lucid Motors)
Deal Size	$11.75 billion
Target Ownership Post-Closing (assuming no redemption)	Target stockholders: 73.4% SPAC stockholders: 13.0% SPAC sponsor: 3.2% PIPE investors: 10.4%
Lock-up Period	180 days after closing, subject to certain customary exceptions
Board Composition Post-Closing	Target: Two members Controlling stockholder: Five members SPAC sponsor: One member SPAC: One member
SPAC Duration	IPO: August 3, 2020 Merger Agreement signed: February 22, 2021 Business combination closed: July 23, 2021
Other – Change to Class Structure	The authorized capital stock was changed via the organizational documents in connection with the closing.

OfferPad Inc.	
Date	September 1, 2021
SPAC Name	Supernova Partners Acquisition Company, Inc.
Target	OfferPad, Inc.
Deal Size	$2.25 billion
Target Ownership Post-Closing (assuming no redemption)	Target equityholders: 74.9% SPAC stockholders: 13.4% Sponsor and related parties: 5.0% PIPE investors: 6.7%
Lock-up Period	180 days after closing, subject to certain customary exceptions
Board Composition Post-Closing	Only holders of Class B common stock can appoint or remove the seven members of the board of directors.
SPAC Duration	IPO: October 23, 2020 Merger Agreement signed: March 17, 2021 Business combination closed: September 1, 2021
Other – Dual class structure and sunset provision	At closing, the company adopted a dual class structure comprising Class A common stock, entitled to one vote per share, and Class B common stock, entitled to 10 votes per share. The Class B common stock is subject to a sunset provision triggered by the earlier of: • The date that is nine months following the date on which founder is no longer providing services to OfferPad and has not provided services for the 9-month period • The date as of which the qualified stockholders have transferred more than 75% of the shares of the Class B common stock

Gingko Bioworks, Inc.	
Date	September 16, 2021
SPAC Name	Soaring Eagle Acquisition Corp.
Target	Ginkgo Bioworks, Inc.
Deal Size	$15 billion (plus contingent earnout)
Target Ownership Post-Closing (assuming no redemption)	Target stockholders: 84.3% SPAC stockholders: 9.7% PIPE investors: 4.3% Initial stockholders: 1.7%
Lock-up Period	Target stockholders are subject to lock-up period of 180 days after closing, subject to certain customary exceptions and for tax purposes. Earnout consideration is excluded from transfer restrictions. Founders and employees are subject to a one-year transfer restriction, subject to exceptions for: • Equity awards • Earnout consideration An aggregate of 10% of the total number of shares are subject to the transfer restrictions.
Board Composition Post-Closing	In connection with the closing, the company declassified the board of directors. Class B common stockholders may elect 25% of the directors.
SPAC Duration	IPO: February 26, 2021 Merger Agreement signed: May 11, 2021 Business combination closed: September 16, 2021
Other – Dual Class Structure	At closing, the company adopted a dual class structure comprising Class A common stock, entitled to one vote per share, and Class B common stock, entitled to 10 votes per share, for so long as the outstanding shares of Class B common stock represent at least 2% of all outstanding shares of common stock.
Other – Earnout Consideration	$180 million earnout shares, which are subject to forfeiture to the extent that the vesting conditions are not satisfied during the five-year period after the closing. The earnout consideration is divided into four equal tranches and 25% of the earnout consideration immediately vests if the trading price per share of Class A common stock is greater than or equal to: • $12.50 for any 20 trading days within any period of 30 consecutive trading days during the earnout period • $15.00 for any 20 trading days within any period of 30 consecutive trading days during the earnout period • $17.50 for any 20 trading days within any period of 30 consecutive trading days during the earnout period • $20.00 for any 20 trading days within any period of 30 consecutive trading days during the earnout period

Aurora Innovation Inc.	
Date	November 3, 2021
SPAC Name	Reinvent Technology Partners Y
Target	Aurora Innovation, Inc.
Deal Size	$12 billion
Target Ownership Post-Closing (assuming no redemption)	Target stockholders: 87.3% SPAC stockholders: 7.3% Sponsor and related parties: 2.4% PIPE investors: 3.0%
Lock-up Period	25% of sponsor shares are subject to a lock-up until the first anniversary after the closing. The remaining 75% of sponsor shares are separated into three tranches and subject to price-based vesting and different lock-up periods: • Tranche I: two years following the closing • Tranche II: three years following the closing • Tranche III: four years following the closing
Board Composition Post-Closing	Aurora stockholders: Seven members SPAC sponsor: One member
SPAC Duration	IPO: March 18, 2021 Merger Agreement signed: July 14, 2021 Business combination closed: November 3, 2021
Other – Change to Class Structure	The authorized capital stock was changed via the organizational documents in connection with the closing.

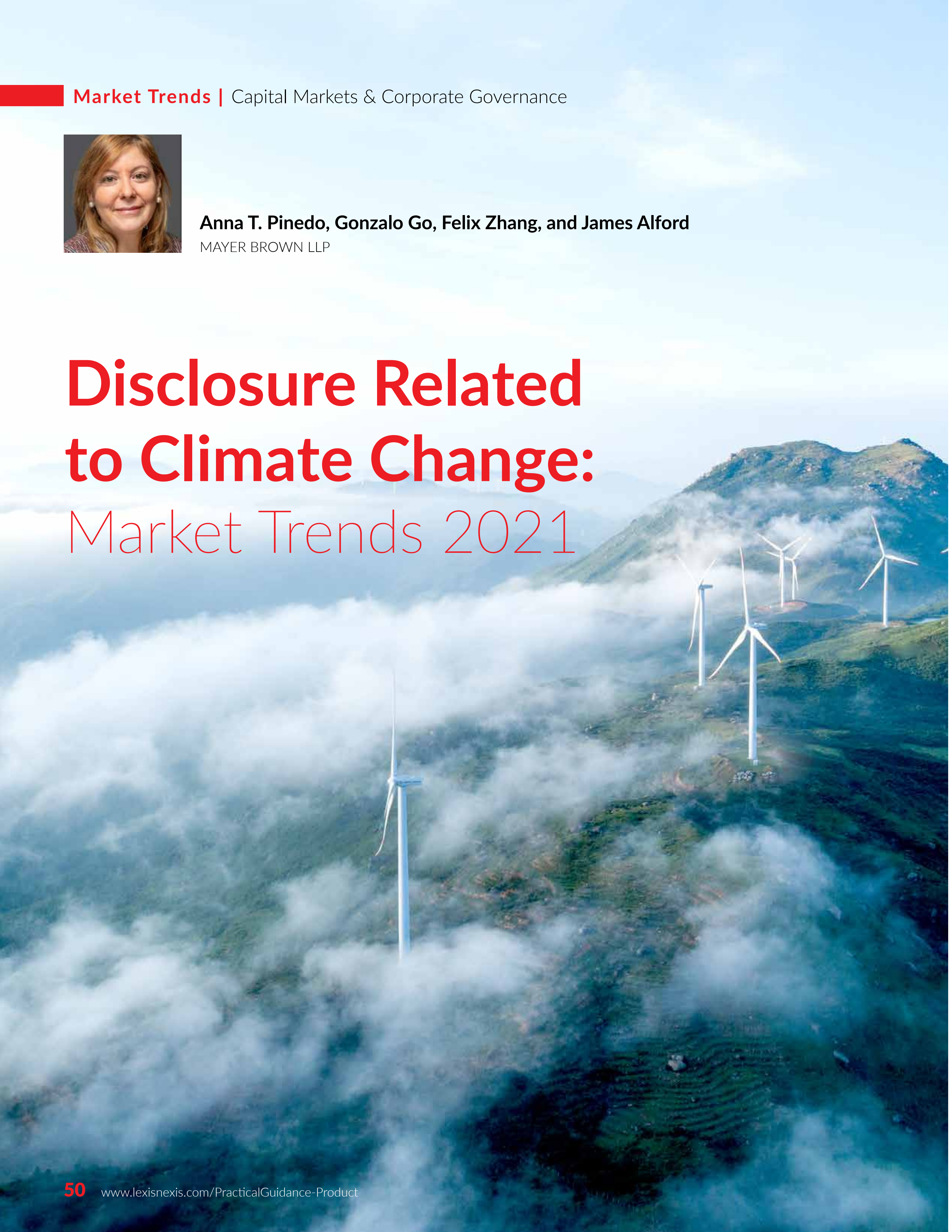
Grab Holdings, Inc.	
Date	December 1, 2021
SPAC Name	Altimeter Growth Corp.
Target	Grab Holdings, Inc.
Deal Size	$39.6 billion

Grab Holdings, Inc.	
Target Ownership Post-Closing (assuming no redemption)	Target stockholders: 88.19% SPAC stockholders: 1.27% Sponsor and certain SPAC directors: 0.32% Sponsor related parties: 1.96% PIPE investors: 8.27%
Lock-up Period	Specifically identified target stockholders are subject to transfer restrictions as follows: • Upon the earlier of five days after the first earnings release of target after the closing if the closing price per share of Class A ordinary shares exceeds $12.50 for any five trading days within the 10 consecutive trading day period preceding such earnings release, or after the first earnings release of target after the consummation of the closing if the closing price per share of Class A ordinary shares exceeds $12.50 for any five trading days within any 10 consecutive trading day period, five days after such fifth trading day, Class A ordinary shares held by certain target stockholders • 180 days after the closing, Class A ordinary shares held by certain target stockholders • One year after the closing, Class A ordinary shares received by certain target executives • Three years after the closing, Class A ordinary shares received by other identified key executives • Three years after the closing, Class A ordinary shares or other securities convertible into or exercisable or exchangeable for Class A ordinary shares held by the sponsor In each case, there is a specific cap on the aggregate number of Class A ordinary shares that may be resold.
Board Composition Post-Closing	Class B ordinary shareholders have a controlling interest in the company and have the sole ability to increase the total number of directors up to nine persons. A majority of the directors are nominated and appointed by the Class B ordinary shareholders.
SPAC Duration	IPO: October 5, 2020 Merger Agreement signed: April 12, 2021 Business combination closed: December 1, 2021
Other – Dual Class Structure	The company adopted a dual class structure comprising Class A ordinary shares, entitled to one vote per share, and Class B ordinary shares, entitled to 45 votes per share. Class B ordinary shareholders may increase the total number of directors without approval of Class A ordinary shareholders.

Buzzfeed, Inc.	
Date	December 3, 2021
SPAC Name	890 5th Avenue Partners, Inc.
Target	BuzzFeed, Inc.
Deal Size	$1.2 billion
Target Ownership Post-Closing (assuming no redemption)	Target stockholders: 94.9% SPAC stockholders: 3.1% Complex Networks Equityholders: 1.1% Initial stockholders: 0.9%
Lock-up Period	Pursuant to an Amended and Restated Investor Rights Agreement: • Certain stockholders (directors, officers, and other parties to the agreement) are subject to a 180-day lock-up from the commencement of sales of SPAC's IPO, subject to certain limited exceptions and customary terms. • The initial stockholders agreed to transfer restrictions on Founder Shares until the earlier to occur of (A) one year after the closing or (B) after the closing if the last reported sale price of the Class A common stock equals or exceeds $12.00 per share for any 20 trading days within any 30-day trading period commencing at least 150 days after the closing, or the date following the closing on which the company complete a liquidation, merger, stock exchange, reorganization or other similar transaction.
Board Composition Post-Closing	As a controlled company, a majority of the seven directors will be independent directors.
SPAC Duration	IPO: January 14, 2021 Merger Agreement signed: June 24, 2021 Business combination closed: December 3, 2021

__Jamie (Cole) Payne__ is a Content Manager with Lexis Practical Guidance's Corporate and M&A team. She has several years of legal experience advising clients in mergers and acquisitions, entity formation, corporate governance matters, and commercial contract negotiations. Her experience is not limited to any one particular industry, and she has worked with a variety of privately-held and public companies. Jamie also served as an adjunct law professor for a brief period of time. She is passionate about teaching best practices and negotiation skills, as well as coaching other lawyers in professional development.

RESEARCH PATH: *Corporate and M&A > Trends & Insights > Practice Notes*



Anna T. Pinedo, Gonzalo Go, Felix Zhang, and James Alford
MAYER BROWN LLP

Disclosure Related to Climate Change: Market Trends 2021

This article discusses market trends in 2021 relating to disclosures of climate change risks and mitigation by public companies, which are intertwined with environmental, social, and governance (ESG) issues.

IT ALSO PROVIDES ILLUSTRATIVE DISCLOSURES BY public companies regarding how climate change has affected or may affect their operations, both directly (e.g., through disruption of supply chains) and indirectly (e.g., through increased regulatory compliance, mitigation, and litigation costs) and concludes with recommendations regarding preparing and enhancing such disclosures.

Background

In the beginning of 2021, the Securities and Exchange Commission (SEC) undertook a number of new initiatives that signaled its increased interest in ESG issues, including climate-related disclosures. In February 2021, the SEC hired a Senior Policy Advisor for Climate and ESG to advise the agency on ESG matters and advance related new initiatives across its offices and divisions. Later that month, then-Acting SEC Chair Allison Herren Lee directed the SEC Division of Corporation Finance to enhance its focus on climate-related disclosures in public company filings. Then, in March 2021, the SEC announced the creation of a Climate and ESG Task Force in the Division of Enforcement and solicited public input on climate change disclosures.

In June 2021, the SEC published its Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions,[1] which included proposed rule amendments "to enhance registrant disclosures regarding issuers' climate-related risks and opportunities." The rules were originally expected to be issued in October 2021. SEC Chair Gary Gensler has stated that he has asked SEC staff "to develop a mandatory climate risk disclosure rule proposal for the SEC's consideration by the end of the year," but suggested that the proposal may not be ready for public notice and comment until early 2022. Recently, the SEC's Division of Corporation Finance has sent comment letters to public companies that suggest that the SEC is already taking a more proactive approach to reviewing climate disclosures than it has in prior years.

While there currently is no requirement to make specific climate change risk disclosures in SEC filings, public companies have frequently and voluntarily included in their public filings some disclosures relating to climate change, in part driven by the increased attention that investors place on greater transparency with respect to such disclosures. Several major institutional investors have expressed an intention to increasingly engage their portfolio companies on disclosing and managing climate-related business risks, particularly those in carbon-intensive sectors. For example, BlackRock, currently the largest money manager in the United States, reported in its 2021 Stewardship Expectations that it had put 191 of its 440 carbon-intensive portfolio companies on watch in the previous year, which meant that BlackRock would vote against the incumbent directors of those companies "unless they demonstrate significant progress on the management and reporting of climate-related risk."[2] In June 2021, it was reported[3] that 168 global asset managers and financial institutions managing more than $17 trillion in assets had pledged their support for the Carbon Disclosure Project, a nonprofit organization campaigning for the world's largest public companies to disclose environmental data. According to ISS Governance, during the 2021 proxy season, a total of 84 climate-related shareholder proposals were submitted[4] (compared to 77 proposals submitted during the prior proxy season), demanding, among other things, that companies (1) take actions toward specific environmental goals, (2) increase climate change-related reporting, (3) reduce emission of greenhouse gases generally, (4) disclose lobbying efforts related to climate regulation, or (5) allow shareholders to vote on companies' plans to mitigate climate risks. Furthermore, ISS Governance reported that median support of such proposals by shareholders was 48.9% during the 2021 season, compared to 37.6% during the prior proxy season.

In June 2021, the U.S. House of Representatives narrowly passed H.R. 1187, the Corporate Governance Improvement and Investor Protection Act, a series of bills containing proposed amendments to the Securities Exchange Act of 1934, as amended (Exchange Act).[5] If enacted into law, H.R. 1187 would, among other things, require the SEC to begin the rulemaking process to define standards for ESG disclosures, including climate risk information. In particular, the Climate Risk Disclosure Act (CRDA) contained within H.R. 1187 would require each public company to file an annual report disclosing the financial risks posed to the company by climate change and efforts by management to identify and mitigate such risks. Specific disclosures that would be mandated by the CRDA include (1) the company's direct and indirect greenhouse gas emissions, (2) the amount of fossil fuel-related assets owned or managed by the company, (3) how the company's valuation would be affected if climate change continues at its current pace, and (4) total costs attributable to the company's greenhouse gas emissions.

1. 86 Fed. Reg. 41,276 (July 30, 2021). 2. https://www.blackrock.com/corporate/literature/publication/our-2021-stewardship-expectations.pdf. 3. *A Record 168 Investors with US$17 Trillion of Assets Urge 1300+ firms to Disclose Environmental Data*, CDP, June 21, 2021. 4. *Proxy Voting in the Anthropocene: 2021 U.S. Proxy Season Climate-Related Voting Trends*, Jelmer Laks and Chris Miller, ISS, Sept. 15, 2021. 5. 15 U.S.C.S. § 78o.

Although H.R. 1187 has yet to be passed by the Senate (and may not be), the SEC may undertake rulemaking of its own accord requiring additional climate change disclosures. In response to investors' increased interest in climate-related issues, Acting SEC Chair Allison Herren Lee stated on March 15, 2021, that the SEC has directed its staff "to evaluate our disclosure rules with an eye toward facilitating the disclosure of consistent, comparable and reliable information on climate change." And, as noted above, the SEC has solicited and received more than 5,800 public comments since March 2021 on its existing climate change disclosure rules and guidance.

These recent developments are part of the SEC's long-term focus on climate change-related disclosures. On February 8, 2010, the SEC released interpretive guidance on how existing disclosure requirements relate to climate change.[6] In that release, the SEC identified a number of climate-related occurrences that may trigger disclosure. For example, legislative and regulatory developments could affect a company's financial and operating decisions or result in changed prices for its services. In addition, the physical effects of climate change may interrupt a company's supply and distribution chains, impact its physical assets, or decrease demand for its products.

The Staff of the SEC's Division of Corporation Finance (Staff) has issued a Sample Letter to Companies Regarding Climate Change Disclosures,[7] updated in September 2021, that provides sample comments that the Staff would issue to companies regarding their climate-related disclosure, following a review of a company's filings made under the Securities Act of 1933,[8] as amended, and the Exchange Act.

Although the SEC has clearly identified climate risk disclosure as a top priority, its rulemaking efforts have been delayed. In the face of opposition from corporate lobbyists and some lawmakers, the SEC has devoted considerable time and effort to gathering data to substantiate that these disclosures are material to investment decisions. SEC Chairman Gary Gensler recently reaffirmed his intention to implement new regulations, noting that investors look for "consistent, comparable, and decision-useful disclosures" when evaluating companies' climate risks.

While H.R. 1187 does not identify specific sections of public filings where climate-related disclosures would be required, there are three main areas where companies would likely need to make climate change-related disclosures in accordance with Regulation S-K: (1) risk factors; (2) business; and (3) management's discussion and analysis of financial condition and results of operations (MD&A), each of which is further discussed below.

6. *See* Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106; 34-61469; FR-82 (February 8, 2010) (2010 SEC LEXIS 360). 7. https://plus.lexis.com/api/permalink/3064ce61-552e-4ce9-99fa-5cccdcc780b4/?context=1530671. 8. 15 U.S.C.S. § 77a. 9. 17 C.F.R. § 229.105.

> ... a number of companies discuss the risk of reputational harm that may arise as a result of certain climate change impacts, such as decreased productivity and failure to adequately address consumers' concerns about climate change.

Disclosure on Climate Change in Risk Factors

Item 105 of Regulation S-K[9] requires a description of material factors that make an investment in the company or the securities being offered speculative or risky, with a concise explanation as to how each risk affects the company or the securities.

Public companies have typically included in the risk factors sections of their recent periodic reports a discussion of how the increase in incidents of extreme weather may interrupt supply chains and overall productivity, and many companies address the potential impacts of new or anticipated climate regulations. Some companies report an increased risk of litigation seeking legal and equitable relief for damages resulting from climate change alleged to be attributable to their operations. Finally, a number of companies discuss the risk of reputational harm that may arise as a result of certain climate change impacts, such as decreased productivity and failure to adequately address consumers' concerns about climate change. Below are some examples of climate change disclosures included in the risk factors section of recent periodic reports.

Financial Risk

- "Certain financial institutions, institutional investors and other sources of capital have begun to limit or eliminate their investment in oil and gas activities due to concerns about climate change, which could make it more difficult to finance our business. Increasing attention to climate change, ESG and sustainability has resulted in governmental investigations, and public and private litigation, which could increase our costs or otherwise adversely affect our business or results of operations. In addition, organizations that provide information to investors on corporate governance and related matters have developed ratings processes for evaluating companies on their approach to ESG matters. Such ratings are used by some investors to inform their investment and voting decisions. Unfavorable ESG ratings may lead to increased negative investor sentiment toward us and our industry and to the diversion of investment to other industries, which could have a negative impact on our stock price and our access to and costs of capital . . . In addition, impacts of climate change could increase the frequency and severity of extreme weather conditions. Any such extreme weather-related events could have a material adverse effect on our business, financial condition and results of operations." *Weatherford International PLC, Form 10-K filed February 19, 2021 (SIC Code 3533—Oil and Gas Field Machinery and Equipment).*

Operational Risk

- "It is not possible at this time to predict the timing and effect of climate change or whether additional [greenhouse gas (GHG)] legislation, regulations or other measures will be adopted at the federal, state or local levels. However, more aggressive efforts by governments and non-governmental organizations to reduce GHG emissions appear likely based on the findings set forth in the 2018 and 2021 [Intergovernmental Panel on Climate Change (IPCC)] Reports and any such future laws and regulations could result in increased compliance costs, additional operating restrictions or affect the demand for our customers' products and, accordingly, our services. For example, a coalition of over 20 governors of U.S. states formed the United States Climate Alliance to advance the objectives of the Paris Agreement, and several U.S. cities have committed to advance the objectives of the Paris Agreement at the state or local level as well. To this end, the California governor issued an executive order on September 23, 2020, ordering actions to pursue GHG emissions reductions, including a direction to the California State Air Resources Board to develop and propose regulations to require increasing volumes of new zero-emission passenger vehicles and trucks sold in California over time, with a targeted ban of the sale of new gasoline vehicles by 2035. If we are unable to recover or pass through a significant level of our costs related to complying with climate change regulatory requirements imposed on us, it could have a material adverse impact on our business, financial condition and results of operations. Further, to the extent financial markets view climate change and GHG emissions as a financial risk, this could negatively impact our cost of or access to capital. Climate change and GHG regulation could also negatively impact the drilling programs of our customers and, consequently, delay, limit or reduce the services we provide. An increased focus by the public on the reduction of GHG emissions as well as the results of the physical impacts of climate change could affect the demand for our customers' products and have a negative effect on our business." *Helmerich & Payne, Inc., Form 10-K filed November 18, 2021 (SIC Code 1381—Drilling Oil & Gas Wells).*

- "Physical impacts of climate change could have a material adverse effect on our costs and operations . . . There has been public discussion that climate change may be associated with rising sea levels as well as extreme weather conditions such as more intense hurricanes, thunderstorms, tornadoes, drought and snow or ice storms. Extreme weather conditions may increase our costs or cause damage to our facilities, and any damage resulting from extreme weather may not be fully insured. Many of our facilities are located near coastal areas or waterways where rising sea levels or flooding could disrupt our operations or adversely impact our facilities. Furthermore, periods of extended inclement weather or associated flooding may inhibit construction activity utilizing our products, delay or hinder shipments of our products to customers or reduce scrap metal inflows to our recycling facilities. Any such events could have a material adverse effect on our costs or results of operations." *Commercial Metals Co., Form 10-K filed October 14, 2021 (SIC Code 3312—Steel Works, Blast Furnaces & Rolling Mills (Coke Ovens))*.
- "Climate change, or legal, regulatory or market measures to address climate change, may negatively affect our business and operations.

  There is growing concern that carbon dioxide and other greenhouse gases in the atmosphere may have an adverse impact on global temperatures, weather patterns, and the frequency and severity of extreme weather and natural disasters. In the event that such climate change has a negative effect on agricultural productivity, we may be subject to decreased availability or less favorable pricing for certain commodities that are necessary for our products, such as wheat, tomatoes, potatoes, cashews and almonds. Adverse weather conditions and natural disasters can reduce crop size and crop quality, which in turn could reduce our supplies of raw materials, lower recoveries of usable raw materials, increase the prices of our raw materials, increase our cost of storing and transporting our raw materials, or disrupt production schedules.

  We may also be subjected to decreased availability or less favorable pricing for water as a result of such change, which could impact our manufacturing and distribution operations. In addition, natural disasters and extreme weather conditions may disrupt the productivity of our facilities or the operation of our supply chain. The increasing concern over climate change may also result in more regional, federal, and/or global legal and regulatory requirements relating to climate change, including, regulating greenhouse gas emissions, alternative energy policies and sustainability initiatives, including single use plastics. In the event such regulation is enacted and is more aggressive than the sustainability measures that we are currently undertaking to monitor our emissions and improve our energy efficiency and other sustainability goals, we may experience significant increases in our costs of operation and delivery. In particular, increasing regulation of utility providers, fuel emissions, or fuel suppliers could substantially increase the distribution and supply chain costs associated with our products. Additionally, consumers and customers may put an increased priority on purchasing products that are sustainably grown and made, requiring us to incur increased costs for additional transparency, due diligence and reporting. As a result, climate change could negatively affect our business and results of operations." *Campbell Soup Co., Form 10-K filed September 23, 2021 (SIC Code 2000—Food and Kindred Products)*.

- "The adoption of climate change legislation or regulations restricting emissions of 'greenhouse gases' could increase our costs to operate. Our landfill operations emit methane, identified as a GHG. There are a number of legislative and regulatory efforts at the state, regional and federal levels to curtail the emission of GHGs to ameliorate the effect of climate change. Should comprehensive federal climate change legislation be enacted, we expect it could impose costs on our operations that might not be offset by the revenue increases associated with our lower-carbon service options, the materiality of which we cannot predict. In 2010, the EPA published a Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, which expanded the EPA's federal air permitting authority to include the six GHGs. The rule sets new thresholds for GHG emissions that define when Clean Air Act permits are required. The current requirements of these rules have not significantly affected our operations or cash flows, due to the tailored thresholds and exclusions of certain emissions from regulation. However, if certain changes to these regulations were enacted, such as lowering the thresholds or the inclusion of biogenic emissions, then the amendments could have an adverse effect on our operating costs." *Creative Waste Solutions, Inc., Form 10-K filed July 12, 2021 (SIC Code 1000—Metal Mining)*.

Litigation Risk

- "Beginning in 2017, cities, counties, governments and other entities in several states in the U.S. have filed lawsuits against oil and gas companies, including ConocoPhillips, seeking compensatory damages and equitable relief to abate alleged climate change impacts. Additional lawsuits with similar allegations are expected to be filed. The amounts claimed by plaintiffs are unspecified and the legal and factual issues involved in these cases are unprecedented. ConocoPhillips believes these lawsuits are factually and legally meritless and are an inappropriate vehicle to address the challenges associated with climate change and will vigorously defend against such lawsuits." *ConocoPhillips, Form 10-K filed February 16, 2021 (SIC Code 2911—Petroleum Refining)*.

Reputational Risk

- "Climate change or measures to address climate change can negatively affect our business or damage our reputation. Climate change may have a negative effect on agricultural productivity which may result in decreased availability or less favorable pricing for certain commodities that are necessary for our products, such as potatoes, sugar cane, corn, wheat, rice, oats, oranges and other fruits (and fruit-derived oils). In addition, climate change may also increase the frequency or severity of natural disasters and other extreme weather conditions, which could impair our production capabilities, disrupt our supply chain or impact demand for our products. Also, concern over climate change may result in new or increased legal and regulatory requirements to reduce or mitigate the effects of climate change, which could result in significant increased costs and require additional investments in facilities and equipment. As a result, the effects of climate change can negatively affect our business and operations. In addition, any failure to achieve our goals with respect to reducing our impact on the environment or perception of a failure to act responsibly with respect to the environment or to effectively respond to regulatory requirements concerning climate change can lead to adverse publicity, resulting in an adverse effect on our business or damage to our reputation." *PepsiCo, Inc., Form 10-K filed February 11, 2021 (SIC Code 2080—Beverages)*.

Climate Change Disclosures in the Business Section

Item 101(a)[10] Regulation S-K requires a company to describe, and disclose material information necessary to understand, the general development of its business.

Similar to the risk factors section, disclosures in the business section discuss the risk that unpredictable weather patterns, rising sea levels, and changing temperatures will interrupt supply chains and have other adverse consequences, which may affect productivity and financial performance. Companies also address the impact new laws or regulations may have on their businesses, such as increased overhead costs and changes to the level of demand for their products. Below are some examples of climate change disclosures included in the Business section of recent periodic reports.

General Disclosure

- "Various state governments and regional organizations are considering enacting new legislation and promulgating new regulations governing or restricting the emission of greenhouse gases from stationary sources such as our equipment and operations. Legislative and regulatory proposals for restricting greenhouse gas emissions or otherwise addressing climate change could require us to incur additional operating costs and could adversely affect demand for the natural gas and oil that we sell. The potential increase in our operating costs could include new or increased costs to obtain permits, operate and maintain our equipment and facilities, install new emission controls on our equipment and facilities, acquire allowances to authorize our greenhouse gas emissions, pay taxes related to our greenhouse gas emissions and administer and manage a greenhouse gas emissions program." *Camber Energy, Inc. Form 10-K/A filed November 22, 2021 (SIC Code 1311—Crude Petroleum & Natural Gas).*
- "The potential impact of climate change on our operations is uncertain. Climate change may result in, among other things, changes in rainfall and storm patterns and intensity and increased temperature and sea levels. . . . [O]ur operating results are significantly influenced by weather, and significant changes in historical weather patterns could significantly impact our future operating results. For example, if climate change results in drier weather and more accommodating temperatures over a greater period of time, we may be able to increase our productivity, which could positively impact our revenues and gross margins. Conversely, if climate change results in a greater amount of rainfall, snow, ice or other less accommodating weather conditions, we could experience reduced productivity, which could negatively impact our revenues and gross margins. Further, while an increase in severe weather events, such as

hurricanes, tropical storms, blizzards and ice storms, can create a greater amount of emergency restoration service work, it often also can result in delays or other negative consequences for our manufacturing operations, which could negatively impact our financial results. Climate change may also affect the conditions in which we operate, and in some cases, expose us to potentially increased liabilities associated with those environmental conditions. Concerns about climate change could also result in potential new regulations, regulatory actions or requirements to fund energy efficiency activities, any of which could result in increased costs associated with our operations." *EnerSys, Form 10-K filed May 26, 2021 (SIC Code 3690—Miscellaneous Electrical Machinery, Equipment & Supplies).*
- "The Company may be, directly and indirectly, subject to the effects of climate change and may, directly or indirectly, be affected by government laws and regulations related to climate change. We cannot predict with any degree of certainty what effect, if any, climate change and government laws and regulations related to climate change will have on the Company and our business, whether directly or indirectly. While we believe that it is difficult to assess the timing and effect of climate change and pending legislation and regulation related to climate change on our business, we believe that those laws and regulations may affect, directly or indirectly, (i) the costs associated with drilling and production operations in which we participate, (ii) the demand for oil and natural gas, (iii) insurance premiums, deductibles and the availability of coverage and (iv) the cost of utilities paid by the Company. In addition, climate change may increase the likelihood of property damage and the disruption of operation of wells in which we participate. As a result, our financial condition could be negatively impacted, but we are unable to determine at this time whether that impact would be material." *Reserve Petroleum Co., Form 10-K filed March 31, 2021 (SIC Code 1311—Crude Petroleum and Natural Gas).*

Climate Change Disclosures in MD&A

Item 303(a)[11] of Regulation S-K, management's discussion and analysis of financial condition and results of operations (MD&A), requires a discussion of a company's financial condition and results of operations and any material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. This includes descriptions and amounts of matters that have had a material impact on reported operations, as well as matters that are reasonably likely based on management's assessment to have a material impact on future operations. MD&A should not include merely generic or boilerplate disclosures but should reflect how particular facts and circumstances affect the company and its business.

Companies generally discuss in their MD&As the direct and indirect impacts and risks of climate change on management and business operations, including increased costs of raw materials due to droughts or flooding, as well as expenses incurred in compliance with climate change regulations, such as carbon taxes, cap-and-trade policies, and bans on drilling. In addition, many companies outline management's role in developing and implementing strategies for addressing actual and potential impacts of climate change. Below are some examples of climate change disclosures included in the MD&A sections of recent periodic reports.

Results of Operations

- "There is an increased focus by local, national and international regulatory bodies on greenhouse gas (GHG) emissions and climate change. A number of nations and U.S. states have adopted or are considering some form of climate change legislation and regulations, including carbon taxes, cap-and-trade policies and bans on drilling in certain areas or in certain ways. The climate accord reached at the Conference of the Parties (COP21) in Paris set many new goals, and while many related policies are still emerging, XTO Energy has informed the Trustee that it continues to anticipate that such policies will increase the cost of carbon dioxide emissions over time. As these regulations are under development, XTO Energy is unable to predict the total impact of the potential regulations upon the operators of the underlying properties, and it is possible that the operators of the underlying properties could face increases in operating costs or a ban or certain types of activities in order to comply with climate change or GHG emissions legislation, which costs could reduce or eliminate net proceeds payable to the Trust and Trust distributions." *Cross Timbers Royalty Trust, Form 10-K filed April 13, 2021 (SIC Code 6792—Energy & Natural Resources).*

10. 17 C.F.R. § 229.101.

11. 17 C.F.R. § 229.303.

- "For the past several years, management has identified multiple risks and opportunities related to climate change, including potential environmental regulation, technological innovation, and availability of fuel and water for operations, as among the most significant risks facing the Company. Accordingly, these risks are overseen by the Board in order to facilitate more integrated risk and strategy oversight and planning. Board oversight includes understanding the various challenges and opportunities presented by these risks, including the financial consequences that might result from enacted and potential federal and/or state regulation of GHG; plans to mitigate these risks; and the impacts these risks may have on the Company's strategy. In addition, the Board approves certain procurements of environmental equipment, grid modernization technologies, and replacement generation resources.

  Management is also responsible for assessing significant risks, developing and executing appropriate responses, and reporting to the Board on the status of risk activities. For example, management periodically updates the Board on the implementation of corporate environmental policy, and the Company's environmental management systems, including the promotion of energy efficiency programs, and the use of renewable resources. The Board is also informed of the Company's practices and procedures to assess the impacts of operations on the environment. The Board considers issues associated with climate change, the Company's GHG exposures, and the financial consequences that might result from enacted and potential federal and/or state regulation of GHG. Management has published, with Board oversight, a Climate Change Report available at http://www.pnmresources.com/about-us/sustainability-portal.aspx, that details the Company's efforts to transition to an emissions-free generating portfolio by 2040." *PNM Resources, Inc., Form 10-K filed March 1, 2021 (SIC Code 4911—Energy & Natural Resources).*

- "As a global corporate citizen, we are concerned about the consequences of climate change and will take prudent and cost effective actions that reduce Green House Gas (GHG) emissions to the atmosphere . . . Even as we take action to control the release of GHGs, additional warming is anticipated. Long-term, higher average global temperatures could result in induced changes in natural resources, growing seasons, precipitation patterns, weather patterns, species distributions, water availability, sea levels, and biodiversity. These impacts could cause changes in supplies of raw materials used to maintain FMC's production capacity and could lead to possible increased sourcing costs. Depending on how pervasive the climate impacts are in the different geographic locations experiencing changes in natural resources, FMC's customers could be impacted. Demand for FMC's products could increase if our products meet our customers' needs to adapt to climate change impacts or decrease if our products do not meet their needs." *FMC Corporation, Form 10-K filed February 25, 2021 (SIC Code 2800—Industrial & Manufacturing).*

- "Our operations, and the activities of our customers, could be disrupted by climate change. The physical changes caused by climate change may prompt changes in regulations or consumer preferences which in turn could have negative consequences for our and our customers' businesses. Climate change may negatively impact our customers' operations, particularly those in the livestock industry, through climate-related impacts such as increased air and water temperatures, rising water levels and increased incidence of disease in livestock. Potential physical risks from climate change may include altered distribution and intensity of rainfall, prolonged droughts or flooding, increased frequency of wildfires and other natural disasters, rising sea levels, and a rising heat index, any of which could cause negative impacts to our and our customers' businesses. If such events affect our customers' businesses, they may purchase fewer of our products, and our revenues may be negatively impacted. Climate driven changes could have a material adverse effect on our financial condition and results of operations.

  There has been a broad range of proposed and promulgated state, national and international regulations aimed at reducing the effects of climate change. Such regulations could result in additional costs to maintain compliance and additional income or other taxes. Climate change regulations continue to evolve, and it is not possible to accurately estimate potential future compliance costs." *Phibro Animal Health Corp., Form 10-K filed August 25, 2021 (SIC Code 2834—Healthcare & Pharmaceuticals).*

Related Content

For an analysis of risk factor disclosure required in SEC filings, see

MARKET TRENDS 2020/21: RISK FACTORS

For a discussion of risk factors in a registration statement, see

RISK FACTOR DRAFTING FOR A REGISTRATION STATEMENT

For a list of tips to follow in drafting a registration statement, see

TOP 10 PRACTICE TIPS: DRAFTING A REGISTRATION STATEMENT

For a review of periodic reporting and other disclosure obligations of public companies under the Securities Exchange Act of 1934, as amended, see

PUBLIC COMPANY PERIODIC REPORTING AND DISCLOSURE OBLIGATIONS

For an overview of the periodic and current reporting obligations of public companies, see

PERIODIC AND CURRENT REPORTING RESOURCE KIT

For an explanation on the business section requirements of Form 10-K, see

FORM 10-K DRAFTING AND REVIEW

For more information on MD&A generally, see

MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

For assistance in drafting the MD&A section of a filing, see

MANAGEMENT'S DISCUSSION AND ANALYSIS SECTION DRAFTING CHECKLIST

- "As our business is focused on reducing carbon emissions and increasing resiliency to climate change, we are impacted by the effects of climate change and various related regulatory responses. In managing our business, we consider the potential impacts to our operations that may result in certain climate-related scenarios." *Hannon Sustainable Infrastructure, Inc., Form 10-K filed February 22, 2021 (SIC Code 6798—Construction & Real Estate).*

To review previous editions of the Practical Guidance Journal, follow this link to the archive.

Climate Change Disclosure Enhancements

Investors' interest in understanding the impact of climate change on public companies is at an all-time high. This is consistent with the efforts by the present federal administration, the SEC, and Congress in pushing for mandatory ESG disclosures, including those related to climate change. A public company's board of directors and management should consider providing a comprehensive and reliable set of climate change-related disclosures, including quantifying to the extent possible the actual or anticipated financial effects of climate change on its business, to minimize its legal risks and maximize the potential benefits of having a business strategy to address ESG issues. These disclosures will also provide a company's investors with insight into whether the company will be able to withstand environmental, regulatory, and potential operational changes that may result from climate change. The following steps may be helpful in preparing or enhancing disclosures related to climate change in SEC-filed documents:

- **Ascertain and disclose if the company currently experiences, or is likely to experience, the direct and indirect impacts of climate change.** A public company should ascertain its actual and potential exposures to short-, medium-, and long-term effects of climate change. It should disclose both direct impacts (e.g., disruptions to operations and supply chains and decreased customer demand due to extreme weather events) and indirect impacts (e.g., costs associated with regulatory compliance, including carbon taxes, cap-and-trade policies, emissions standards, and bans on drilling).
- **Disclose the business risks and impacts associated with climate change.** A company should consider identifying which parts of its business or operations are expected to be affected by climate change. It should also provide a reasonable estimate on how climate change affects or will affect that business segment and for how long. It should not only focus on the negative effects on financial condition, operating results, and cash flows, but also should underscore any favorable effects climate change may have on the company's business and operations (accompanied, of course, by appropriate cautionary language). To the extent possible, a public company should reasonably attempt to quantify the impacts of climate change, taking into consideration that if and when H.R. 1187 is enacted, it will be required to "incorporate a price on greenhouse gas emissions in financial analyses that reflects, at a minimum, the social cost of carbon that is attributable to issuers."
- **Describe how the company decides to initiate and enhance the processes for identifying and mitigating risks related to climate change.** A company should consider disclosing any policies, procedures, and controls in place to identify, assess, and manage actual and potential impacts of climate change or other related-ESG issues, as well as any strategy or specific actions that the company is taking to mitigate any of these impacts or their corresponding risks. If a strategy is already in place, a company should disclose how it was developed, the business and other factors considered when developing it, its salient points, and how often it is updated based on the priorities set by its board of directors and management. It should also discuss how these climate change-related risks are incorporated into the company's overall risk management strategy and how the ESG goals, practices, and philosophies are aligned with the company's business, operational strategy, corporate culture, and investor expectations. Furthermore, a company should also consider including a scenario analysis that describes how effective its ESG strategy will be in the face of differing climate scenarios. This type of disclosure has consistently been a part of many major institutional investors' stewardship expectations, as well as H.R. 1187.
- **Describe any reputational risks the company may receive as a result of its climate-related policies.** Companies in carbon-intensive or heavily pollutive industries may face lawsuits by activist shareholders and environmental activists seeking damages to abate alleged climate change impacts, as well as negative media coverage that may diminish their goodwill. A company should consider disclosing the impact of its climate policies on its reputation, as well as any plan in place to address these impacts.
- **Disclose and enhance climate change-related internal controls and procedures to mitigate litigation risk and regulatory scrutiny.** Section 10(b)[12] of the Exchange Act and Rule 10b-5[13] adopted thereunder prohibit material misstatements or omissions of fact by public companies in their filings with the SEC and in other public statements. Accordingly, a company's disclosure regarding its climate change and other-ESG policies, procedures, and internal controls should be accurate and complete in all material respects, and the company should be prepared to confirm the accuracy and reliability of all data and metrics it includes in its public filings and other public statements. L

12. 15 U.S.C.S § 78j. 13. 17 C.F.R. § 240.10b-5.

***Anna T. Pinedo** is a partner in Mayer Brown's New York office and co-leader of the Global Capital Markets practice. She concentrates her practice on securities and derivatives. Anna represents issuers, investment banks/financial intermediaries, and investors in financing transactions, including public offerings and private placements of equity and debt securities, as well as structured notes and other hybrid and structured products. She works closely with financial institutions to create and structure innovative financing techniques, including new securities distribution methodologies and financial products. She has particular financing experience in certain industries, including technology, telecommunications, healthcare, financial institutions, REITs, and consumer and specialty finance. Anna has worked closely with foreign private issuers in their securities offerings in the United States and in the Euro markets. She also works with financial institutions in connection with international offerings of equity and debt securities, equity- and credit-linked notes, and hybrid and structured products, as well as medium term note and other continuous offering programs.*

***Gonzalo Go** is an associate in Mayer Brown's Corporate & Securities practice. He advises issuers on shelf registration statements, medium term note programs, and issuances exempt from registration under Rule 144A, Regulation S and Section 3(a)(2) of the Securities Act. He advises issuers, investment banks, and sponsors in public and private offerings of equity and debt securities, including initial public offerings, de-SPAC and Up-C business combinations, follow-on offering, investment grade debt offerings, and securitizations. He also assists public companies with stock exchange listing applications, maintenance and transfers; securities law reporting; and compliance requirements such as Forms 10-K, 10-Q and 8-K, and Section 16 filings; and general corporate governance matters, including preparation and review of resolutions, minutes, meeting agendas, and relevant corporate policies and processes.*

***Felix Zhang** is an associate in Mayer Brown's Washington DC office and a member of the Corporate & Securities practice.*

***James Alford** is an associate in the Corporate & Securities practice at Mayer Brown.*

RESEARCH PATH: *Capital Markets & Corporate Governance > Trends & Insights > Practice Notes*

The Practical Guidance Employee Benefits and Executive Compensation Team

Post-employment Restrictive Covenants: Market Trends 2017-2021

This Market Trends review provides an overview of restrictive covenant obligations contained in executive employment agreements and discusses recent market trends in publicly filed executive employment agreements from 2017 to the first half of 2021.

SPECIFICALLY, IT DISCUSSES NON-COMPETITION CLAUSES and employee non-solicitation and client/customer non-solicitation clauses. Such provisions prohibit executives from taking certain actions that are adverse to their employers' interests. As indicated below, these have become common features of employment agreements and other compensatory agreements with executives.

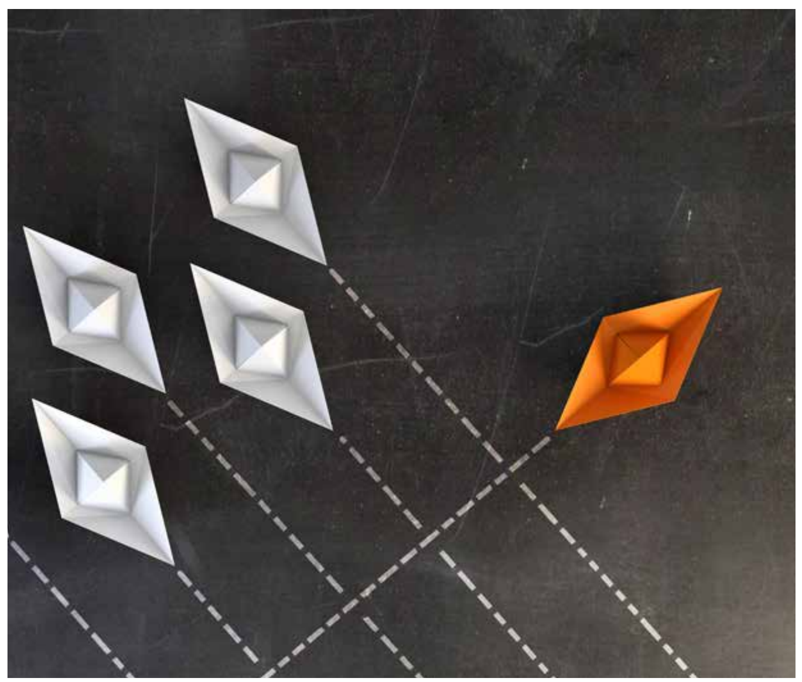
The following analysis is based on publicly filed executive employment agreements covered by Market Standards—Employment Agreements, the searchable database from Practical Guidance of publicly filed employment agreements that enables users to search, compare, and analyze over 4,800 employment agreements using approximately 75 detailed deal points to filter search results. For more information on Market Standards, click here.

Non-competition Restrictive Covenants

A traditional non-competition clause in the employment setting prohibits the employee from engaging in activities that would or would be likely to compete with the business activities of the employer. The scope of such provisions is sometimes limited to a designated geographical area and often is stipulated to last during the period of employment and for a specific period after the employment period terminates.

Non-compete Prevalence Data and Trends

Of the 4,860 agreements covered by Market Standards as of September 23, 2021, which date from 2017 to 2021, well over



half (2,704) include a covenant not to compete that extends beyond the period of employment. In addition, 499 agreements refer to a separate agreement containing restrictive covenant provisions. If we assume that a majority of those separate agreements also contain non-competes, then we can estimate the total percentage of agreements having some kind of post-employment non-competition provision to be over 60%.

Based on the Market Standards data set, the relative prevalence of non-competes in this data set has not changed dramatically over the last three years, but the rate was somewhat higher in 2017.

Non-compete Drafting and Enforceability

In the United States, the enforceability of non-competes is largely a matter of state law (although increasingly federal anticompetitive measures have impacted non-competes in the context of corporate transactions). Under common law doctrines in many states, public policy concerns have led courts to subject challenged non-competes to balancing tests, weighing the employer's justification for the restriction or the employer's protectable interest against restraint-of-trade issues implicated, such as the employee's ability to earn a living during the restricted period and anticompetitive effects. The protectable interests that states will recognize, the rules of construction that states will apply, and the required elements of a non-compete agreement will vary from one state to the next.

In addition, some states have enacted legislation to regulate the use of restrictive covenants or establish more specific parameters for their enforceability. California's strong statutory restriction on non-competition clauses largely eliminates their use in the state (subject to certain exceptions, including non-competes entered into in connection with the sale of a business).[1] About 30 states have statutes that regulate the practice in some manner. These laws change frequently, so it is important to keep up to date on jurisdictional developments. The table below summarizes legislative activity over the last 12 months.

State	Legislation	Enactment Date	Effective Date
Illinois	2021 Bill Text ILL S.B. 672 amends the Illinois Freedom to Work Act to impose greater restrictions on non-competes, including prohibitions on non-competes and non-solicitation clauses with employees earning under applicable threshold amounts.	August 13, 2021	Effective January 1, 2022
Oregon	2021 Or. S.B. 169 amends the Oregon non-compete law to change the voidability, duration, and minimum salary requirements.	May 21, 2021	Effective January 1, 2022
Nevada	2021 Nev. AB 47 amends certain provisions of the Nevada non-compete statute affecting covered employees and employer penalties among other things.	May 25, 2021	Effective October 1, 2021
South Dakota	2021 S.D. HB 1154 prohibits non-compete agreements with certain healthcare providers.	March 25, 2021	Effective July 1, 2021
Washington, D.C.	2019 D.C. B 494 generally prohibits employers from requiring or requesting that D.C. employees execute a non-compete.	January 11, 2021	Effective April 1, 2022
Louisiana	La. Rev. Stat. Ann. § 23:921 amends the Louisiana non-compete law to include partners, shareholders, and LLC members as individuals who may be subject to a non-compete agreement.	June 9, 2020	Effective August 1, 2020

1. Cal. Bus. & Prof. Code §§ 16600 through 16607.

In general, broadly drafted non-competes place a heavier burden on the employer to justify the restrictions when attempting to enforce a non-compete, and narrowly tailored clauses reduce the risk that a court will strike down or modify the covenant. Among the general considerations for structuring a non-compete, you should consider:

- Whether the protectable interest is something that would give the employee an unfair competitive advantage
- Whether the potential unfair competition would cause irreparable harm to the employer
- Whether a less restrictive option exists to protect the employer's interest

For analyzing the reasonableness of a non-competition restriction, the duration and geographic scope are often among the most important factors. The 2,672 employment agreements covered by Market Standards as of September 23, 2021, that contain a non-compete having a post-employment restricted period indicate that the most common duration is 12 months (~62%). The second most common duration is 24 months (~23%). Based on the Market Standards data set, the duration of non-compete post-employment restricted periods appears to have remained remarkably steady over the past four years.

You can also find data about geographic scope of non-competes in Market Standards. Of the database's 2,704 agreements containing non-compete language, 851 (~31.5%) indicate a specific jurisdiction, area, or region; 1,033 (~38%) indicate coverage in areas where the employer does business; and 890 (~33%) indicate a worldwide scope or have no geographic limitation.

Following are several recent examples of non-compete clauses from publicly filed executive employment agreements found using Market Standards:

Employer (Position)	Non-Compete Language	Date
Travel + Leisure Co.; Wyndham Destinations, Inc (CFO)	**Section VII.B.a.** During the Restricted Period, the Executive will not make any statements or perform any acts intended to advance or which reasonably could have the effect of advancing the interest of any competitors of the Company or any of its affiliates or in any way injuring or intending to injure the interests of the Company or any of its affiliates. During the Restricted Period, the Executive will not, without the express prior written consent of the Company which may be withheld in the Company's sole and absolute discretion, engage in, or directly or indirectly (whether for compensation or otherwise), own or hold any proprietary interest in, manage, operate, or control, or join or participate in the ownership, management, operation or control of, or furnish any capital to or be connected in any manner with, any party or business which competes with the business of the Company or any of its affiliates, as such business or businesses may be conducted from time to time, either as a general or limited partner, proprietor, common or preferred shareholder, officer, director, agent, employee, consultant, trustee, affiliate, or otherwise. The Executive acknowledges that the Company's and its affiliates' businesses are conducted nationally and internationally and agrees that the provisions in the foregoing sentence will operate throughout the United States and the world.	7/1/21

Employer (Position)	Non-Compete Language	Date
Charter Communications, Inc. (Senior Vice President)	**Section 15.b.i.** For purposes of this Section 15, the term "Restricted Period" shall mean the period commencing on the Effective Date and terminating on the second annual anniversary (or, in the case of Section 15(b)(iii), the first anniversary) of the Date of Termination; provided, that the "Restricted Period" also shall encompass any period of time from whichever anniversary date is applicable until and ending on the last date Executive is to be paid any payment; and provided further, that the "Restricted Period" shall be tolled and extended for any period of time during which Executive is found to be in violation of the covenants set forth in this Section 15(b). In consideration of the acknowledgments by Executive, and in consideration of the compensation and benefits to be paid or provided to Executive by the Company, Executive covenants and agrees that during the Restricted Period, Executive will not, directly or indirectly, for Executive's own benefit or for the benefit of any other person or entity other than the Company: (i) in the United States or any other country or territory where the Company then conducts its business: engage in, operate, finance, control or be employed by a "Competitive Business" (as defined below); serve as an officer or director of a Competitive Business (regardless of where Executive then lives or conducts such activities); perform any work as an employee, consultant (other than as a member of a professional consultancy, law firm, accounting firm or similar professional enterprise that has been retained by the Competitive Business and where Executive has no direct role in such professional consultancy and maintains the confidentiality of all information acquired by Executive during his employment with the Company), contractor, or in any other capacity with, a Competitive Business; directly or indirectly invest or own any interest in a Competitive Business (regardless of where Executive then lives or conducts such activities); or directly or indirectly provide any services or advice to any business, person or entity who or which is engaged in a Competitive Business (other than as a member of a professional consultancy, law firm, accounting firm or similar professional enterprise that has been retained by the Competitive Business and where Executive has no direct role in such professional consultancy and maintains the confidentiality of all information acquired by Executive during his employment with the Company). A "Competitive Business" is any business, person or entity who or which, anywhere within that part of the United States, or that part of any other country or territory, where the Company conducts business, directly or indirectly through any entity controlling, controlled by or under common control with such business, offers, provides, markets or sells any service or product of a type that is offered or marketed by or competitive with a service or product offered or marketed by the Company at the time Executive's employment terminates or is being planned to be offered or marketed by the Company with Executive's participation, or who or which in any case is preparing or planning to do so. To appropriately take account of the highly competitive nature of the Company's business, the Parties agree that any business engaged in any of the activities set forth on Schedule 1 shall be deemed to be a "Competitive Business." The provisions of this Section 15 shall not be construed or applied so as to prohibit Executive from owning not more than five percent (5%) of any class of securities that is publicly traded on any national or regional securities exchange, as long as Executive's investment is passive and Executive does not lend or provide any services or advice to such business or otherwise violate the terms of this Agreement in connection with such investment	7/27/21

Employer (Position)	Non-Compete Language	Date
Ceridian HCM, Inc (EVP, GC, Corporate Secretary)	**Section 7.02.** 7.02 Non-competition. During the terms of this Agreement, Employee will devote full time and energy to furthering Ceridian's business and will not pursue any other business activity without Ceridian's written consent. Unless the obligation is waived or limited by Ceridian in accordance this Section 7.02, Employee agrees that during his or her employment and for a period of time, as defined in Section 8.15, ("Restrictive Period") following termination of employment with Ceridian for any reason, Employee will not directly or indirectly, alone or as a partner, officer, director, shareholder or an employee, engage in any commercial activity on behalf of the following specified competitors of Ceridian (and/or their respective affiliates or subsidiaries), having acknowledged that all such entities provide products or services or are otherwise engaged in a competitive business with the business carried out by Ceridian: Workday, Inc., Automatic Data Processing, Inc/ADP, LLC., Ultimate Software Group, Inc., Kronos Incorporated, Paycom Software Inc., SAP SE, Oracle Corporation and Paylocity Corporation, in competition with Ceridian's business as conducted as of the date of such termination of employment, in the United States or Canada. For purposes of this subsection, "shareholder" shall not include beneficial ownership of less than five percent (5%) of the combined voting power of all issued and outstanding voting securities of a publicly held corporation whose stock is traded on a major stock exchange. For the avoidance of doubt "Ceridian's business" as used herein shall include business conducted by any Ceridian Affiliate and any partnership or joint venture in which Ceridian or its Affiliates is a partner or join venture, including in particular the provision of human capital management software and services.	6/7/21
Sharecare Operating Company, Inc.; Sharecare, Inc (President)	**Section V.H.** Executive agrees that while Executive is employed hereunder and for the Non-Compete Period following resignation or termination of Executive's employment for any reason, Executive will not participate as an owner, partner, officer, employee, director, or consultant for, any company or business competing with any line of business of the Company Group in the Territory; provided, however, that nothing herein shall prevent Executive from investing as less than a five (5%) percent stockholder in the securities of any company listed on a national securities exchange or quoted on an automated quotation system. 1. The "Non-Compete Period" means the first anniversary of Executive's termination of employment. 2. The "Territory" means any place in the U.S. that the Company Group conducts the relevant competing line of business within the two (2)-year period preceding Executive's termination of employment. The obligations contained in this Section V(H) shall survive the termination of the Term of Employment and the termination Executive's employment with the Company Group and shall be fully enforceable thereafter.	8/13/21
SYNNEX Corporation (CEO, President)	Section 10.a. Noncompete. For a period beginning on the Employment Date and ending on the date you cease to provide services to the Company or any parent or subsidiary of the Company (excluding services provided pursuant to Section 11 following your termination of employment) or, if later, the date through which severance is payable pursuant to Section 7, you agree to not, directly or indirectly, engage in (whether as an employee, consultant, agent, proprietor, principal, partner, stockholder, corporate officer, director or otherwise), nor have any ownership interest in or participate in the financing, operation, management or control of, any person, firm, corporation or business that competes with Company (or any parent or subsidiary of the Company); provided, however, that you shall not be prohibited from owning, solely as an investment, up to 1% of the stock of a publicly traded corporation or up to 5% of the equity of a non-publicly traded company. You may elect not to comply with the provisions of this Section 10(a) following your termination of employment. However, all continuing payments and benefits to which you would have been entitled pursuant to Section 7 will immediately cease.	8/31/21

Non-solicitation Restrictive Covenants

There are two main types of non-solicitation provisions:

- **Employee non-solicits.** These are prohibitions on encouraging or enticing employees (and typically independent contractors and other service providers) of the former employer to leave their employment to work with or for the departing employee and/or otherwise interfering with such employment relationships.
- **Client/customer non-solicits.** These are prohibitions on soliciting the business of the former employer's clients or customers and/or otherwise interfering with such business relationships.

As was the case for non-competes, state jurisdictions differ in their treatment of employee and client/customer non-solicitation agreements.

Employee non-solicits are generally accepted as a legitimate way for employers to maintain stability in their workforce and, because they do not directly restrict the former employee's ability to compete or otherwise pursue his or business interests, most courts are more likely to consider them valid and enforceable contractual terms. On the other hand, client/customer non-solicits generally implicate restraint-of-trade concerns and are much more likely to be scrutinized similar to non-competes in many jurisdictions, applying common law balancing tests, examining compliance with applicable statutes, and assessing the reasonableness of the restriction.

So, for example, although California's Supreme Court has held that client/customer non-solicits violate the statutory prohibition on non-competition provisions, California courts have upheld employee non-solicits. Note, though, that some states, including Illinois, Indiana, Missouri, Oklahoma, and Wisconsin, at least nominally evaluate employee non-solicits similarly to client/customer non-solicits.

Thus, employers generally will want to address the same considerations for non-solicits as they do for non-competes when evaluating their enforceability in light of the applicable jurisdiction, including the justification for the restrictions being used to demonstrate the employer's legitimate protectable interest in imposing the restriction and the scope of the restriction, including the activities prohibited and the time, geographic, and other limitations of the covenant.

Non-solicit Prevalence Data and Trends

Of the 4,860 Market Standards executive employment agreements analyzed, approximately 64% (3,108) have an employee non-solicit and 51% (2,474) have a client/customer non-solicit that, in each case, extends beyond the period of employment. If we take into consideration the additional 499 agreements that refer to a separate agreement containing restrictive covenant provisions, it is likely that the actual percentages of such arrangements among this data set are considerably higher.

The fact that employee non-solicits are notably more common than client/customer non-solicits is not surprising given the fact that they are more likely to be considered valid contractual obligations in most jurisdictions.

The relative prevalence of non-solicits in this data set has not changed dramatically over the last three years, but the rate for both types of non-solicits was somewhat higher in 2017. That mirrors the trend for non-competition clauses noted above.

As for non-competes, the duration of a non-solicitation period can be an important factor for assessing reasonability and enforceability. Of the 3,108 employment agreements having an employee non-solicit and 2,474 agreements having a client/customer non-solicit covered by Market Standards as of September 23, 2021, the most prevalent post-employment restricted periods for each type are the same as for the non-competes found in the data set (and roughly to the same degree). Here again 12 months is most common (~60%), and 24 months is second-most frequent (~25%). Also similar to the non-compete data discussed earlier, these data do not show a consistent trend over the last four years for either longer or shorter restricted periods for non-solicitation provisions.

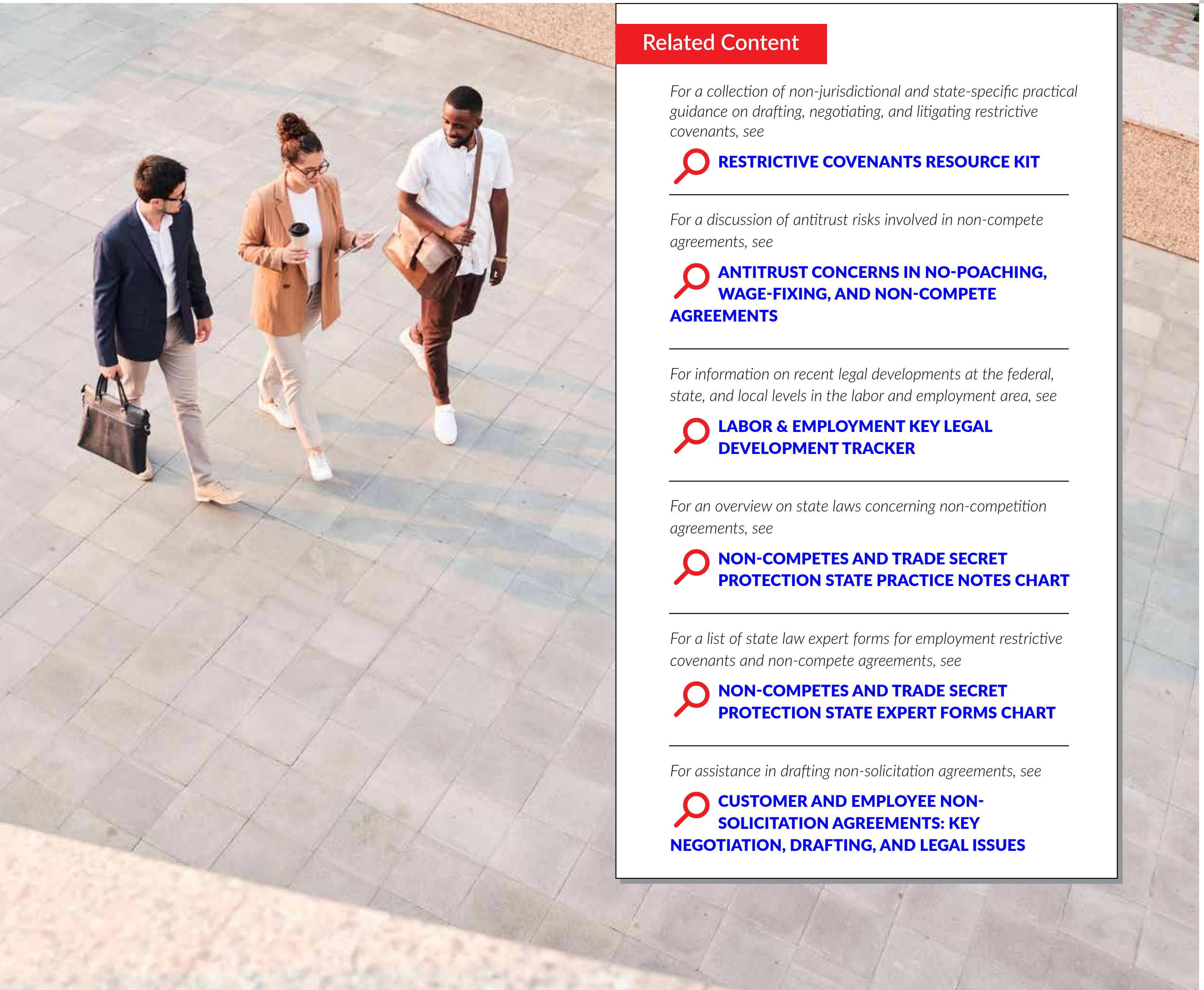
Of the 2,474 Market Standards agreements containing client/customer non-solicit language, 185 (~7.5%) impose a geographic limitation naming a specific jurisdiction, area, or region; 222 (~9%) indicate coverage in areas where the employer does business; and 1,542 (~62%) indicate a worldwide scope or have no geographic limitation. In addition, 505 (~20%) agreements limit the restriction to clients/customers with whom the executive worked or about whom the executive had confidential information.

Following are several recent examples of employee and client/customer non-compete clauses from publicly filed executive employment agreements found using Market Standards:

Employer (Position)	Nonsolicit Language	Date
DraftKings Inc. (CFO)	**Exhibit A: Section 2.** Nonsolicitation of Customers, Clients or Vendors. During the period of Employee's relationship with the Company and for a period of twelve (12) months after termination of such relationship (for any reason), Employee shall not directly or indirectly either for him/herself or for any other person, partnership, legal entity, or enterprise, solicit or transact business, or attempt to solicit or transact business with, any of the individuals or entities actually known to Employee to be the Company's customers, clients, vendors or partners, or prospective customers, clients, vendors or partners, in all cases, about which Employee learned Confidential Information (as defined above) or which Employee had some involvement or knowledge related to the Business of the Company. **Exhibit A: Section 3.** Nonsolicitation of Employees and Contractors. During the period of Employee's relationship with the Company and for a period of twelve (12) months after termination of such relationship (for any reason), Employee will not directly or indirectly either for him/herself or for any other person, partnership, legal entity, or enterprise: (i) solicit, in person or through supervision or control of others, an employee, advisor, consultant or contractor of the Company for the purpose of inducing or encouraging the employee, advisor, consultant or contractor to leave his or her relationship with the Company or to change an existing business relationship with the Company or to change an existing business relationship to the detriment of the Company, (ii) hire away an employee, advisor, consultant or contractor of the Company; or (iii) help another person or entity hire away a Company employee, advisor, consultant or contractor. Notwithstanding the foregoing, the placement of general advertisements offering employment, other service relationships or activities that are not specifically targeted toward employees, advisors, consultants or contractors of the Company shall not be deemed to be a breach of this Section 3.	8/5/21

Employer (Position)	Nonsolicit Language	Date
NXP USA, Inc. (GC, EVP)	**Section 8.** Non-Competition and Non-Solicitation. . . . During the Restricted Period, you also shall not, directly or indirectly: (i) persuade or attempt to persuade any customer or client, or any potential customer or client to which you have (or an employee who reports to you has or had) made a presentation or with respect to which you had access to confidential or proprietary information, (A) not to hire, engage or purchase products or services from the Company or its affiliates or (B) to hire, engage or purchase products or services from another entity or person in connection with a Competing Business within the Restricted Territory; or (ii) solicit for employment or hire (or solicit for engagement as an independent contractor or engage as an independent contractor) any employee (or independent contractor) of the Company or its affiliates (or any person who was employed (or engaged) by the Company or its affiliates within the 12-month period prior to such solicitation, hiring or engagement, as applicable (or, if following the termination of your employment, the 12-month period prior to such termination), or otherwise encourage any employee of, or independent contractor with, the Company or its affiliates to terminate his or her employment with or engagement by the Company or its affiliates or accept employment or a consulting relationship with any entity or person other than the Company or its affiliates.	8/25/21

Employer (Position)	Nonsolicit Language	Date
The Walt Disney Company (SVP)	**Section 7.d.** Non-Solicitation of Employees. During the Employment Period and, subject to the provisions of applicable law, during the one-year period following any termination of Executive's employment, Executive shall not, except in the course of carrying out Executive's duties hereunder, directly or indirectly induce any employee of the Company or any of its subsidiaries to terminate employment with such entity, and shall not directly or indirectly, either individually or as owner, agent, employee, consultant or otherwise, (i) solicit, encourage or induce the employment or engagement of, or entice from the employment of the Company or any of its subsidiaries, or (ii) direct, arrange, participate or assist in any such solicitation, encouragement, inducement or enticement of, any person who is or was employed by the Company or any subsidiary of either (other than Executive's personal assistant) unless such person shall have ceased to be employed by such entity for a period of at least six (6) months.	7/1/21



Related Content

For a collection of non-jurisdictional and state-specific practical guidance on drafting, negotiating, and litigating restrictive covenants, see

RESTRICTIVE COVENANTS RESOURCE KIT

For a discussion of antitrust risks involved in non-compete agreements, see

ANTITRUST CONCERNS IN NO-POACHING, WAGE-FIXING, AND NON-COMPETE AGREEMENTS

For information on recent legal developments at the federal, state, and local levels in the labor and employment area, see

LABOR & EMPLOYMENT KEY LEGAL DEVELOPMENT TRACKER

For an overview on state laws concerning non-competition agreements, see

NON-COMPETES AND TRADE SECRET PROTECTION STATE PRACTICE NOTES CHART

For a list of state law expert forms for employment restrictive covenants and non-compete agreements, see

NON-COMPETES AND TRADE SECRET PROTECTION STATE EXPERT FORMS CHART

For assistance in drafting non-solicitation agreements, see

CUSTOMER AND EMPLOYEE NON-SOLICITATION AGREEMENTS: KEY NEGOTIATION, DRAFTING, AND LEGAL ISSUES

Employer (Position)	Nonsolicit Language	Date
Bausch Health Companies Inc. (EVP, CFO)	**Section 13.a.** Covenants Not to Solicit or to Interfere. To protect the Confidential Information, Company Intellectual Property (as defined below) and other trade secrets of the Company and its affiliates, Executive agrees, during the Employment Term and for a period of twelve (12) months after Executive's cessation of employment with the Company (the "Restricted Period"), not to solicit, hire or participate in or assist in any way in the solicitation or hire of any employees of the Company or any of its subsidiaries (or any person who was an employee of the Company or any of its subsidiaries during the six-month period preceding such action). For purposes of this covenant, "solicit" or "solicitation" means directly or indirectly influencing or attempting to influence employees of the Company or any of its subsidiaries to become employed with any other person, partnership, firm, corporation or other entity. In addition, to protect the Confidential Information, Company Intellectual Property and other trade secrets of the Company and its affiliates, Executive agrees, during the Employment Term and the Restricted Period, not to (x) solicit any client or customer to receive services or to purchase any good or services in competition with those provided by the Company or any of its subsidiaries or (y) interfere or attempt to interfere in any material respect with the relationship between the Company or any of its subsidiaries on one hand and any client, customer, supplier, investor, financing source or capital market intermediary on the other hand. For purposes of this covenant, "solicit" or "solicitation" means directly or indirectly influencing or attempting to influence clients or customers of the Company or any of its affiliates to accept the services or goods of any other person, partnership, firm, corporation or other entity in competition with those provided by the Company or any of its affiliates. Executive agrees that the covenants contained in this Section 13(a) are reasonable and desirable to protect the Confidential Information and Company Intellectual Property of the Company and its affiliates; provided that solicitation through general advertising or the provision of references shall not constitute a breach of such obligations.	6/1/21

Employer (Position)	Nonsolicit Language	Date
Dollar General Corporation (Chief Accounting Officer)	**Sections 18 and 19.** Non-Interference with Employees. Through employment and thereafter through the Restricted Period, Employee will not, either directly or indirectly, alone or in conjunction with any other person or Entity: actively recruit, solicit, attempt to solicit, induce or attempt to induce any person who is an exempt employee of the Company or any of its subsidiaries or affiliates (or has been within the last six (6) months) to leave or cease such employment for any reason whatsoever. Non-Interference with Business Relationships. a. Employee acknowledges that, in the course of employment, Employee will learn about the Company's and, if applicable, the Subsidiary's business, services, materials, programs and products and the manner in which they are developed, marketed, serviced and provided. Employee knows and acknowledges that the Company and, if applicable, the Subsidiary has invested considerable time and money in developing its product sales and real estate development programs and relationships, vendor and other service provider relationships and agreements, store layouts and fixtures, and marketing techniques and that those things are unique and original. Employee further acknowledges that the Company and, if applicable, the Subsidiary has a strong business reason to keep secret information relating to Company's or, if applicable, the Subsidiary's business concepts, ideas, programs, plans and processes, so as not to aid Company's competitors. Accordingly, Employee acknowledges and agrees that the protection outlined in (b) below is necessary and reasonable. b. During the Restricted Period, Employee will not, on Employee's own behalf or on behalf of any other person or Entity, solicit, contact, call upon, or communicate with any person or entity or any representative of any person or entity who has a business relationship with the Company and, if applicable, the Subsidiary and with whom Employee had contact while employed, if such contact or communication would likely interfere with the Company's or, if applicable, the Subsidiary's business relationships or result in an unfair competitive advantage over the Company or, if applicable, the Subsidiary.	4/1/21

RESEARCH PATH: *Employee Benefits & Executive Compensation > Trends & Insights > Practice Notes*

Mark Haut PRACTICAL GUIDANCE BANKRUPTCY TEAM
with assistance from **Emony Robertson**
LEXISNEXIS RULE OF LAW FOUNDATION FELLOW

Differences between Chapters 7 and 13 of the Bankruptcy Code

This chart details the differences between Chapters 7 and 13 of the Bankruptcy Code and can be used to guide attorneys in understanding the differences between these chapters.

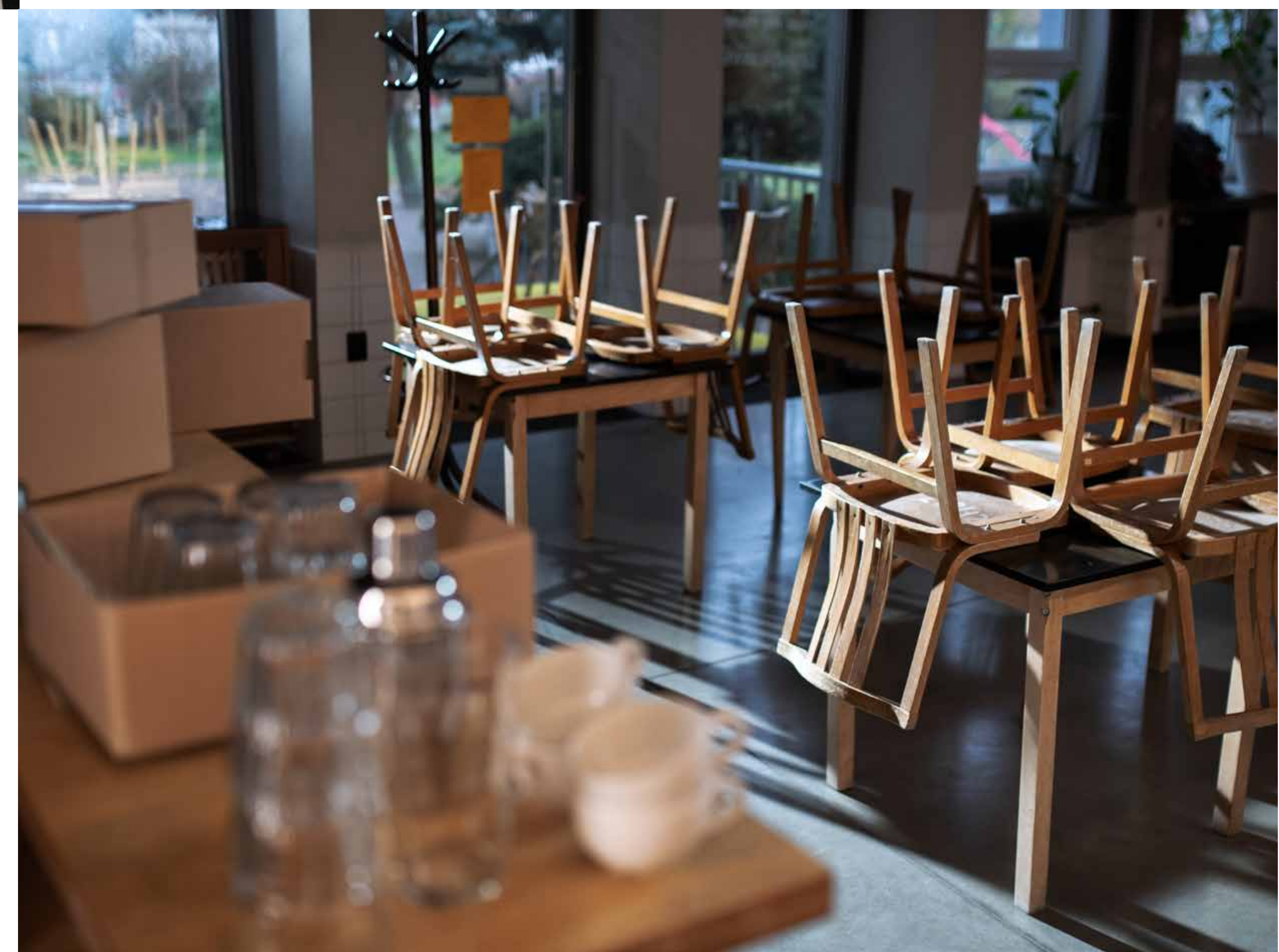
PRACTICAL GUIDANCE SUPPORTS THE EFFORTS TO ADVANCE what's possible in the world by strengthening the rule of law, illustrating transparency in the law, and providing equitable access to legal remedies. In connection therewith, this checklist contains a short list of questions practitioners should pose when counseling consumer clients to file for Chapter 7, or alternatively, Chapter 13. For more information, see Advancing the Rule of Law in Consumer Bankruptcies below.

Overview of Chapters 7 and 13

Chapter 7 of the Bankruptcy Code is utilized by individual and business debtors to liquidate assets. Chapter 7 cases are designed to give (1) an individual debtor a fresh start in the form of discharge of his or her debts and (2) a business debtor relief from its debts through an orderly dissolution process. In exchange for the fresh start or business relief, the debtor submits its assets to the control of a Chapter 7 trustee. If the Chapter 7 trustee discovers value in the debtor's assets, the trustee is required to sell those assets and distribute the proceeds to the debtor's creditors. Chapter 13 is for individuals (other than stockbrokers or commodity brokers) residing (or with a domicile or place of business) in the United States with regular income sufficiently stable to make payments under a Chapter 13 plan. After the debtor completes plan payments, a discharge issues for the remainder of the debt not paid through the Chapter 13 plan, giving the debtor his or her fresh start.

	Chapter 7	Chapter 13
Filing for Bankruptcy **Relevant Bankruptcy Code Sections / Bankruptcy Rules:** 11 U.S.C.S. §§ 301, 303 **Related Content:** • Chapter 7 Liquidation • Chapter 13 Bankruptcy • Involuntary Bankruptcy Cases • Preparing for a Bankruptcy Filing Checklist • Voluntary Petition (Official Form 201)	The debtor may commence a Chapter 7 case by filing a voluntary petition. 11 U.S.C.S. § 301. Creditors can commence an involuntary case by filing an involuntary petition against the debtor. 11 U.S.C.S. § 303(b).	A Chapter 13 case may only be commenced by the debtor filing a voluntary bankruptcy petition. 11 U.S.C.S. §§ 301, 303(a).

	Chapter 7	Chapter 13
Eligible Debtors **For All Chapters:** An individual cannot file under any chapter if, during the preceding 180 days, the individual previously filed a bankruptcy petition that was dismissed (1) by the court because the individual disobeyed orders or failed to appear to prosecute the case or (2) on the individual debtor's motion after a request for relief from stay had been filed. 11 U.S.C.S. §§ 109(g), 362(d), and (e). Subject to certain exceptions, an individual also may not be a debtor under any chapter unless he or she received credit counseling from an approved credit counseling agency in an individual or a group briefing within 180 days before filing. 11 U.S.C.S. §§ 109(h), 111. **Relevant Bankruptcy Code Sections / Bankruptcy Rules:** 11 U.S.C.S. §§ 101, 109(g) , 362, 707 **Related Content:** • Chapter 7 Liquidation • Chapter 13 Bankruptcy	Individuals, stockbrokers, commodity brokers, corporations, and certain other business entities may file for relief under Chapter 7. 11 U.S.C.S. §§ 101(13) and (41), 109(b). Railroads and domestic and foreign insurance companies, banks, and credit unions are not eligible for relief under Chapter 7. 11 U.S.C.S. § 109(b). The amount of the debtor's debt does not impact an individual or business debtor's ability to seek relief under Chapter 7. The individual or business debtor simply must owe debts. However, an individual debtor's income level may impact the ability to seek relief under Chapter 7. The means test may force individual debtors into Chapter 13 if they want to obtain a discharge of their debts (described later in this chart).	Only individuals may be debtors under Chapter 13. To qualify, the individual, as of the petition date, must have regular income and: • Owe noncontingent, liquidated, unsecured debts of less than $419,275 and noncontingent, liquidated, secured debts of less than $1,257,850 –or– • The individual and a spouse (except a stockbroker or a commodity broker) must be below the same debt limits 11 U.S.C.S. § 109(e).



Trustees

Relevant Bankruptcy Code Sections / Bankruptcy Rules:
11 U.S.C.S. §§ 521, 701, 702, 703, 704, 707, 1106, 1302, 1322, 1326

Fed. R. Bankr. P. 2015

Related Content:

- Chapter 7 Trustee Duties
- Chapter 7 Trustee Duties Checklist
- Chapter 13 Trustee Duties
- Section 341 Meeting Preparation (Consumers)
- Reaffirmation Agreements in Chapter 7
- Converting a Bankruptcy Case Checklist

Chapter 7

Upon the filing of a Chapter 7 petition, the U.S. Trustee will appoint a panel member to serve for that particular case. 11 U.S.C.S. § 701. At the Section 341 meeting of creditors, creditors may request an election be held to appoint a permanent trustee. 11 U.S.C.S. § 702. If no such request is received and no election is held, the interim trustee becomes the permanent trustee in the case. 11 U.S.C.S. § 702(d).

The Chapter 7 trustee must perform certain duties pursuant to Section 704 of the Bankruptcy Code including the following:

- Collect property of the estate. 11 U.S.C.S. § 704(a)(1).
- Be accountable for all property received by the trustee. 11 U.S.C.S. § 704(a)(2); see also Bankruptcy Rule 2015.
- Ensure the debtor files a statement of intentions and performs the intentions as stated. 11 U.S.C. § 704(3).
- Investigate the debtor's financial affairs. 11 U.S.C.S. § 704(a)(4).
- Examine and, if appropriate, object to claims. 11 U.S.C.S. § 704(a)(5).
- Object to discharge (if appropriate). 11 U.S.C.S. § 704(a)(6).
- Provide requesting creditors information concerning the case. 11 U.S.C.S. § 704(a)(7).
- File periodic reports and summaries with the court. 11 U.S.C.S. § 704(a)(8).
- File a final report and accounting with the court and the U.S. Trustee. 11 U.S.C.S. § 704(a)(9).
- Provide certain notices with regard to domestic support claims. 11 U.S.C.S. § 704(a)(10)
- Continue the administration of any employee benefit plan held by a business in a Chapter 7 case. 11 U.S.C.S. § 704(a)(11).
- Use all reasonable and best efforts to transfer patients from a closing healthcare business in a Chapter 7 case to another appropriate healthcare business. 11 U.S.C.S. § 704(a)(12).

Chapter 13

Chapter 13 debtors retain possession of their assets and are permitted to continue business operations (to the extent applicable) during the bankruptcy. In Chapter 13, a bankruptcy trustee is appointed at the commencement of the case. 11 U.S.C.S. § 1302(a). The Chapter 13 Trustee must perform some of the same tasks as a Chapter 7 trustee and certain additional tasks, including the tasks listed below:

- Be accountable for all property received by the trustee. 11 U.S.C.S. §§ 1302(b)(1), 704(a)(2); see also Bankruptcy Rule 2015(c) (expands on the requirements for Chapter 13 trustees).
- Ensure the debtor files a statement of intentions and performs the intentions as stated. 11 U.S.C.S. §§ 1302(b)(1), 704(3). Note that this requirement may be a drafting error. See Collier on Bankruptcy P 1302.03.
- Investigate the debtor's financial affairs. 11 U.S.C.S. §§ 1302(b)(1), 704(4).
- Examine and, if appropriate, object to claims. 11 U.S.C.S. §§ 1302(b)(1), 704(5).
- Object to discharge (if appropriate). 11 U.S.C.S. §§ 1302(b)(1), 704(6).
- Provide requesting creditors information concerning the case. 11 U.S.C.S. §§ 1302(b)(1), 704(7).

Trustees (cont'd.)

Chapter 7

A Chapter 7 trustee must also fulfill the obligations outlined in the U.S. Trustee's Handbook For Chapter 7 Trustees (Handbook). These obligations consist of, among other things, reviewing debtor documents to ensure adequacy and timeliness, including the following documents:

- Chapter 7 petition
- Credit counseling certificate
- Social security statement
- Schedules and statement of financial affairs
- Statement of exemptions
- Statement of debtor's attorney's fees
- Review for bankruptcy preparers
- Pay advices
- Tax returns

According to the Handbook, if the debtor is a business, the Chapter 7 trustee must also perform the following duties promptly after the petition date:

- Review the books and records of the debtor.
- Preserve business assets.
- Determine whether the employment of any professionals is necessary.

The Chapter 7 trustee has additional duties, including:

- Discuss the effect of reaffirming debts with the debtor prior to examining him or her at the Section 341(a) meeting of creditors
- Preside over the Section 341 meeting of creditors
- Advise and examine the debtor at the Section 341 meeting of the effects of commencing a Chapter 7 case
- Review the debtor's filings and testimony for compliance (11 U.S.C.S. § 521) and any evidence of substantial abuse that provides a basis for a motion to dismiss (or convert) pursuant to Section 707(b)
- Notify the U.S. Trustee if, after reviewing the material listed above, the trustee determines that such evidence exists
- Report suspected criminal activity to the U.S. Trustee

Chapter 13

- File a final report and accounting with the court and the U.S. Trustee. 11 U.S.C.S. §§ 1302(b)(1), 704(9).
- Appear and be heard at a hearing on the value of property subject to a lien, confirmation hearing, and plan modifications. 11 U.S.C.S. § 1302(b)(2).
- Advise and assist the debtor in performance under the plan. 11 U.S.C.S. § 1302(b)(4).
- Ensure the debtor makes timely payments under the plan. 11 U.S.C.S. § 1302(b)(5).
- Provide notices to domestic support claimholders and related parties. 11 U.S.C.S. § 1302(b)(6).
- If the debtor is engaged in business, the Chapter 13 trustee has certain additional obligations. 11 U.S.C.S. §§ 1302(c), 1106(a)(3), 1106(a)(4).
- Collect plan payments and make distributions to creditors in accordance with the debtor's plan. 11 U.S.C.S. §§ 1322(a)(1), 1326.

The Chapter 13 trustee has additional duties, including:

- Preside over the Section 341 meeting of creditors
- Advise and examine the debtor at the Section 341 meeting of the effects of commencing a Chapter 13 case

	Chapter 7	Chapter 13
Means Test	The means test identifies Chapter 7 individual debtors who can repay some of their debts and forces them into Chapter 13 if they want to obtain a discharge of their debts. The means test calculates an individual debtor's disposable income and estimates the debtor's ability to repay general unsecured debts. The means test is used to determine whether a Chapter 7 case is presumed abusive for purposes of dismissal. 11 U.S.C.S. § 707(b).	In Chapter 13 cases, the means test determines the applicable commitment period for the Chapter 13 plan and the debtor's disposable income necessary for inclusion in the plan. 11 U.S.C.S. § 1325.
Relevant Bankruptcy Code Sections / Bankruptcy Rules: 11 U.S.C.S §§ 101(10A), 101(39A), 707, 1325 Fed. R. Bankr. P. 1007 **Related Content:** • Chapter 7 Liquidation • Chapter 13 Bankruptcy Means Test • Chapter 13 Bankruptcy • Census Bureau, IRS data and Administrative Expenses Multipliers • Chapter 7 Statement of Your Current Monthly Income • Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period • Chapter 7 Means Test Calculation • Chapter 13 Calculation of Disposable Income • Statement of Exemption from Presumption of Abuse Under § 707(b)(2)	**Statement of Current Monthly Income**	
	The Chapter 7 statement of current monthly income (CMI) is the first part of the Chapter 7 means test and is divided into two parts. 11 U.S.C.S. § 101(10A). Part 1 requires the debtor to calculate his or her CMI. This part is the same under Chapters 7 and 13. Part 2 compares the debtor's CMI to the applicable median income for the debtor's state of residency to determine whether the Chapter 7 case is presumed abusive. Each state has its own median family income which can be found on the U.S. Department of Justice website. If the debtor's CMI is below the applicable median income, then no further action with regard to the means test is needed. If the debtor's CMI is above the applicable median income, the Chapter 7 means test calculation form must be filled out.	The Chapter 13 statement of current monthly income (CMI) is the first part of the Chapter 13 means test and is divided into three parts. Part 1 requires the debtor to calculate his or her CMI. This part is the same under Chapters 7 and 13. Part 2 of the Chapter 13 means test (1) adjusts the debtor's CMI by subtracting any portion of the debtor's spouse's income not regularly used to pay household expenses (marital adjustment) and (2) compares the debtor's adjusted CMI to the applicable median income for the debtor's state of residency. Each state has its own median family income which can be found on the U.S. Department of Justice website. Part 3 of the Chapter 13 means test calculates the applicable commitment period. If the debtor's current monthly income is less than the median family income applicable to the debtor, then (1) the commitment period for the Chapter 13 plan is three years, and (2) no further action with regard to the means test is needed. If the debtor's current monthly income is above the median family income applicable to the debtor, then (1) the commitment period for the Chapter 13 plan must be five years, and (2) the Chapter 13 disposable income calculation form must be filled out.

Means Test (cont'd.)

Chapter 7	Chapter 13
Calculation of Income	
The Chapter 7 means test is the second part of the Chapter 7 means test. It calculates the debtor's income and is divided into four parts. Part 1 of the Chapter 7 means test adjusts the debtor's CMI by subtracting any portion of the debtor's spouse's income not regularly used to pay household expenses (marital deduction). Part 2 of the Chapter 7 means test calculates the debtor's monthly disposable income by deducting certain living expenses and debt payments from the debtor's CMI. The U.S. Department of Justice posts links to the allowed expense data for bankruptcy practitioners. Part 3 of the Chapter 7 means test determines whether a presumption of abuse exists by multiplying the debtor's disposable income by 60 months. The presumption of abuse arises if the individual debtor's five-year disposable income is greater than $13,650. Alternatively, the presumption of abuse arises if the individual debtor's five-year disposable income is at least $8,175 but not more than $13,650 and enough to pay 25% of the total general unsecured debt. Part 4 of the Chapter 7 means test permits the debtor to list any special circumstances that justify additional deductions or adjustments to the debtor's disposable income. To claim special circumstances, a debtor must itemize each and provide documentation of the additional expense/adjustment claimed. Note that special circumstances are rarely allowed.	The Chapter 13 calculation of disposable income is the second part of the Chapter 13 means test and is divided into three parts. Part 1 of the Chapter 13 calculation of disposable income adjusts the debtor's CMI by deducting certain living expenses and debt payments from the debtor's CMI. The U.S. Department of Justice posts links to the allowed expense data for bankruptcy practitioners. Part 2 of the Chapter 13 calculation of disposable income (1) permits the deduction of certain additional expenses from the debtor's CMI and (2) calculates the debtor's disposable monthly income. This is the amount required to be paid monthly to unsecured creditors through the Chapter 13 plan under Section 1325(b). Monthly disposable income multiplied by 60 represents the minimum amount that the debtor must pay to general unsecured creditors. Part 3 of the Chapter 13 means test permits the debtor to list any special circumstances that justify additional deductions or adjustments to the debtor's disposable income. To claim special circumstances, a debtor must itemize each and provide documentation of the additional expense/adjustment claimed. Note that special circumstances are rarely allowed.
Statement of Exemption	
Certain Chapter 7 individual debtors may claim an exemption from a presumption of abuse if the debtor is one or more of the following: • A business debtor with primarily nonconsumer debts • A disabled veteran whose debts were mostly incurred while on active duty or performing a homeland defense activity • A reservist or member of the National Guard under certain circumstances If any of the above applies, the debtor may claim the exemption and is not required to fill out the remainder of the Chapter 7 means test.	There is no exemption from completing the Chapter 13 means test. All Chapter 13 debtors must complete both the Chapter 13 Statement of Income and Chapter 13 Calculation of Disposable Income forms.

	Chapter 7	Chapter 13
Tax Returns **Relevant Bankruptcy Code Sections or Rules:** 11 U.S.C.S. §§ 521, 1308 Fed. R. Bankr. P. 4002 **Related Content:** • Chapter 7 Liquidation • Chapter 13 Bankruptcy • Individual Chapter 7 Timeline • Chapter 13 Timeline • Section 341 Meeting Preparation (Consumers)	Chapter 7 debtors must provide the Chapter 7 trustee with their most recent federal income tax return no later than seven days prior to the date first set for the Section 341(a) meeting of creditors. 11 U.S.C.S. § 521(e)(2); Fed. R. Bankr. P. 4002(b)(3). If the debtor does not submit and file the requisite tax returns and fails to show that circumstances beyond the debtor's control prevented the submission, the bankruptcy court will dismiss the case. See 11 U.S.C.S. § 521(e)(2)(B).	Chapter 13 debtors must provide the Chapter 13 trustee with their most recent federal income tax return no later than seven days prior to the date first set for the Section 341(a) meeting of creditors. 11 U.S.C.S. § 521(e)(2); Fed. R. Bankr. P. 4002(b)(3). If the debtor does not submit and file the requisite tax returns and fails to show that circumstances beyond the debtor's control prevented the submission, the bankruptcy court will dismiss the case. See 11 U.S.C.S. § 521(e)(2)(B). Chapter 13 debtors must also ensure that all tax returns required to be filed within the four-year period preceding the filing of the Chapter 13 case have been filed with the appropriate taxing authority. 11 U.S.C.S. § 1308.
Professionals **Relevant Bankruptcy Code Sections or Rules:** 11 U.S.C.S. § 327. Fed. R. Bankr. P. 2014. **Related Content:** • Approval of the Debtor's Chapter 11 Professionals • Chapter 13 Retainer Agreement • Trustee's Application for Interim Allowance of Compensation and Disbursements	A Chapter 7 trustee must retain professionals pursuant to Section 327(a) of the Bankruptcy Code and Bankruptcy Rule 2014.	A Chapter 13 trustee must retain professionals pursuant to Section 327(a) of the Bankruptcy Code and Bankruptcy Rule 2014. A Chapter 13 debtor does not need court approval to retain professionals. However, in certain instances, a Chapter 13 debtor should request court approval to retain professionals. For example, a Chapter 13 debtor may need to engage outside counsel to pursue a personal injury claim. If employment is not approved by the bankruptcy court, the professional may not be able to collect any fees.

	Chapter 7	Chapter 13
Statement of Intentions **Relevant Bankruptcy Code Sections or Rules:** 11 U.S.C.S. § 524 Fed. R. Bankr. P. 4004, 4008 **Related Content:** • Reaffirmation Agreements in Chapter 7	An individual Chapter 7 debtor must file a statement of intentions with regard to debts secured by property of the estate. 11 U.S.C.S. § 521(a)(2)(A); Fed. R. Bankr. P. 1007(b)(2). The statement must indicate whether the debtor intends to reaffirm, redeem, or surrender such property and, if applicable, must state whether the property is claimed as exempt. The debtor must file the statement within 30 days after the petition date or on or before the date of the meeting of creditors, whichever is earlier. The debtor must perform his or her intention (as set forth on the statement) within 30 days of the first set date for the Section 341(a) meeting of creditors. 11 U.S.C.S. § 521(a)(2)(B).	A statement of intentions is not required in a Chapter 13 bankruptcy case. Chapter 13 debtors specify their intentions in a Chapter 13 plan (discussed below).
Reaffirmation Agreement **Relevant Bankruptcy Code Sections or Rules:** 11 U.S.C.S. § 327 Fed. R. Bankr. P. 2014 **Related Content:** • Approval of the Debtor's Chapter 11 Professionals • Chapter 13 Retainer Agreement • Trustee's Application for Interim Allowance of Compensation and Disbursements	A reaffirmation agreement is a voluntary contract between the debtor and a creditor to establish the validity of a particular debt and except the debt from a Chapter 7 discharge. In some instances, a debtor may desire to continue paying on a specific debt even though the debt could be discharged in the bankruptcy case. In those instances, a reaffirmation agreement may be utilized to except the debt from discharge and contractually bind the debtor to the repayment. Reaffirmation agreements are usually reserved for secured debts where the debtor wants to keep the property that secures the debt. Section 524 of the Bankruptcy Code sets forth the requirements for an enforceable reaffirmation agreement. A reaffirmation agreement must be filed no later than 60 days after the date first set for the Section 341(a) meeting of creditors. Fed. R. Bankr. P. 4008(a). The court has discretion to enlarge the time to file a reaffirmation agreement. Id. A debtor can make a motion to defer entry of the discharge if they need additional time to negotiate reaffirmation agreements. Fed. R. Bankr. P. 4004(c)(2)	Reaffirmation agreements are not relevant in Chapter 13 cases. The Chapter 13 plan details the treatment of claims and property in Chapter 13 cases.

	Chapter 7	Chapter 13
Redemption **Relevant Bankruptcy Code Sections / Bankruptcy Rules:** 11 U.S.C.S. § 722 Fed. R. Bankr. P. 6008 **Related Content:** • Redemption in Chapter 7	Redemption is the process through which an individual Chapter 7 debtor may retain certain personal property by making a lump-sum payment to the secured creditor of the fair market value of the property or the amount of claim. Redemption only applies to exempt or abandoned, tangible, personal property that is used primarily for personal, family, or household use and is subject to a lien securing a dischargeable consumer debt. Redemption may be voluntary through an agreement between the debtor and the creditor. If the creditor does not consent, however, the debtor may file a motion under Bankruptcy Rule 6008 for court authorization of the redemption.	Redemption is not utilized in Chapter 13 cases. The Chapter 13 plan details the treatment of claims and property in Chapter 13 cases.
Automatic Stay **Individual Debtors:** The automatic stay is limited where the individual debtor has filed one prior case under Chapter 7, Chapter 11, or Chapter 13, dismissed within one year of the current pending case. 11 U.S.C.S. § 362(c). Where the individual debtor has filed two or more prior cases under Chapter 7, Chapter 11, or Chapter 13, the automatic stay is unavailable in the pending case. 11 U.S.C.S.§ 362(c)(4)(A). **Relevant Bankruptcy Code Sections or Rules:** 11 U.S.C.S. §§ 101, 362, 521, 1301 **Related Content:** • Automatic Stay • Automatic Stay: When the Debtor Is an Individual • Co-debtor Stay	Collection efforts against non-debtor co-obligors, guarantors, codefendants, partners, and sureties are not automatically stayed. 11 U.S.C.S. § 362(a). In an individual debtor's bankruptcy case, the automatic stay terminates with respect to personal property if the debtor fails to timely comply with the requirement in Section 521(a)(2) that the debtor file a statement of intention and perform such intention for such property. 11 U.S.C.S.§ 362(h)(1).	Subject to certain exceptions, the automatic stay applies to stay collection efforts against co-obligors for consumer debt. 11 U.S.C.S.§ 1301; see also 11 U.S.C.S. § 101(8) (for the definition of consumer debt). Section 362(h) only applies in Chapter 7 and not an individual debtor's case under Chapter 13 even though the statute does not limit its applicability to Chapter 7. The reason is that Section 362(h) requires compliance with Section 521(a)(2), which only applies to Chapter 7 cases (and both sections only apply to individual cases).

To review previous editions of the Practical Guidance Journal, follow this link to the archive.

	Chapter 7	Chapter 13
Proof of Claims **Relevant Bankruptcy Code Sections or Rules:** Fed. R. Bankr. P. 2002, 3002 **Related Content:** • Proofs of Claim in an Individual Bankruptcy • Proofs of Claim in Bankruptcy • Proofs of Claim Categories and Calculations • Chapter 7 Liquidation • Proof of Claim (US Bankruptcy Court Official Form 410) • Addendum to Proof of Claim	In a Chapter 7 case, a proof of claim is timely filed if it is filed not later than 70 days after the petition date or the date of conversion to the chapter (and 90 days after the order for relief in an involuntary case). Fed. R. Bankr. P. 3002(c). Governmental units generally have 180 days after entry of the order for relief to file proofs of claim. Fed. R. Bankr. P. 3002(c)(1). The exception to these deadlines is when the trustee files and serves a notice of insufficient assets to pay a dividend. Fed. R. Bankr. P. 2002(e). In most cases, a Chapter 7 debtor has no assets to distribute to creditors. Such cases are known as no asset cases. The trustee will send a notice to unsecured creditors that they do not need to file proofs of claim because there will not be a distribution. If the Chapter 7 trustee later determines that the debtor has assets that can be liquidated for distribution to unsecured creditors, the trustee will notify unsecured creditors to file proofs of claim so that they may participate in the distribution. The notice must provide at least 90 days' notice by mail to creditors of the date for filing proofs of claim.	In a Chapter 13 case, a proof of claim is timely filed if it is filed not later than 70 days after the petition date or the date of conversion to the chapter (and 90 days after the order for relief in an involuntary case). Fed. R. Bankr. P. 3002(c). Governmental units generally have 180 days after entry of the order for relief to file proofs of claim. Fed. R. Bankr. P. 3002(c)(1).

Convert or Dismiss	Chapter 7	Chapter 13
Relevant Bankruptcy Code Sections or Rules: 11 U.S.C.S. §§ 706, 1307 Fed. R. Bankr. P. 1017, 9013, 9014 **Related Content:** • Conversion and Dismissal Resource Kit • Converting a Bankruptcy Case Checklist • Debtor's Motion to Convert (Chapter 7 to Chapter 13) • Non-debtor's Motion to Dismiss or Convert (Chapter 7 to Chapter 13 Case) • Voluntary Conversion Order (Chapter 7 to Chapter 12 or 13) • Voluntary Conversion Order (Chapter 7 to Chapter 11) • Involuntary Conversion Order (Chapter 7 to Chapter 11) • Notice of Conversion (Chapter 13 to Chapter 7) • Non-debtor Motion to Dismiss or Convert (Chapter 13 to Chapter 7) • Conversion Order (Chapter 13 to Chapter 7) • Involuntary Conversion Order (Chapter 7 to Chapter 13)	A Chapter 7 debtor may voluntarily convert to a Chapter 11, 12, or 13 case, at any time, if (1) he or she is eligible under the rules for those chapters and (2) the Chapter 7 case was not previously converted from a Chapter 11, 12, or 13 case. 11 U.S.C.S. § 706(a). The debtor must file a motion to convert under Section 706(a) and serve the motion in accordance with Bankruptcy Rule 9013. Fed. R. Bankr. P. 1017(f)(2). The court considers whether (1) the case has been previously converted, (2) the debtor is eligible for the chapter he or she seeks to convert to, and (3) the conversion is sought in bad faith prior to entering an order on a motion to convert a Chapter 7 case. Any waiver of the right to convert under Section 706(a) is unenforceable. Section 706(c) provides that a Chapter 7 case may not be converted to a Chapter 12 or Chapter 13 case unless the debtor consents to (or requests) such conversion. 11 U.S.C.S. § 706(c). However, the court may convert a Chapter 7 case to a Chapter 11 case on the request of a party in interest at any time after notice and a hearing. 11 U.S.C.S.§ 706(b). An involuntary conversion from a Chapter 7 case to Chapter 11 only occurs in corporate (not an individual) cases.	The debtor has an absolute right to convert a Chapter 13 case to a case under Chapter 7. 11 U.S.C.S. § 1307(a); Fed. R. Bankr. P. 1017. The debtor must file a notice of conversion to convert the case. Fed. R. Bankr. P. 1017(f)(3). The debtor also has an absolute right to dismiss a Chapter 13 unless the case was previously converted from a Chapter 7, 11, or 12 case. 11 U.S.C.S. § 1307(b); Fed. R. Bankr. P. 1017(f).

Convert or Dismiss (cont'd.)

Chapter 7	Chapter 13
The court may dismiss a Chapter 7 case, upon notice and a hearing, for cause including: • Unreasonable delay by the debtor that is prejudicial to creditors • Nonpayment of any fees –and– • For a U.S. Trustee motion, failure of the debtor to file the information required under Section 521(1) 11 U.S.C.S .§ 707(a). The factors listed in Section 707(a) are non-exhaustive and the bankruptcy court may dismiss a Chapter 7 case on other grounds if the court finds sufficient cause. The court may also dismiss a Chapter 7 case if the debtor's debts are mainly consumer and if granting a discharge would be an abuse of Chapter 7 based upon: • The outcome of the means test • Bad faith –or– • The totality of the circumstances 11 U.S.C.S. § 707(b)(1)–(b)(3)	The court may convert a Chapter 13 case to a Chapter 11 or 12 case prior to confirmation of a Chapter 13 plan, after notice and a hearing. 11 U.S.C.S. § 1307(d). The court may also grant a party's motion to convert to Chapter 7 or dismiss the Chapter 13 case where there is cause justifying conversion or dismissal of the case. Section 1307(c) currently lists 11 nonexclusive examples of cause: • Unreasonable delay that is prejudicial to creditors • Failure to pay statutory fees or charges • Failure to file a plan within the time fixed by the Bankruptcy Code or the court • Failure to make timely payments under a plan • Denial of an order confirming a plan and request for time to refile or modify a plan • Material default by the debtor with respect to a confirmed plan • Revocation and denial of an order confirming a plan • Termination of a confirmed plan based on the occurrence of a condition set forth in the plan • Failure to timely file schedules and statement of financial affairs (on request by the trustee) • Failure to file a statement of intention with respect to property subject to liens (on request by the trustee) • The debtor's failure to pay post-petition domestic support obligations 11 U.S.C.S. § 1307(c). Section 1307(e) requires the bankruptcy court to convert a Chapter 13 case to Chapter 7 (or dismiss the Chapter 13 case) upon request by a party in interest if the debtor fails to file a tax return as required under Section 1308 of the Bankruptcy Code. 11 U.S.C. § 1307(e)

	Chapter 7	Chapter 13
Plan/Confirmation Relevant Bankruptcy Code Sections / Bankruptcy Rules: 11 U.S.C.S. §§ 1307, 1321, 1322, 1324, 1325, 1326 Fed. R. Bankr. P. 3015 Related Content: • Chapter 13 Bankruptcy • Chapter 13 Timeline • Official Form B113, Chapter 13 Plan	There is no plan in Chapter 7 bankruptcy cases.	A Chapter 13 debtor must file a Chapter 13 plan with the petition or within 14 days thereof, unless the court extends the time for filing. 11 U.S.C.S. § 1321; Fed. R. Bankr. P. 3015(b). Most jurisdictions require the use of a standardized form Chapter 13 plan. See Official Form B113, Chapter 13 Plan. Section 1322 of the Bankruptcy Code sets forth the mandatory and optional provisions for Chapter 13 plans. 11 U.S.C.S. § 1322. A Chapter 13 debtor must make his or her first plan payment within 30 days after the filing of the petition. 11 U.S.C.S. § 1326(a)(1). The failure to file a plan is grounds for dismissal. 11 U.S.C.S. § 1307(c)(3). Section 1325 sets forth the confirmation requirements for Chapter 13 plans. There is no right to vote on a plan. Rather, parties in interest have the right to object to the plan (does not meet confirmation standards or other general grounds). 11 U.S.C.S. § 1324; see also Fed. R. Bankr. P. 3015.The confirmation hearing must be held between 20 and 45 days after the Section 341 meeting of creditors but could be held earlier if in the best interests of creditors and there is no objection. 11 U.S.C.S. § 1324(b).

	Chapter 7	Chapter 13
Financial Management Training **Relevant Bankruptcy Code Sections / Bankruptcy Rules:** 11 U.S.C.S. §§ 727, 1328 Fed. R. Bankr. P. 1007, 4004 **Related Content:** • Individual Chapter 7 Timeline • Chapter 13 Timeline • Official Form B423, Certification About a Financial Management Course	Individual Chapter 7 debtors must complete a financial management course to obtain a discharge. 11 U.S.C.S. § 727(a)(11); Fed. R. Bankr. P. 1007(b)(7)(A), 4004(c)(1)(H). The debtor must complete the course and file a certification with the court within 60 days of the first date set for the Section 341 meeting of creditors. Fed. R. Bankr. P. 1007(c).	Individual Chapter 13 debtors must complete a financial management course to obtain a discharge. 11 U.S.C.S. § 1328(g); Fed. R. Bankr. P. 1007(b)(7)(A), 4004(c)(4). The debtor must complete the course and file a certification with the court before making the last payment under the plan or before filing a motion for a hardship discharge (discussed below) under Section 1328(b) of the Bankruptcy Code. Fed. R. Bankr. P. 1007(c).

Discharge

Relevant Bankruptcy Code Sections / Bankruptcy Rules:

11 U.S.C.S. §§ 522, 523, 524, 727, 1328

Fed. R. Bankr. P. 4004

Related Content:

- Chapter 7 Liquidation
- Chapter 13 Bankruptcy

Chapter 7

A Chapter 7 discharge is only available in individual cases. Corporate Chapter 7 debtors are not eligible to receive a discharge. 11 U.S.C.S. § 727(a)(1). A Chapter 7 discharge is typically entered after 60 days after the date first set for the Section 341 meeting of creditors as set forth in Bankruptcy Rule 4004.

Section 727(a) lists the grounds which serve as a basis for denial of a general Chapter 7 discharge, which include:

- Transferring or concealing property of the debtor with the intent to hinder, delay, or defraud within one year before the petition date (11 U.S.C.S. § 727(a)(2)(A))
- Transferring or concealing property of the estate with the intent to hinder, delay, or defraud after the petition date (11 U.S.C.S. § 727(a)(2)(A))
- Failing to preserve financial records (11 U.S.C.S. § 727(a)(3))
- Knowingly making a false oath or account (11 U.S.C.S. § 727(a)(4)(A))
- Knowingly presenting a false claim (11 U.S.C.S. § 727(a)(4)(B))
- Knowingly and fraudulently gave money for an action (11 U.S.C.S. § 727(a)(4)(C))
- Knowingly and fraudulently withheld information from the court or the trustee (11 U.S.C.S. § 727(a)(4)(D))
- Failing to explain any loss of assets (11 U.S.C.S. § 727(a)(5))
- Refusing to obey any lawful order of the court (11 U.S.C.S. § 727(a)(6)(A))
- Refusing to respond to a court approved question or testify (subject to certain exceptions) (11 U.S.C.S. § 727(a)(6)(B), (C)
- Committing any of the previously listed acts in any prior bankruptcy case pending within one year of the current bankruptcy case (11 U.S.C.S. § 727(a)(7))

Chapter 13

In most cases, once the Chapter 13 debtor completes the payments under the payment plan, the debtor receives a discharge. 11 U.S.C.S. § 1328(a).

A discharge in Chapter 13 includes some debts that cannot be discharged in a Chapter 7, including:

- Long-term debts cured and maintained under Section 1322(b)(5)
- Debts to pay some non-dischargeable tax obligations
- Debts for restitution or criminal fines
- Debts from malicious and willful tortious acts by the debtor that caused personal injury to an individual or the death of an individual
- Certain post-petition debts under Section 1305(a)(2)

11 U.S.C.S. § 1328. A discharge will not be granted if the debtor previously received a discharge:

- In a case filed under Chapter 7, 11, or 12 of the Bankruptcy Code within the four-year period preceding the petition date
- In a case filed under Chapter 13 Bankruptcy Code within the two-year period preceding the petition date

Discharge (cont'd.)

Chapter 7

- Receiving a prior Chapter 7 or 11 discharge within eight years of the petition date (11 U.S.C.S. § 727(a)(8))
- Receiving a Chapter 12 or Chapter 13 discharge within six years of the petition date unless the payments in such cases totaled (1) 100% of the allowed unsecured claims or (2) 70% of the total unsecured claims and the plan was proposed in good faith and represented the debtor's best effort (11 U.S.C.S. § 727(a)(9))
- Executing a waiver of discharge and obtaining court approval of such waiver (11 U.S.C.S. § 727(a)(10))
- Failing to complete a personal finance management course (subject to certain exceptions) (11 U.S.C.S. § 727(a)(11))
- Finding by the court that there is reasonable cause to believe that Section 522(q) applies to the debtor and there is a proceeding where the debtor may be guilty of a felony specified in Section 522(q)(1)(A) or liable for a debt of the kind described in Section 522(q)(1)(B) (11 U.S.C.S. § 727(a)(12))

If one of these grounds exists and is timely asserted, the debtor is denied a discharge of all debts.

Even if an individual debtor receives a general discharge, certain debts may be excepted from the discharge. These excepted debts remain due and owing as personal liabilities of the debtor as if no bankruptcy occurred. Section 523(a) enumerates the debts excepted from discharge and includes:

- Certain taxes
- Debts based on false pretenses, false representations, actual fraud, and false financial statements
- Debts not scheduled by the debtor
- Debts based on fraud as a fiduciary, larceny, or embezzlement
- Debts based on fraud or defalcation while acting as a fiduciary
- Domestic support obligations
- Debts as a result of a willful or malicious injury

If one of these grounds exists and is timely asserted, the debtor is denied a discharge of that particular debt.

Chapter 13

11 U.S.C.S. § 1328(f). A motion objecting to discharge under Section 1328(f) must be filed no later than 60 days after the first date set for the Section 341 meeting of creditors. Fed. R. Bankr. P. 4004(a).

The debtor can qualify for a hardship discharge if:

- The failure to make payments is due to circumstances for which the debtor should not justly be held accountable.
- The value of property actually distributed on account of each allowed unsecured claim is not less than the amount that would have been paid in a Chapter 7.
- Modification of the plan is not practicable.

11 U.S.C.S. § 1328(b).

A debtor will be denied a discharge upon a finding by the court that there is reasonable cause to believe that Section 522(q) applies to the debtor and there is a proceeding where the debtor may be guilty of a felony specified in Section 522(q)(1)(A) or liable for a debt of the kind described in Section 522(q)(1)(B). 11 U.S.C.S. § 1328(h).

The debtor will not receive a discharge if the debtor has not filed the financial management certification. Fed. R. Bankr. P. 4004(c)(4).

	Chapter 7	Chapter 13
Revocation of Discharge **Relevant Bankruptcy Code Sections / Bankruptcy Rules:** 11 U.S.C.S. §§ 727, 1328 Fed. R. Bankr. P. 9024 Related Content: • Chapter 7 Liquidation • Chapter 13 Bankruptcy	The Chapter 7 trustee, the U.S. Trustee, or a creditor may seek to revoke the discharge by commencing an adversary proceeding on the following grounds: • The individual debtor obtained the discharge through fraud and the requesting party did not know of the fraud until after the discharge was granted. • The individual debtor acquired property of the estate or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to the property or to deliver or surrender the property to the Chapter 7 trustee. • The individual debtor committed an act specified in Section 727(a)(6) of the Bankruptcy Code (generally, failing to obey a court order or answer certain questions). • The individual debtor failed to explain a material misstatement in a bankruptcy audit or failed to make available all necessary papers or property that was requested in a bankruptcy audit. 11 U.S.C.S. § 727(d). The complaint to revoke the discharge must be filed within one year after granting of the discharge if the plaintiff is asserting the ground that the individual debtor obtained a discharge was through fraud under Section 727(d)(1). 11 U.S.C.S. § 727(e)(1). The plaintiff must seek revocation within one year after granting of the discharge or by the date the case is closed, whichever is later, if the revocation is based on the individual debtor fraudulently failing to report or deliver property under Section 727(d)(2) or that the individual debtor committed an act specified in Section 727(a)(6). 11 U.S.C.S. § 727(e)(2).	On request of a party in interest before one year after a discharge is granted, and after notice and a hearing, the court may revoke the discharge if: • The discharge was obtained by fraud. • The requesting party did not know of such fraud until after the discharge was granted. 11 U.S.C.S. § 1328(e).

Advancing the Rule of Law in Consumer Bankruptcies

In counseling clients on the proper chapter to file for consumer bankruptcy, and in an effort to advance the rule of law, the transparency of law, and equitable access to legal remedies, attorneys should consider the following:

- Have you effectively communicated the advantages and disadvantages of Chapter 7 and Chapter 13 petitions? More specifically, is that chapter choice aligned with your client's long term goals of debt relief?
- Do your client's current priorities (i.e., saving their home, etc.) conflict with his or her long term goals of debt relief? If so, have you communicated this conflict to your client?
- Would you make the same recommendations to this client if they had a different racial background?

For more information, see Chapter 7 Liquidation and Chapter 13 Bankruptcy. For additional resources, see Consumer Bankruptcy Resource Kit. L

***Mark Haut** is a Content Manager for Practical Guidance. Prior to joining Practical Guidance, he was counsel at Norton Rose Fulbright, where he advised clients on a variety of bankruptcy matters. Previously, he was an associate in the Bankruptcy and Reorganization Practice Group at Morgan, Lewis & Bockius, LLP. Prior to joining Morgan Lewis, he clerked for Judge Stuart M. Bernstein in the United States Bankruptcy Court for the Southern District of New York.*

***Emony M. Robertson** is a third year law student at Howard University School of Law. Her time as a Robert S. Strauss Diversity & Inclusion Scholar at Akin Gump Strauss Hauer & Feld LLP, along with her participation in the Annual Duberstein Bankruptcy Competition, helped to clarify her interest in bankruptcy litigation. Emony's LexisNexis Rule of Law Foundation Fellowship focused on reducing racial bias in consumer bankruptcy practices. Emony currently serves as the Captain of the Charles Hamilton Houston National Moot Court Team and a Student Attorney in the Investor Justice Education Clinic. After graduation in May 2022, she will clerk for Judge Craig Goldblatt in the United States Bankruptcy Court for the District of Delaware.*

RESEARCH PATH: *Bankruptcy > Commencing a Bankruptcy Proceeding > Bankruptcy Fundamentals*

AAN, Rule of Law Foundation Collaborate on Initiative to Address Systemic Racism

The LexisNexis African Ancestry Network (AAN) and the LexisNexis Rule of Law Foundation launched a fellowship with the shared goal of addressing systemic racism in our legal system while advancing the four key elements of the rule of law—equality under the law, transparency of law, independent judiciary, and accessible legal remedy.

TWELVE LAW STUDENTS WERE SELECTED FOR THE inaugural cohort. The Fellows developed projects and proposed solutions aimed at eliminating systemic racism from the American legal system.

The Fellows' recommendations were compiled into a LexisNexis publication entitled "Eliminating Systemic Racism in the Legal System: A Collection of Legal Advocacy Papers by the LexisNexis African Ancestry Network LexisNexis Rule of Law Foundation Fellowship 2021 Cohort." The publication is a culmination of a nine-month project involving the student fellows and members of the LexisNexis Legal & Professional leadership team.

The fellows, who were chosen from a large pool of applicants, included two students from each of the six law schools that make up the Historically Black Colleges and Universities Law School Consortium (HBCUSLC)—Florida Agricultural and Mechanical University College of Law, Howard University School of Law, North Carolina Central University School of Law, Southern University Law Center, Thurgood Marshall School of Law at Texas Southern University, and the University of the District of Columbia David A. Clarke School of Law.

The fellows were each awarded $10,000 and spent nine months developing leadership skills, working on projects and solutions, while researching their selected topics and writing about their findings and recommendations. The program was overseen by Adonica Black, Director of Global Talent Development and Inclusion for LexisNexis Legal & Professional.

The project launched in March 2021 with a virtual orientation session where the fellows were introduced by their mentors, members of the LexisNexis Legal & Professional leadership team. Over the ensuing months, the fellows attended professional development sessions on topics including analytics, data mining, marketing, project management, and leadership skills, in addition to bi-monthly meetings with their mentors to develop their projects.

The fellows and their projects include:

- Charles Graham, Jr. of Thurgood Marshall School of Law of Texas Southern University: **Money, Power, and Diversity: Examining the Impact of Compensation Models on Attorneys of Color at Major U.S. Law Firms.**
- Darnell-Terri Andrews of Southern University Law Center: **Legislative Advocacy for Bail Reform**
- Ebony Cormier of Southern University Law Center: **Cash Bail: Profit, Poverty, and People of Color**
- Emony Robertson of Howard University School of Law: **Pulling African Americans from Under the Faults in Consumer Bankruptcy**
- Feven Yohannes of Howard University School of Law: Looking at the Numbers: **Analyzing Metrics to Effectuate Best Practices and Develop Training to Combat Judicial Bias**
- Herbert Brown of North Carolina Central University School of Law: **HB6U Law Practice Pipeline**
- Jamal Bailey of the University of the District of Columbia David A. Clarke School of Law: **Revisiting the Myth of Meritocracy**
- Kailyn Kennedy of North Carolina Central University School of Law: **Keep Shutting the Door on Systemic Racism**
- Oscar Draughn of Florida Agricultural and Mechanical University College of Law: **Misdemeanor Defendants and the Ever-Evasive Right to Court-Appointed Counsel**
- Paris Maulet of Thurgood Marshall School of Law of Texas Southern University, Law School: **Preparation Bridge Program**
- Pearl Mansu of the University of the District of Columbia David A. Clarke School of Law: **Diverse at the Bottom, Converse at the Top? It's Time to Stop: A Study on Factors that Affect Underrepresentation of Black Women Partners Across the United States**
- Shayla McIntyre of Florida Agricultural and Mechanical University College of Law: **Systemic Racism's Impact on Minority Attorneys Within Law Firms**

The fellows presented their papers to members of LexisNexis leadership, including LexisNexis Legal & Professional CEO Mike Walsh, at a two-day summit at the LexisNexis offices in New York City on Nov. 11 and 12.

"The core mission of advancing the rule of law which underpins LexisNexis and its foundation has never been more important than it is today. We applaud the work being undertaken by the Fellows to expose elements of systemic racism in the legal system and address these challenges through a rule of law framework," said Ian McDougall, President of LexisNexis Rule of Law Foundation.

The fellowship is now in its second year, with 12 new fellows scheduled to report out the results of their research in October.

The African Ancestry Network (AAN) is organized as an official network for employees of African descent at Reed Elsevier LexisNexis. AAN embraces corporate diversity initiatives aimed at improving the company's competitiveness by increasing the representation, development, promotion, and retention of black employees.

LexisNexis Rule of Law Foundation is a 501(c)(3) non-profit organization which has the mission to advance the rule of law around the world. The foundation efforts focus on the four key elements of the rule of law: transparency of the law, accessible legal remedy, equal treatment under the law, and independent judiciaries.

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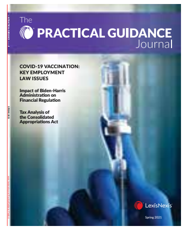

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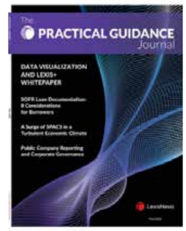

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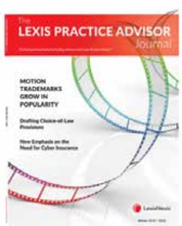

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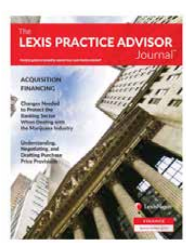

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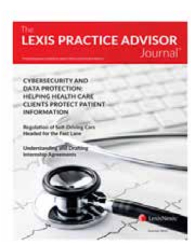

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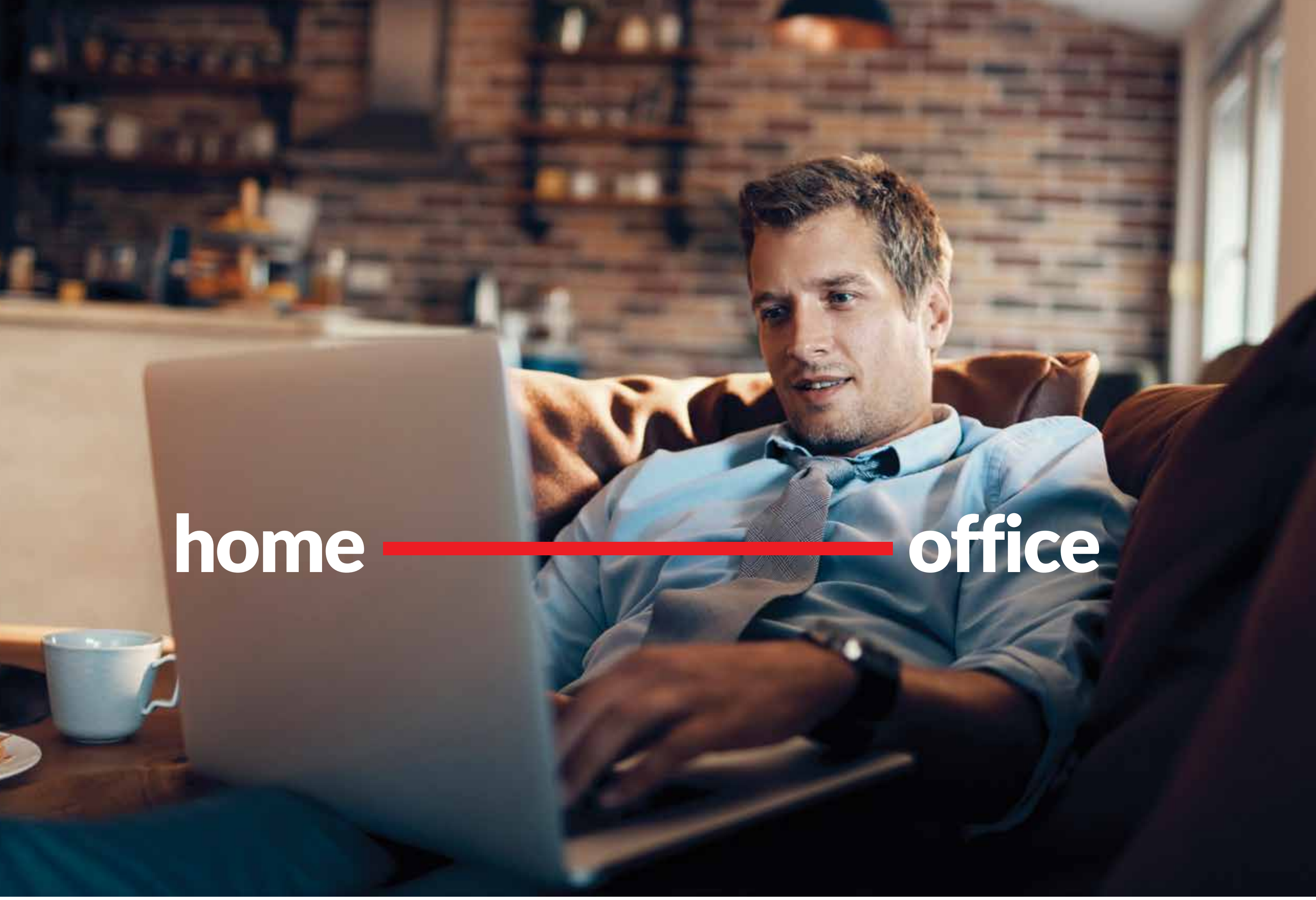
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