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SEC Update

Recent Final and Proposed Rules

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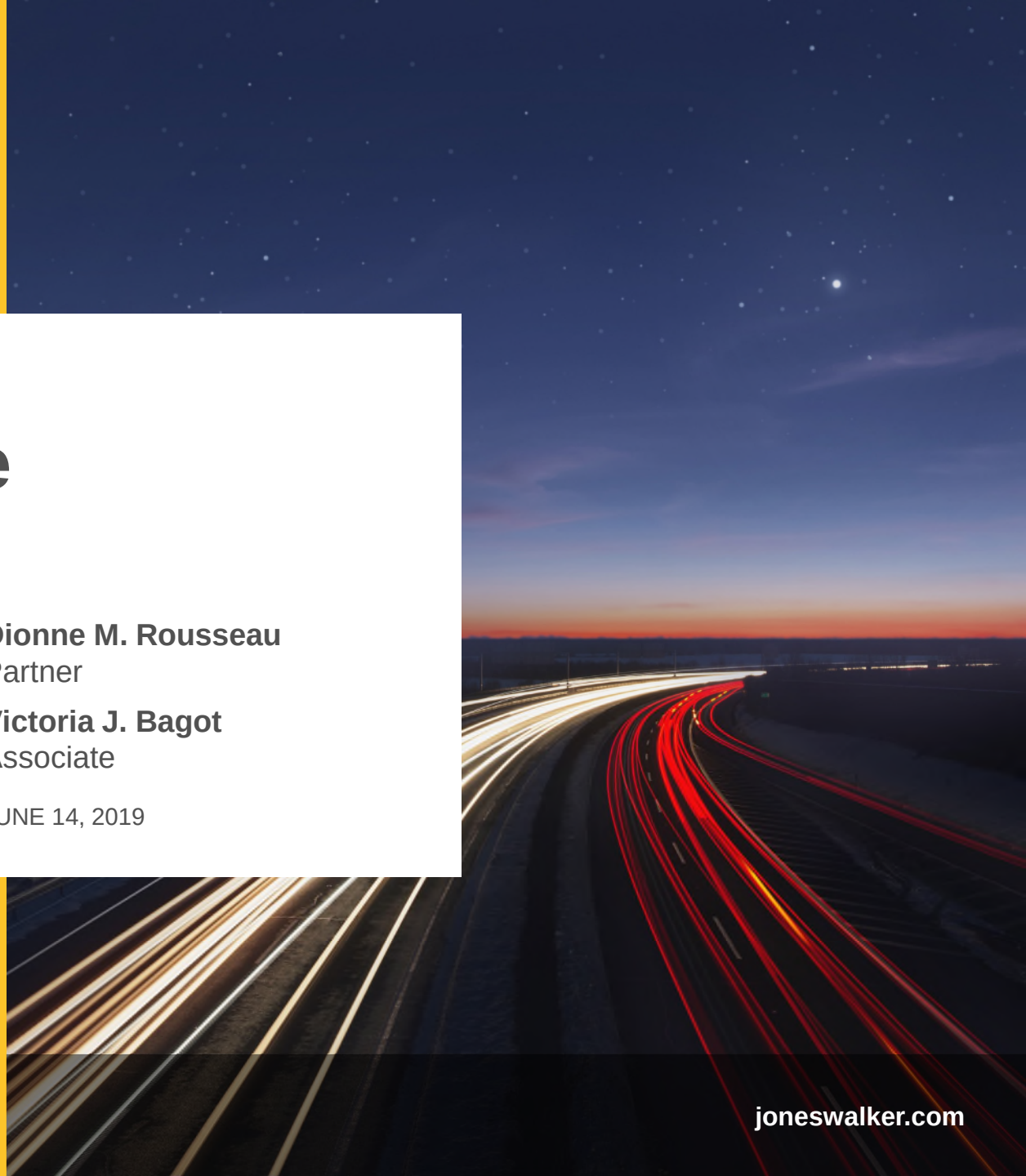
JUNE 14, 2019



Agenda

- SEC Final Rules
  - Inline XBRL
  - Management's Discussion & Analysis
  - Exhibits
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  - Other
- PCAOB Critical Audit Matters
- SEC Proposed Rules
  - Modifying Large Accelerated Filer and Accelerated Filer Definitions
  - Expansion of "Testing-the-Waters" Communications
  - Financial Requirements for Acquisitions and Dispositions
  - Financial Disclosure for Registered Debt Offerings
- What's Next?

Note: This presentation covers U.S. GAAP domestic issuer operating companies.

SEC Update – General Observations

- The SEC has been focused on amendments designed to modernize and simplify disclosure requirements for public companies.
- Many of the amendments discussed in this presentation are part of the SEC's ongoing examination of its disclosure requirements and follow an earlier round of disclosure simplification amendments adopted in August 2018 and effective in November 2018, which registrants have substantially implemented already.
- In addition, changes in laws and SEC rules have made it easier for companies to go public (*e.g.*, "emerging growth company" status) and for smaller cap companies to stay public (*e.g.*, amendment to definition of "smaller reporting company"; proposed amendments to large accelerated filer and accelerated filer definitions).
- While many of the changes are technical and procedural in nature, companies should pay careful attention to their upcoming filings to ensure compliance with these recent changes and take advantage of the modified requirements, as applicable.

Final Rule – Inline XBRL

- In June 2018, the SEC adopted amendments requiring the use of Inline XBRL for financial statement information, with a 3-year phase in period *beginning this year*.
  - The amendments do not change the categories of filers or scope of disclosures subject to XBRL requirements.
- In March 2019, the SEC adopted amendments requiring tagging of additional (now all) information on the cover pages of certain forms, including Form 10-K, Form 10-Q and Form 8-K, effective at the same time as the company is required to implement Inline XBRL.
- When must U.S. domestic registrants begin filing using Inline XBRL?
  - ***The first Form 10-Q for the fiscal period ended on or after:***
    - *June 15, 2019 for large accelerated filers*
    - June 15, 2020 for accelerated filers
    - June 15, 2021 for all other filers
- ***Accordingly, large accelerated filers with a calendar year fiscal year must begin using Inline XBRL starting with the upcoming Form 10-Q for the quarter ending June 30, 2019.***

Final Rule – Inline XBRL

- What is Inline XBRL?
  - Generally, Inline eXtensible Business Reporting Language (XBRL) is a format that allows filers to embed XBRL data directly into an HTML document, so that the document is both human-readable and machine-readable.
  - Currently, companies are required to submit XBRL data within a separate XBRL exhibit.
- See Interactive Data File provisions of Regulation S-K Item 601(b)(101); Rule 405 of Regulation S-T; EDGAR Filer Manual for details.
- Effective September 2018, the amendments also eliminated the requirement to post "Interactive Data Files" on websites. Corresponding changes to the cover pages of Forms 10-K and 10-Q are indicated below:

Indicate by check mark whether the registrant has submitted electronically ~~and posted on its corporate Web site, if any,~~ every Interactive Data File required to be submitted ~~and posted~~ pursuant to Rule 405 of Regulation S-T (§ 232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit ~~and post~~ such files). Yes No

Final Rule – Management's Discussion & Analysis

- Effective May 2, 2019, the SEC adopted amendments to Item 303(a) of Regulation S-K (Management's Discussion and Analysis or MD&A), applicable to annual reports.
- **Omission of Earliest of 3-Year Period Discussion**
  - The new rules allow a registrant to eliminate discussion of the earliest of the three-year period presented in their financial statements if such discussion is already included in *any* other of the registrant's prior filings, as long as the registrant identifies the location of the discussion in the prior filing.
- **Tailored Presentations**
  - The new rules also emphasize that registrants may use any presentation that, in their judgment, would enhance a reader's understanding.
    - A year-to-year comparison is not required, although the SEC expects many registrants will continue to use this format.

Final Rule – Management's Discussion & Analysis

- The purpose of MD&A and other substantive rules governing MD&A have not changed:
  - A registrant must provide all material information "necessary to an understanding of its financial condition, changes in financial condition and results of operations."
  - "Known trends and uncertainties" disclosure is still required.
- Companies should consider revising their MD&A disclosure to improve readability, eliminate repetitive and immaterial disclosure and should consider taking advantage of the new rule to omit discussion of the earliest year of the 3-year period.
- As of June 4, 2019, only 2 of 20 registrants filing Form 10-Ks chose to forego discussion of the earliest year, although it is likely too early to tell how the new flexibility will be incorporated by registrants over time.

Final Rule - Exhibits

- The SEC has recently adopted a variety of amendments to Item 601 of Regulation S-K (Exhibits), which are all currently effective:
- **Description of Securities Must be Provided as Exhibit to Form 10-K**
  - Previously, a description of securities in accordance with Item 202 of Regulation S-K was required only in registration statements.
  - Companies are now required to file descriptions of their securities registered under Section 12 of the Exchange Act as exhibits to Form 10-K (Item 601(b)(4)).
  - The description may be incorporated by reference to a prior filing, if it remains unchanged.
  - ***Many companies will likely need to update their description of securities in connection with preparing the new exhibit for their next Form 10-K filing.***

Final Rule - Exhibits

- **No Longer Required to Submit Confidential Treatment Requests**
  - The amendments revise Item 601(b)(10) of Regulation S-K, material agreements, as well as Item 601(b)(2) of Regulation S-K, plans of acquisition, to permit companies to redact from these exhibits confidential information that is not material and would likely cause competitive harm to the company if publicly disclosed, without having to submit an unredacted copy and formal confidential treatment request in advance to the SEC Staff, as previously required.
  - Instead, companies must mark the exhibit index to indicate that portions of the exhibit have been omitted, mark the filed exhibit with brackets to show where information has been omitted and add a “prominent statement” on the first page of the redacted exhibit to indicate that marked information has been omitted from the exhibit because it is both (i) not material and (ii) would likely cause competitive harm to the company if publicly disclosed.
  - Upon request by the SEC Staff, companies will be required to provide, on a supplemental basis, an unredacted paper copy and supporting analyses regarding materiality and competitive harm. If the SEC disagrees with the analyses, it may require the filing to be amended.

Final Rule - Exhibits

- **Material Contract 2-Year Look-Back Limited to Newly Reporting Registrants**
  - Under revised Item 601(b)(10) of Regulation S-K material contracts not made in the ordinary course of business must be filed
    - For all registrants: if the contract is to be performed in whole or in part at or after the filing
    - Only for “newly reporting registrants”: or if the contract was entered into not more than two years before the filing
- **Once Implemented, “Inline” Must be in the Exhibit Title**
  - Once Inline XBRL is implemented by a company, the exhibit index must include the word “Inline” within the title description for any XBRL-related exhibit.

Final Rule – Exhibits

- **Omission of Immaterial Schedules and Attachments Permitted for all Exhibits**
  - Generally, companies were required to file complete copies of exhibits, including all schedules and attachments, no matter how immaterial or irrelevant, except that Item 601(b)(2) of Regulation S-K expressly allowed acquisition and disposition agreements to be filed without schedules or attachments if they were not material.
  - New Item 601(a)(5) of Regulation S-K permits the omission of schedules and similar attachments to ***all*** exhibits, so long as they do not contain material information and the information is not otherwise disclosed in the exhibit or the disclosure document. Companies are instead required to file with each exhibit a list briefly identifying the contents of the omitted schedules or attachments and to furnish them supplementally upon request by the SEC.
- **Omission of Personally Identifiable Information Codified**
  - New Item 601(a)(6) of Regulation S-K implements current SEC Staff practice of allowing companies to redact certain personally identifiable information from filed exhibits without the need for a confidential treatment request.
  - Personally identifiable information is information the disclosure of which would be "a clearly unwarranted invasion of personal privacy (*e.g.*, disclosure of bank account numbers, social security numbers, home addresses and similar information)."

Final Rule – Disclosure of Hedging Policies

- In December 2018, the SEC adopted final rules regarding disclosure of hedging policies (as required by the Dodd-Frank Act), which will be effective for most companies for the first time in proxy statements filed in 2020.
- The amendments require a company to describe in its proxy or information statements for the election of directors any practices or policies it has adopted regarding the ability of its employees (including officers) or directors to purchase financial instruments, or otherwise engage in transactions, that hedge or offset, or are designed to hedge or offset, any decrease in the market value of the registrant's equity securities granted as compensation to, or held directly or indirectly by, those persons. (New Item 407(i) of Regulation S-K)
- Phased-in compliance dates:
  - Companies that are not emerging growth companies or smaller reporting companies: proxy and information statements for the election of directors during fiscal years beginning on or after July 1, 2019 (*e.g.* for calendar year-end reporting companies, annual proxy statements filed in 2020)
  - Emerging growth companies and smaller reporting companies: proxy and information statements for the election of directors during fiscal years beginning on or after July 1, 2020 (*e.g.* for calendar year-end reporting companies, annual proxy statements filed in 2021)

Final Rule – Disclosure of Hedging Policies

- A company may either disclose the practices or policies in full or provide a fair and accurate summary.
  - A summary must include the categories of persons covered and any categories of hedging transactions that are specifically permitted or specifically disallowed.
- If the company does not have any such practices or policies, the company must disclose that fact or state that hedging transactions are generally permitted.
- The new rules do not require companies to disclose any actual hedging transactions by employees (including officers) or directors.
  - Although note that many of these transactions will trigger Section 16 reporting obligations, and companies have been required to disclose pledges of equity securities (which are often components of hedging transactions) by named executive officers and directors.
- ***Many companies already include disclosure of anti-hedging policies in their proxy statements, and these should be revisited to ensure compliance with the new rules. Companies may also want to review their relevant policies in light of the new disclosure requirements.***

Final Rule – Other – Currently Effective

- **Financial statement cross references:** In financial statements, incorporation by reference to, or cross-referencing to, information outside of the financial statements is not permitted (unless specifically permitted or required by SEC rules or GAAP).
- **Other cover page changes:**
  - Forms 10-K, 10-Q and 8-K must include disclosure of the title of each class of securities registered under Section 12(b) of the Exchange Act, the trading symbol(s) and name of each exchange where registered.
  - Removed checkbox on Form 10-K cover page re: delinquent Section 16 filings.
- **Description of property:** Item 102 of Regulation S-K is amended to limit the description of property to material information.
  - Disclosures specific to mining, oil and gas and real estate industries are outside the scope of the amendment.

Final Rule – Other – Currently Effective

- **Section 16(a) Compliance:**
  - Eliminated the requirement for insider to furnish Section 16 reports to the company on paper.
  - Company may rely on Section 16 reports filed on EDGAR to assess delinquencies.
  - Eliminated the need to include the caption if there are no delinquencies to report.
- **New headings:**
  - “Delinquent Section 16(a) Reports” instead of “Section 16(a) Beneficial Ownership Reporting Compliance” (in proxy statements)
  - “Information about our Executive Officers” instead of “Executive officers of the registrant” when Item 401 of Regulation S-K disclosure about executive officers included in Form 10-K

Critical Audit Matters (PCAOB)

- In October 2017, the SEC approved PCAOB revised audit standard AS 3101 governing the form and content of unqualified audit reports for public companies, resulting in the following changes:
  - Disclosure of auditor tenure (effective already)
  - Modifications to the structure of the auditor's report (effective already)
  - Disclosure of "Critical Audit Matters" (CAMs) – phased in effectiveness; emerging growth companies exempt
- A CAM is defined as any matter arising from the (current period) audit of the financial statements that was communicated or required to be communicated to the audit committee and that:
  - Relates to accounts or disclosures that are material to the financial statements; and
  - Involved especially challenging, subjective, or complex auditor judgment.
- Phase-in for disclosure of CAMs:
  - Large accelerated filers (LAFs) – audit reports for fiscal years ending on or after June 30, 2019 **(*i.e.* calendar-year LAFs need to include CAMs in upcoming FY 2019 audit report filed in 2020).**
  - All other public companies (except EGCs) – audit reports for fiscal years ending on or after December 15, 2020.

Critical Audit Matters (PCAOB)

- Calendar-year LAFs should be discussing draft CAM disclosures with their auditors and audit committees now.
  - Many companies have already participated in dry runs.
- For each CAM communicated in the auditor's report, the auditor must:
  - Identify the CAM
  - Describe the principal considerations that led the auditor to determine that the matter is a CAM
  - Describe how the CAM was addressed in the audit; and
  - Refer to the relevant financial statement accounts or disclosures that relate to the CAM.
- PCAOB expects most audits to have at least one CAM.
  - If none, the audit report must state that the auditor determined there are no CAMs.

Proposed Rules

- SEC Proposed Rules
  - Modifying Large Accelerated Filer and Accelerated Filer Definitions
  - Expansion of “Testing-the-Waters” Communications
  - Financial Requirements for Acquisitions and Dispositions
  - Financial Disclosure for Registered Debt Offerings

Proposed Rules – Modifying Large Accelerated Filer and Accelerated Filer Definitions

- Amendments to accelerated filer (AF) and large accelerated filer (LAF) Definitions
  - Proposed: May 9, 2019; Comments due July 29, 2019
- Background – In June 2018 the SEC adopted amendments to the definition of smaller reporting company (SRC) to expand the number of companies that qualified for the scaled disclosure accommodations. Before the amendments, SRCs were generally also non-AFs; after the amendments, it is possible to be both a SRC and an AF (or LAF).
- Background – Main benefits of being a non-AF:
  - ***Not required to have an audit of internal control over financial reporting***
  - Have 90 days to file Form 10-Ks and 45 days to file Form 10-Qs
- The proposed amendments would:
  - Exclude from the AF and LAF definitions an issuer that is eligible to be an SRC and had annual revenues of less than $100 million (or no revenues) in the most recent fiscal year for which audited financial statements are available (and public float less than $700 million or no public float)
  - Modify the transition thresholds so that companies would be less likely to move from one category to another.
- Implications – more SRCs would also be non-AFs, with benefits described above.

Proposed Rule – Expansion of "Testing-the-Waters" Communications

- Proposed new Rule 163B – Solicitations of Interest Prior to a Registered Public Offering
  - Proposed: February 19, 2019; Comments were due: April 29, 2019
- Summary:
  - The SEC is proposing to extend the "testing-the-waters" accommodation to all issuers, not just EGCs as is currently the case.
  - Would allow all issuers, or any person authorized to act on an issuer's behalf, to engage in oral or written communications with potential investors that are, or that the issuer reasonably believes to be, "qualified institutional buyers" or "institutional accredited investors" either prior to or following the date of filing of a registration statement with the SEC, to determine whether such investors might have an interest in a contemplated registered securities offering.
  - Not limited to IPOs, and would also be available to reporting companies under the Exchange Act. Such issuers would need to consider whether any information in their testing-the-waters communications would trigger any obligations under Regulation FD.
  - While the communications would not need to be filed with the SEC, the SEC's practice is to ask supplementally to see copies of all testing-the-waters communications in connection with its review of an EGC registration statement.

Proposed Rules – Financial Requirements for Acquisitions and Dispositions

- Amendments to Rule 1-02(w), Rule 3-05 and Article 11 of Reg S-X, primarily
  - Proposed: May 3, 2019; Comments due July 29, 2019
- The proposed (extensive) amendments are intended to reduce the complexity and costs associated with the preparation of historical financial statements and pro forma financial information for businesses that are acquired or disposed of.
- Some highlights:
  - Revise significance calculation under investment test and income test of Rule 1-02(w)
  - Significance threshold for a disposition: raise from 10% to 20%
  - Rule 3-05 financial statements of acquired businesses: No more than 2 years audited financial statements, depending on significance (instead of 3)
  - Article 11 pro forma financial information: Simplified adjustment criteria, in 2 columns:
    - Transaction accounting adjustments
    - Management adjustments
  - Amendments would not apply to target company financial statements required to be included in a proxy statement or registration statement on Form S-4

Proposed Rules – Financial Disclosure for Registered Debt Offerings

- Amendments to Rule 3-10 and Rule 3-16 of Reg S-X, primarily
  - Proposed: July 24, 2018; Comments were due December 31, 2018
  - Spring 2019 SEC Reg-Flex Agenda indicates these amendments are in the Final Rules Stage.
- The proposed (extensive) amendments would simplify the financial disclosure requirements applicable to registered debt offerings for guarantors and issuers of guaranteed securities, as well as for affiliates whose securities collateralize a registrant's securities.
  - The proposed amendments to Rule 3-10 would make it easier to omit separate financial statements as well as reduce the required alternative supplemental financial and nonfinancial disclosure about the subsidiary issuers and/or guarantors and the guarantees.
    - Under the proposed rules, the disclosures would be required only as long as the issuers and guarantors have an Exchange Act reporting obligation with respect to the guaranteed securities (rather than for as long as the securities are outstanding), which means generally if the security is held by fewer than 300 holders of record, the reporting obligation would be suspended within approximately one year after the offering.
  - The proposed amendment to Rule 3-16 replaces trigger of "constitutes a substantial portion of the collateral" with a requirement to provide certain abbreviated financial and nonfinancial disclosures about the affiliate and the collateral arrangement if material to investors/holders of the collateralized securities.

What's Next?
SEC Rulemaking Calendar (Spring 2019 Reg Flex Agenda)

- The Spring 2019 Reg Flex Agenda includes these rulemaking projects as among those the SEC plans to address over the coming year:
  - Thresholds for shareholder proposals under Rule 14a-8 *(SEC is generally expected to propose increases in the ownership and resubmission thresholds for shareholder proposals)*;
  - Advisors' reliance on the proxy solicitation exemptions in Rule 14a-2(b);
  - Securities Act Rule 701, the exemption from registration for securities issued by non-reporting companies pursuant to compensatory arrangements, and Form S-8, the registration statement for compensatory offerings by reporting companies *(Concept release July 2018);*
  - Industry Guide 3, Statistical Disclosure by Bank Holding Companies *(Request for comment March 2017);* and
  - Potential concept release on ways to harmonize and streamline private offering exemptions.
- "Long-Term Actions" include (i) clawbacks of executive compensation (Dodd-Frank; rules proposed 2015); (ii) pay vs. performance (Dodd-Frank; rules proposed 2015); (iii) corporate board diversity disclosure; (iv) proxy process amendments ("proxy plumbing"); and (v) universal proxies (rules proposed 2016).
- SEC request for comment December 2018: nature, content and timing of earnings releases/quarterly reports.

More Information

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Dionne M. Rousseau

Dionne Rousseau is a partner in the Corporate Practice Group. She provides corporate finance, securities, mergers and acquisitions, and other transaction and compliance counsel to public and private entities.

Dionne has served as lead outside corporate and securities counsel for 12 public companies, and as boardroom lawyer for three of these entities. With more than 25 years of experience handling corporate finance and mergers and acquisitions transactions, Dionne has led client service teams and deal teams for clients in the financial services, real estate, oil and gas services, energy exploration and production, marine construction, hard rock mining, death care, distribution, transportation, and technology industries. In 2018, Dionne served as lead counsel to a public offshore drilling company in connection with raising $1.5 billion to emerge from Chapter 11 – named Energy Deal of the Year by The M&A Advisor.

Dionne provides ongoing corporate and securities law advice to public companies and their boards of directors, including compliance with the corporate governance and disclosure requirements of the securities laws and trading markets. She regularly reviews Forms 10-Ks, 10-Qs, 8-Ks, 20-Fs, 6-Ks, proxy statements, and press releases, handles board and executive compensation matters, proxy contests, and activist investors, and implements takeover defenses. Dionne represents domestic issuers and foreign private issuers, as well as companies and funds in connection with private equity transactions.

Prior to practicing law, she was an investment banker with PaineWebber (now UBS) in New York City.

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- The University of Chicago Law School JD, with honors, 1990 Order of the Coif
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Victoria J. Bagot

Victoria Bagot is an associate in the Corporate Practice Group. She represents clients on corporate, securities, mergers and acquisitions, and private equity matters.

Victoria advises public and private companies on a range of corporate matters, including finance, capital markets, mergers and acquisitions, and private equity.

Victoria represents issuers and underwriters in a variety of corporate finance transactions, including tender offers, public and private securities offerings of debt and equity securities, and initial public offerings. She also works with private equity investors, their portfolio companies, and other public and private companies in connection with mergers, acquisitions, dispositions, internal reorganizations, and strategic investments. In 2018, Victoria assisted as lead counsel to a public offshore drilling company in connection with raising $1.5 billion to emerge from Chapter 11 – named Energy Deal of the Year by The M&A Advisor.

In the area of corporate governance, Victoria advises clients on disclosure and reporting requirements of securities laws and capital markets, and regularly reviews annual, quarterly, and current reports, proxy statements, and other SEC filings. She coordinates periodic reviews and compliance with internal company policies such as insider trading policies and ethics and business conduct policies.

Prior to joining Jones Walker, Victoria was an associate in the capital markets and mergers and acquisitions practice group at the Houston office of an *Am Law* 100 firm.

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