



November 2020 Public Companies Update

Preparing for the 2021 10-K and Proxy Season

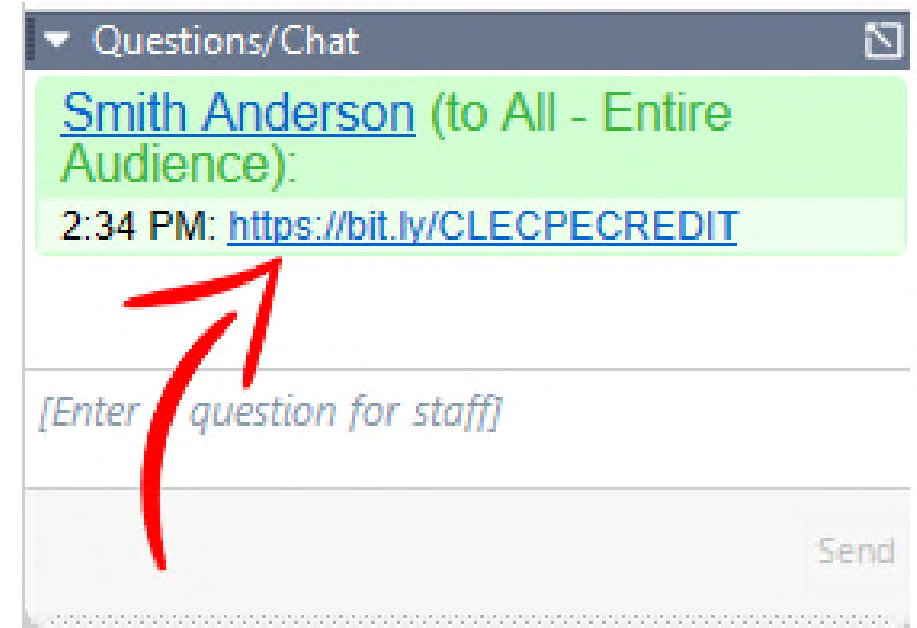


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Agenda

- Preparation of Form 10-K
- Form 10-K Comment Letter Trends
- SEC Enforcement Trends
- Proxy Season Preparation
- Proxy Statement, Governance and Shareholder Issues

Preparation of Form 10-K

Determine Filing Status

- New amendments (effective April 27, 2020) revise the definitions of “accelerated filer” and “large accelerated filer” and increase public float transition thresholds

Status	Public Float	Annual Revenues
Smaller Reporting Company and Non-Accelerated Filer	Less than \$75 million	N/A
	\$75 million to less than \$700 million	Less than \$100 million
Smaller Reporting Company and Accelerated Filer	\$75 million to less than \$250 million	\$100 million or more
Accelerated Filer (not a Smaller Reporting Company)	\$250 million to less than \$700 million	\$100 million or more
Large Accelerated Filer (not a Smaller Reporting Company)	\$700 million or more	N/A

SEC Rule Amendments

- Regulation S-K Modernization
 - SEC has been fairly active in promulgating new or amended requirements to Regulation S-K
 - Review older changes:
 - Cover Page (e.g., ticker symbol, deletion of Section 16 report checkbox and Inline XBRL)
 - Familiarize yourself with recent amendments:
 - Item 101 - Business
 - Item 103 - Legal Proceedings
 - Item 105 - Risk Factors
 - Business Acquisitions and Dispositions Disclosures
 - Understand the impact of COVID-19 on your business

Reg. S-K - Principles-Based Approach

- The changes generally eliminate certain prescriptive requirements in favor of a more flexible “principles-based, registrant-specific” approach, designed to elicit more tailored disclosures
- The amendments also permit increased use of summaries, cross-references and hyperlinks in order to reduce repetition, among other changes seeking to discourage overly lengthy disclosure

Reg. S-K Item 101(a) - Business

- Prior Requirement: Item 101(a) formerly required disclosure of “the general development of the business of the registrant, its subsidiaries and any predecessor(s) during the past five years”
- Amendments: Item 101(a) now only requires disclosure of the information material to an understanding of the general development of the registrant’s business, without a specified timeframe
 - After the initial registration statement, registrants are permitted to only provide an update of the material developments to their business as opposed to a full discussion
 - Must provide hyperlink to, and incorporate by reference, the full discussion from a single previous filing that, together with the update, provides the full overview of the business

Reg. S-K Item 101(c) - Business

- Prior Requirement: Item 101(c) formerly included a specific list of disclosure topics
- Amendments: Item 101(c) now contains a non-exhaustive list of disclosure topic examples
 - Registrants now required to discuss material effects of all applicable government regulations (not just material effects of environmental laws)
 - New human capital disclosure (discussion follows)

Reg. S-K Item 101(c) - Human Capital Disclosure

- Disclosure Requirement
 - Discuss, to the extent material to an understanding of the registrant's business taken as a whole:
 1. the registrant's human capital resources, including the number of persons employed by the registrant
 2. any human capital measures or objectives that the registrant focuses on in managing the business (such as, depending on the nature of the registrant's business and workforce, measures or objectives that address the development, attraction and retention of personnel)

Reg. S-K Item 101(c) - Human Capital Disclosure (cont'd)

- Human Capital Resources
 - Focus on the people that make up the company
 - Use of quantitative demographic information
 - Questions that companies can ask to help identify aspects of human capital resources that are material to an understanding of the business
 - Remember audience includes investors and employees
 - Disclosure likely to be objective and consistent year-over-year

Reg. S-K Item 101(c) - Human Capital Disclosure (cont'd)

- Human Capital Measures or Objectives
 - More room for interpretation and subjectivity
 - Responsive to current environment and current business priorities
 - Which measures and objectives are top-of-mind for the company's senior leadership and Board when it comes to managing the human capital aspects of the business?
 - What are the material human capital issues that the company is facing and how is it addressing them?
 - Disclosure more likely to change year-over-year

Reg. S-K Item 101(c) - Human Capital Disclosure (cont'd)

- Process Considerations
 - No requirement for companies to change their practices or create new or particular measures or objectives
 - Provides an opportunity to evaluate the process of establishing, maintaining and reporting human capital measures and objectives
 - Process for reporting to the Board
 - “Bottom-up” approach for gathering feedback

Reg. S-K Item 105 - Risk Factors

- Prior Requirement: Item 105 (formerly Item 503(c)) required a discussion, under the caption “Risk Factors,” of the most significant factors that make an investment in the registrant or offering speculative or risky
- Amendments: Item 105 now requires disclosure of material risks, organized under relevant headings (in addition to the subcaptions currently required)
 - General risk factors grouped at the end under a “General Risk Factors” heading
 - If risk factor disclosure exceeds 15 pages, registrants must prepare a series of concise, bulleted or numbered statements, no longer than two pages, of the principal risk factors at the forefront of the applicable filing

Reg. S-K Item 105 - Risk Factors (cont'd)

- Organization of Risk Factors
 - One size doesn't fit all - Organization may vary depending on each company's particular circumstances
- Reducing Risk Factor Disclosure
 - Weighing pros/cons of including a summary against the potential increase of litigation risk from dropping/reducing current risk factor disclosure
- General Risk Factor Category Examples:
 - Risks related to investment in registrant's securities
 - Risks related to shifts in the broader economy or market
 - Risks associated with a particular industry
 - General business risks

Reg. S-K Item 105 - Risk Factors (cont'd)

- Potential areas of focus:
 - COVID-19
 - Corp Fin Disclosure Guidance: Topic No. 9 and Topic No. 9A
 - Cybersecurity
 - Corp Fin Disclosure Guidance: Topic No. 2; Feb. 2018 Cybersecurity Interpretative Release
 - Tariffs/Trade
 - LIBOR/Reference Rate Reform
 - FASB guidance regarding transition from LIBOR to SOFR
 - Brexit
 - Climate Change

Reg. S-K Item 102 - Properties

- Prior Requirement: Item 102 formerly required disclosure of “the location of the principal plants, mines, and other materially important physical properties of the registrant and its subsidiaries”
- Amendments: Item 102 now only requires disclosure “[t]o the extent material...[of] the location and general character of the registrant’s principal physical properties”

Reg. S-K Item 103- Legal Proceedings

- Prior Requirement: Item 103 formerly required disclosure of any material pending legal proceedings to which the registrant or any of its subsidiaries is a party
 - Instructions to Item 103 imposed a \$100,000 disclosure threshold for environmental proceedings to which the government is a party
- Amendments: Item 103 now permits (and encourages) registrants to provide hyperlinks or cross-references to legal proceedings disclosure located elsewhere in the document (i.e., the notes to the financial statements)
 - Increases quantitative threshold to \$300,000 for environmental proceedings, but also permits registrants to adopt an alternative threshold so long as (i) it reasonably believes the alternative threshold is designed to result in disclosure material to the business; (ii) it discloses the use of an alternative threshold; and (iii) alternative threshold does not exceed lesser of \$1 million or 1% of the registrant's consolidated current assets

Reg. S-K Item 301 - Selected Financial Data

- Current Requirement: Item 301 requires registrants to furnish, in columnar form, selected financial data for each of the last five fiscal years
 - Instruction 2 to Item 301 requires disclosure of (i) net sales or operating revenues; (ii) income (loss) from continuing operations; (iii) income (loss) from continuing operations per common share; (iv) total assets; (v) long-term obligations and redeemable preferred stock; and (vi) cash dividends
- Proposed Rule: In January 2020, the SEC proposed amendments that would eliminate Item 301 (selected financial data)
 - Proposed amendment not yet adopted

Reg. S-K Item 303 - MD&A

	Prior Requirement	Updated Requirement
Periods covered	3-year period covered by the financial statements (other than for SRCs, which only present 2 years of financial statements)	Discussion of the earliest year may be omitted if such discussion was already included in a prior filing and the registrant discloses the location of such disclosure
Discussion required	Period-to-period comparisons and reference to selected financial data specifically mentioned as potentially being appropriate or necessary	May use principles-based presentation—"registrants may use any presentation that in the registrant's judgment enhances a reader's understanding"

Reg. S-K Item 303 - MD&A (cont'd)

- Key Performance Indicators (KPIs) (Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations (Release No. 33-10751), effective February 25, 2020)
 - Registrants advised to provide additional disclosures about KPIs and other metrics included in MD&A
 - Inclusion of such disclosure consistent with requirement in Item 303(a) to disclose information not specifically referenced in the item that the company believes is necessary to an understanding of its financial condition, changes in financial condition and results of operations, as well as the requirement of a discussion and analysis of "other statistical data" that, in the company's judgment, enhances a reader's understanding of MD&A

Reg. S-K Item 303 - MD&A (cont'd)

- SEC proposed amendments to Item 303 in January 2020, which have not been adopted yet
- These proposed amendments would:
 - Add a new Item 303(a), Objective, to state the principal objectives of MD&A
 - Replace Item 303(a)(4), Off-balance sheet arrangements, with a principles-based instruction to prompt registrants to discuss off-balance sheet arrangements in the broader context of MD&A
 - Eliminate Item 303(a)(5), Tabular disclosure of contractual obligations, given the overlap with information required in the financial statements and to promote the principles-based nature of MD&A
 - Add a new disclosure requirement to Item 303, Critical Accounting Estimates, to clarify and codify existing SEC guidance in this area
 - Revise the interim MD&A requirement in Item 303(b) to provide flexibility by allowing companies to compare their most recently completed quarter to either the corresponding quarter of the prior year (as currently required) or to the immediately preceding quarter

Reg. S-K Item 601 - Exhibits

- Omission of Immaterial Schedules and Attachments from Exhibits (Item 601(a)(5))
- Elimination of the Two-Year Look Back for Material Contracts (Item 601(b)(10)(i))
 - Does not apply to “newly reporting registrants”
 - File contracts not made in the ordinary course of business that are material to the registrant and to be performed in whole or in part at or after the filing of the registration statement or report
- Description of Securities Exhibit (Item 601(b)(4))

Reg. S-K Item 601 - Confidential Treatment

- Reminder:
 - Companies are no longer required to submit confidential treatment requests to redact information from exhibits
 - Redacted information:
 - Must not be material
 - Must be likely to cause competitive harm to the company if publicly disclosed
 - Be prepared to articulate rationale for redacting information
 - SEC has issued a number of comment letters questioning the appropriateness of a registrant's redactions

Additional Reminders

- Heading for Section 16 Disclosure:
 - Heading for disclosure of late Section 16 filings (i.e., Forms 3, 4 and 5) has been changed to “Delinquent Section 16(a) Reports” (instead of “Section 16(a) Beneficial Ownership Reporting Compliance”)
 - An instruction permits (and encourages) this caption to be excluded if there are no delinquencies to report
 - Because this disclosure typically appears in the proxy statement and is incorporated by reference into the Form 10-K, companies will need to address this change in their proxy statements
- Signature Pages:
 - On November 17, 2020, the SEC adopted rules and amendments to permit the use of electronic signatures in signature “authentication documents”
 - EDGAR Filer Manual will specify conditions, and the rules will become effective immediately upon publication in the *Federal Register*
 - Attestation: Signatory must manually sign a document “attesting that the signatory agrees that the use of an electronic signature in any authentication document constitutes the legal equivalent of such individual's manual signature for purposes of authenticating the signature”
 - Keep for seven years

Form 10-K: SEC Comment Letter Trends

Comment Letters - Volume and Composition

- The volume of SEC staff comment letters in the year ended June 30, 2020 declined approximately 15% from the previous year
 - This continues the downward trend of recent years
- Non-accelerated filers only received 20% of comment letters in the 12-month period ending June 30, 2020, reflecting the SEC Staff's focus on larger issuers
 - Large accelerated filers received 58% of the comments

Source: Ernst & Young

Most Frequent Comment Areas

1. Non-GAAP Financial Measures
2. MD&A
3. Revenue Recognition
4. Segment Reporting
5. Fair Value Measurements
6. Intangible Assets and Goodwill
7. Contingencies
8. Inventory and Cost of Sales
9. Income Taxes*
10. Signatures/Exhibits/Agreements

Source: Ernst & Young

*Deloitte comment letter roadmap listed ICFR

Non-GAAP Financial Measures

- SEC continues to focus on whether non-GAAP financial measures comply with relevant rules and regulations
- Most comments focus on:
 - Whether certain metrics should have been identified as non-GAAP measures
 - Whether non-GAAP measures are presented with the most directly comparable GAAP financial measure at the appropriate prominence level
 - SEC staff believes that, to comply with the requirement to present the comparable GAAP measure with equal or greater prominence, a registrant must present the GAAP measure before the related non-GAAP measure
 - In reconciliations, GAAP measures should precede the non-GAAP measures in the required reconciliations

Non-GAAP Financial Measures (cont'd)

- The following are five common non-GAAP financial measures issues that drew Staff scrutiny:
 - GAAP measure not given enough prominence
 - Reconciliation between GAAP and non-GAAP measures is missing or does not start with the GAAP measure
 - Non-GAAP measure is not presented consistently between periods or the reason for changing a non-GAAP measure is not disclosed
 - Management fails to adequately explain why a non-GAAP measure is useful to investors
 - Use of an individually-tailored accounting principle (a company cannot make up its own GAAP)

Source: PwC

MD&A

- SEC often requests registrants to explain the results of operations with greater specificity, including identifying underlying drivers for each material factor that affected their earnings or is reasonably likely to have a material effect on future earnings
- Comments often request registrants to quantify the effects of factors that contributed to material period-to-period changes
- Disclose known trends and uncertainties related to COVID-19

COVID-19

- The SEC staff has issued relatively few comments on disclosures relating to the pandemic in periodic reports
 - Potential reason: SEC Chairman Jay Clayton issued a series of statements and the SEC's Division of Corporation Finance staff issued a series of statements in March 2020 to help companies meet their disclosure obligations
 - However, the SEC has issued a number of comments related to the pandemic in connection with registered securities offerings
- Companies are urged to provide as much information as practicable about their current operating and financial status and future plans in earnings releases and calls with analysts and investors
 - Could provide insights into approach for reviewing periodic reports

COVID-19 (cont'd)

- SEC issued guidance related to COVID-19 pandemic in March 2020 and June 2020
 - Assessing and Disclosing the Evolving Impact of COVID-19
 - Non-exhaustive list of 10 questions each issuer should ask itself
 - Operations, Liquidity and Capital Resources
 - Operational Adjustments
 - Financing Activities
 - Illustrative Considerations
 - CARES Act
 - Going Concern
 - Financial Statements
 - MD&A

COVID-19 (cont'd)

- Consider the following:
 - Where the company stands today, operationally and financially
 - How the company's COVID-19 response, including its efforts to protect the health and wellbeing of its workforce and customers, is progressing
 - How its operations and financial condition may change as efforts to fight COVID-19 progresses
 - Receipt of governmental financial assistance (nature, amount and effect of the assistance)

COVID-19 (cont'd)

- Usually focused on disclosures made under Regulation S-K (risk factors and MD&A)
- Example:
 - *“Please revise to discuss the effects, if any, that COVID-19 has had on your business, including what management expects its future impact will be, how management is responding to evolving events and how it is planning for COVID-19-related uncertainties going forward”*

COVID-19 (cont'd)

Example SEC staff comment: Risk factors

We note your disclosure that the extent to which your operations may be impacted by the COVID-19 pandemic will depend largely on future developments, which are highly uncertain and cannot be accurately predicted, including new information that may emerge concerning the severity of the outbreak and actions by government authorities to contain the outbreak or treat its impact. Please amend your risk-factor disclosure to provide more detailed risks related to the COVID-19 pandemic, tailored to your specific facts and circumstances. For guidance, see CF Disclosure Guidance: Topic No. 9 (25 March 2020).

Example SEC staff comment: MD&A disclosure – historical results

We note your disclosure that your overall revenues since 1 January 2020, were below expectations by approximately X% primarily due to COVID-19, and your revenues from providing services were below expectations by approximately Y%. Because investors do not know your expected revenue for this period, please revise to present the impact based on your historical financial performance. In this regard, please discuss how COVID-19 has impacted operations as compared to prior financial periods. Please refer to CF Disclosure Guidance: Topic No. 9 (25 March 2020).

Recent SEC Enforcement Actions

SEC Enforcement Trends - 2020

- In fiscal year 2020, the SEC brought a diverse mix of 715 enforcement actions, including 405 standalone actions
 - Actions address a wide range of issues from issuer disclosure and accounting violations to broker-dealer misconduct
- SEC obtained record levels of judgments and orders (totaling approximately \$4.68 billion) in disgorgement and penalties

Noteworthy Enforcement Proceedings - Known Trends (HP)

- HP sales practices at issue:
 - In an effort to meet quarterly sales targets, regional managers used a variety of incentives to accelerate, or “pull-in” to the current quarter, sales of printing supplies that they otherwise expected to materialize in later quarters
 - Further, in an effort to meet revenue and earnings targets, managers in one HP region sold printing supplies at substantial discounts to resellers known to sell HP products outside of the resellers’ designated territories, in violation of HP policy and distributor agreements

Noteworthy Enforcement Proceedings

- Known Trends (HP) (cont'd)

- The order finds that HP failed to disclose known trends and uncertainties associated with these sales practices
 - HP failed to disclose the known trend of increased quarter-end discounting leading to margin erosion and an increase in channel inventory, and the unfavorable impact that the trend would have on HP's sales and income from continuing operations, causing HP's reported results to not necessarily be indicative of its future operating results
- The SEC's order also focused on HP's disclosure controls and procedures
 - The SEC alleged that the company's disclosure process "lacked sufficient interaction with operational personnel who reasonably would have been expected to recognize that the known trends" attributable to these discounting practices

Noteworthy Enforcement Proceedings

- Perks (Argo Group)

- The SEC's order finds that in its proxy statements over a five-year period, Argo Group International Holdings failed to disclose over \$5.3 million it had paid on the CEO's behalf
 - The perks Argo paid for, but did not disclose, included personal use of corporate aircraft, helicopter trips and other personal travel, housing costs, transportation for family members, personal services, club memberships and tickets and transportation to entertainment events
- The company settled the action without admitting or denying the SEC's findings and it will pay a \$900,000 civil penalty in addition to taking a remedial actions

Noteworthy Enforcement Proceedings

- Stock Buyback (Andeavor)

- Enforcement action against Andeavor LLC in connection with a company engaging in a stock buyback while in preliminary merger negotiations with a potential buyer
 - Andeavor CEO directed its CFO to initiate a \$250M stock buyback two days before the CEO was scheduled to resume confidential discussions about the potential acquisition of Andeavor at a significant premium
 - Andeavor's legal department approved a Rule 10b5-1 plan after concluding that these discussions did not constitute MNPI
 - The parties ultimately did agree on a deal at a valuation of \$150 per share in April compared to an average price of \$97 paid for shares acquired in the buyback during February and March

Noteworthy Enforcement Proceedings

- Stock Buyback (Andeavor) (cont'd)

- According to the order, the conclusion that discussions were not MNPI was “based on a deficient understanding of all relevant facts and circumstances regarding the two companies’ discussions” resulting from a breakdown in internal accounting controls
 - Andeavor used an abbreviated and informal process to evaluate the materiality of the acquisition discussions that did not allow for a proper analysis of the probability that Andeavor would be acquired.
 - Did not require conferring with persons reasonably likely to have potentially material information regarding significant corporate developments prior to approval of share repurchases
 - Nobody involved in the process discussed with the CEO the prospects that the two companies would reach a deal, which the SEC said resulted in a miscalculation of its probability

Notable Supreme Court Case

- *Liu v. SEC*
 - On June 22, 2020, in an 8-1 decision, the U.S. Supreme Court held that the SEC may continue to obtain disgorgement in federal court, albeit in a significantly narrowed fashion
- Background:
 - In 2016, the SEC charged Charles *Liu* and *Xin* (Lisa) Wang with defrauding Chinese investors of a project that the couple falsely claimed met the requirements of the EB-5 Immigrant Investment Program, which is subject to federal securities laws. Fifty investors paid nearly \$27 million to fund construction of a cancer-treatment center in California. The SEC alleged that the couple misappropriated investors' funds by diverting them to overseas marketers and by paying themselves generous salaries

Notable Supreme Court Case (cont'd)

- Arguments:
 - In briefing, the couple argued that the omission of “disgorgement” from the statute listing the SEC’s judicial remedies was intentional, as Congress wrote a separate statute expressly authorizing the SEC to obtain disgorgement in administrative proceedings.
 - In response, the SEC argued that its authorizing statute granted it implicit authority to seek disgorgement as a form of “any equitable relief.” The SEC relied heavily on lower court decisions that, since the early 1970’s, held that courts could award the SEC disgorgement as an equitable remedy ancillary to an injunction

Notable Supreme Court Case (cont'd)

- Ruling:
 - Writing for the majority, Justice Sotomayor wrote that “a disgorgement award that does not exceed a wrongdoer’s net profits and is awarded for victims is equitable relief permissible under §78u(d)(5).”
 - The Court found that the fact that Congress used the term “disgorgement” when defining the SEC’s administrative remedies, but not when defining its judicial remedies, was of no consequence—“it makes sense that Congress would expressly name the equitable powers it grants to an agency for use in administrative proceedings,” because agencies, unlike courts, lack “inherent equitable powers”

Proxy Season Preparation

Proxy Season Preparation

- Drafting CD&A may require more time than usual this season
- Anticipating required compensation disclosures
 - Has the NEO agreed to forgo salary, bonus or perquisites?
 - Have compensation amounts been adjusted?
 - Has the company repriced options?
 - Has the company changed the metrics used to evaluate performance?

Proxy Season Preparation (cont'd)

- CEO Pay Ratio Disclosure
 - Selecting a new median employee (based on three-year limit or COVID impacts on employee population)
 - Per C&DI, whether furloughed workers should be included as employees is based on the facts and circumstances
- Corporate governance disclosures
 - Consider board's role in overseeing risk during the pandemic

Virtual Annual Meetings

- 2020 Season Statistics
 - Average virtual annual meeting attendance was 50 people
 - Average number of questions asked during virtual meetings: 5 questions
 - 97% of companies took live questions
- Considerations
 - Decide on format as early as possible to permit sufficient time to plan
 - State law: Confirm permissibility of virtual meetings under applicable state law
 - Notice: Confirm notice is sufficient
 - Many companies in 2020 had to issue press releases to cure defective notice
 - Logistics: Make shareholders lists available before and during the meeting. Disclose where and when it will be available

D&O Questionnaires

- No relevant rule/regulatory updates for 2020
- Prior rule/regulatory updates to revisit:
 - Tax Cuts and Jobs Act eliminated the exception to IRC §162(m)
 - Nasdaq definition of family member
- Many companies are adding additional diversity / demographic information

Proxy Statement, Governance and Shareholder Issues

Regulation of Proxy Advisors

Proxy Advisor Rules Adopted

- SEC adopted a set of principles-based rules for proxy firms on July 22, 2020
- New rules require that proxy firms provide to affected parties: (i) disclosure of any material conflicts of interest (information regarding an interest, transaction or relationship that is material to assessing the objectivity of the proxy voting advice); and (ii) public disclosure of written policies and procedures it uses to:
 - Identify material conflicts of interest
 - Ensure that issuers have access to proxy advice before or at the same time as it is provided to clients
 - Ensure advice is provided to clients in a timely manner with a mechanism to make them aware of issuer input
- SEC amended Rule 14a-9 to include examples of when a proxy firm's failure to disclose certain material information in its advice would be considered misleading

Shareholder Proposal Thresholds

Amendments to Shareholder Proposal Rules

- SEC adopted amendments to Rule 14a-8 in September 2020
 - Notable amendments to Rule 14a-8(b), (c) and (i)(12)
- These amendments provide a transition provision
 - Shareholders currently eligible to submit a proposal under the existing criteria remain eligible (without any additional investment) to submit proposals for an annual or special meeting to be held prior to January 1, 2023
- Final amendments will apply to any proposal submitted for an annual or special meeting to be held on or after January 1, 2022

Initial Submission Threshold (Rule 14a-8(b))

- Prior Rules: Any shareholder may submit a proposal if it holds at least \$2,000 or 1% of a company's securities for at least one year
- Amendments: Provide three alternative thresholds that will require a shareholder to demonstrate continuous ownership of at least:
 - \$2,000 of the company's securities for at least three years
 - \$15,000 of the company's securities for at least two years
 - \$25,000 of the company's securities for at least one year

One Proposal Limit (Rule 14a-8(c))

- Prior Rules: Allow “each shareholder” to submit no more than one proposal to a company for a particular shareholders’ meeting, but someone serving as a representative for more than one shareholder can submit multiple proposals to the same company on behalf of different shareholders
- Amendments: Revise the rule to apply the one-proposal limit to “each person” rather than “each shareholder,” and the amendments further state that a person cannot rely on the securities holdings of another person for purposes of meeting the eligibility requirements

Resubmission Threshold (Rule 14a-8(i)(12))

- Prior Rules: Permit a company to exclude from its proxy materials a shareholder proposal dealing with substantially the same subject matter as another proposal or proposals that had been submitted once, twice or three or more times in the preceding five calendar years and received less than 3%, 6% and 10% of shareholder votes, respectively
- Amendments: Increase the relevant thresholds to 5%, 15% and 25%, respectively
 - E.g., a proposal would need to achieve support by at least 5% of the voting shareholders in its first submission in order to be eligible for resubmission in the following three years. Proposals submitted two and three times in the prior five years would need to achieve 15% and 25% support, respectively, in order to be eligible for resubmission in the following three years

Governance and Shareholder Issues

Governance and Shareholder Issues

- Environmental and Social Disclosure
- Director Overboarding
- Board Diversity
- 2020 Proxy Season
Shareholder Proposals

Environmental and Social Disclosure

E&S Disclosures - Overview

- For the fourth year in a row, the number of E&S shareholder proposals filed surpassed governance-focused proposals
 - 18 of the proposals (11% of the total number of E&S proposals voted on) passed
 - This is double the passage rate from the 2019 season
- 14 proposals that focused on climate change reached a vote and three received majority support
- Adding voluntary E&S disclosures may be an opportunity to control the message and provide a basis to direct shareholder engagement in this area
- Companies should be cognizant of securities law and other legal ramifications

ISS Climate Awareness Scorecard

- ISS announced in August 2019 that it will start to include this in some of its research reports
- Initial reports are out and include three sections
 - Climate Risk Exposure (including Industry Climate Risk Exposure and Incident-Based Risk Exposure),
 - Climate Performance (including Current Climate Performance and Forward-Looking Climate Performance), and
 - Climate Disclosure
- Keep in mind that not all institutional investors subscribe to ISS and even those who do may not use this data point
 - There are a lot of ESG ratings out there. The only way to know which ones your investors are using—if any—is to talk with them

Director Overboarding

Director Overboarding

- Proxy advisory firm and investor policies have become stricter on the maximum number of boards on which directors may serve
- The cap of public directorships is variable across policies, typically at four to six
 - Five is general policy for both ISS and Glass Lewis
- Different thresholds may apply for directors who serve as executive officers
 - ISS generally permits up to three board seats (including own board) for CEO and up to five for other named executive officers
 - Glass Lewis generally permits up to two board seats (including own board) for CEO or other named executive officers

Overboarding Action Items

- Action items for overboarding include:
 - Reviewing the policies of largest investors and of the proxy advisory firms as part of review of board composition, board refreshment strategies, and recruiting new directors;
 - Reviewing corporate governance guidelines to determine whether to adopt or update company-specific overboarding policies;
 - Considering other time constraints of directors and potential directors that may adversely affect board service, including the individual's full-time job, responsibilities at not-for-profit boards or privately held company boards, and time-consuming committee assignments or other board leadership roles at the company or on other boards; and
 - Being prepared to discuss overboarding issues when engaging with institutional investors

Board Diversity

Pressure from Proxy Advisory Firms and Institutional Investors

- ISS:
 - Will generally recommend an against or withhold vote for the chair of the nominating committee and possibly other directors when no women on the board
 - Will consider mitigating factors such as commitment to appointing at least one female in the near term or the presence of a female on the board at the preceding annual meeting
- Glass Lewis:
 - Will generally recommend voting against the chair of the nominating committee of a board that has no female members
 - Will, depending on the circumstances, possibly extend that negative recommendation to all members of the nominating committee

Pressure from Proxy Advisory Firms and Institutional Investors (cont'd)

- BlackRock and State Street also have policies for voting against nominating committee members based on board composition
- New York City Comptroller Scott M. Stringer announced the “Boardroom Accountability Project 3.0” in 2019
 - Asked the boards of directors of 56 S&P 500 companies to adopt a diversity search policy requiring that the initial lists of candidates from which new director nominees and chief executive officers are chosen include qualified female and racially/ethnically diverse candidates

Diversity Disclosure C&DIs

- In February 2019, SEC issued two C&DIs addressing disclosure of a director's self-identified diversity characteristics
 - If considered and the individual has consented to the company's disclosure, the staff expects the company's proxy statement will include identification of the characteristics and how they were considered
 - The Staff also expects the proxy statement's description of company diversity policies
 - to discuss how the company considers the self-identified diversity attributes of nominees,
 - as well as any other qualifications its diversity policy takes into account
- If including self-identified diversity characteristics, a company may want to develop questions for director and officer questionnaires to that end

Board Diversity Proposals

- Proponents filed 35 proposals addressing board diversity, eight of which were voted upon
- Half of these proposals were submitted by the NYC Comptroller's Office as part of its Boardroom Accountability 3.0 campaign
- An absence of a diversity policy is beginning to be heavily scrutinized by investors
- Submission, and passage, of proposals focused on diversity, equity and inclusion will likely be accelerated in the 2021 proxy season
 - NYC Comptroller announced a letter writing campaign focused on 67 S&P 100 companies that issued supportive statements on racial equality, asking that they publicly disclose the composition of their workforce by race, ethnicity and gender

ISS Proposed Policy Changes for 2021

- Director Elections; Racial/Ethnic Board Diversity:
 - For companies in the Russell 3000, or S&P 1500 index, highlight boards with no apparent racial and/or ethnic diversity
 - As of September 21, 2020, 1260 of the Russell 3000, 492 of the S&P 1500 and 71 of the S&P 500 do not have ethnic minority and/or racial board representation
- Director Elections; Material E&S Risk Oversight Failures
 - Under extraordinary circumstances, vote against or withhold from directors individually, committee members, or entire board, due to material failures of risk oversight
 - Examples of failures of risk oversight has been updated to include “demonstrably poor risk oversight of environmental and social issues, including climate change”

ISS Proposed Policy Changes for 2021 (cont'd)

- Exclusive Forum Proposals
 - Generally vote for federal forum selection provisions in the charter or bylaws that specify “the district courts of the United States” as the exclusive forum for federal securities law matters
 - Vote against provisions that restrict the forum to a particular federal district court. Unilateral adoption (without a shareholder vote) of such a provision will generally be considered a one-time failure under the Unilateral Bylaw/Charter Amendments policy

2020 Proxy Season Shareholder Proposals

Governance-Related Proposals

- Number of governance-related proposals submitted and voted on during the 2020 proxy season trended upwards slightly in 2020
 - However, only 27 received majority support (compared to 42 in 2019)
 - Two-thirds of the governance proposals voted upon were sponsored or co-sponsored by five individuals
 - 11.7% of governance related proposals did not disclose a proponent (up significantly from 1.3% in 2019)

Types of Governance-Related Proposals

- Independent Board Chair
 - Previously only one proposal had passed in the past five years (Rite Aid Corporation in 2018)
 - Two proposals passed this year (Baxter International and The Boeing Company)
- Eliminate/Reduce Supermajority/Adopt Simple Majority Requirements
 - Number of proposals dropped from 20 proposals in 2019 to 12 proposals in 2020
 - 11 of the 12 proposals that reached a vote received majority support (10 of which passed)
- Reduction of Thresholds for Shareholders to Call a Special Meeting
 - Significant surge in the number of proposals (40 proposals went to a vote);
 - Six proposals received majority support
 - 33 of the 40 proposals that went a vote were proposed by John Chevedden or members of his group

Types of Governance-Related Proposals (cont'd)

- Shareholder Right to Act by Written Consent
 - 56 proposals went to a vote this year (compared to 34 in 2019)
 - Two proposals received majority support
- Shareholder Approval of Bylaw Amendments
 - A new shareholder proposal category requiring non-binding shareholder approval of any board-adopted bylaw amendments was introduced by certain investors. 16 companies voted on the proposal, with an average support of 3.7%

Lobbying/Political Contributions

- Number of proposals seeking reporting on lobbying and political contributions decreased to 76 (compared to 101 in 2019)
 - 55 went to a vote with five proposals passing
- The number of proposals voted upon related to political contributions decreased to 25 (from 38), but the number of proposals voted upon related to lobbying payments and policies increased to 30 (from 26)

Change in No-Action Requests

- This is the second proxy season where the SEC will no longer automatically provide a written response to all no-action requests submitted pursuant to Rule 14a-8
 - Will issue a written response “where it believes doing so would provide value, such as more broadly applicable guidance about complying with Rule 14a-8”
 - May respond orally to some requests
 - A decision to “decline to state a view” should not be interpreted as indicating that the company must include the proposal according to the SEC
 - Other steps for additional comfort before excluding such a proposal are possible, such as going to court
 - Companies should consider how this change interacts with the proxy advisory firms’ updated proxy voting policies

Additional Questions and Discussion

Thank you

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Appendix

Business Acquisitions and Dispositions Disclosures

Financial Disclosures in M&A Transactions

- The amendments:
 - Align significance thresholds used in dispositions with the minimum significance thresholds used for acquisitions
 - Revise the tests commonly utilized by registrants to test the significance of a business acquisition or disposition
 - Reduce maximum number of years of financial statements required for significant business acquisitions to two years
 - Change the types of pro forma adjustments a registrant is permitted to make
- These amendments take effect January 1, 2021, but registrants are permitted to voluntarily comply with them prior to such date

Alignment of Significance Levels Related to Dispositions

- Current Rules: Require registrants to file pro forma financial statements to reflect significant business dispositions, using 10% as the significance threshold
- Amendments: Raise the significance threshold for dispositions from 10% to 20%

Amended Significance Tests

Test	Current Test	Amended Test
Investment	$\frac{\text{Purchase Price}^*}{\text{Registrant's Total Assets}}$ <p><i>*Registrant's investments in and advances to the tested subsidiary, which is generally the purchase price.</i></p>	$\frac{\text{Purchase Price}^*}{\text{Registrant's Aggregate Worldwide Market Value}^{**}}$ <p><i>**If such metric is available, otherwise use current test</i></p>
Income	$\frac{\text{Acquired Business's Pre – Tax Income}}{\text{Registrant's Pre – Tax Income}}$	$\frac{\text{Acquired Business's Total Revenue}}{\text{Registrant's Total Revenue}}$ <p><i>The lower result obtained from applying the current test (which remains in effect) and the amended test determines the periods of financial statements that must be presented pursuant to Rule 3-05.</i></p>
Asset	$\frac{\text{Acquired Business's Total Assets}}{\text{Registrant's Total Assets}}$	Largely Unchanged

Pro Forma Financial Information

Highest Significance Level	Current Rules	Amended Rules
Less than 20%	<ul style="list-style-type: none"> No historical or pro forma financial statements are required 	<ul style="list-style-type: none"> Unchanged
Between 20% - 40%	<ul style="list-style-type: none"> Audited financial statements for the most recent fiscal year Unaudited interim financial statements for the most recent interim period AND any corresponding interim period in the prior year Pro forma balance sheet as of the date of the registrant's most recent interim balance sheet Pro forma annual and interim income statements for the most recent fiscal year and interim period 	<ul style="list-style-type: none"> Unchanged Only the unaudited interim financial statements for the most recent interim period Unchanged Unchanged

Pro Forma Financial Information (cont'd)

Highest Significance Level	Current Rules	Amended Rules
Between 40%-50%	<ul style="list-style-type: none"> Audited financial statements for the two most recent fiscal years Unaudited financial statements for the most recent interim period AND the corresponding interim period in prior year Pro forma balance sheet as of the date of the registrant's most recent interim balance sheet Pro forma annual and interim income statements for the most recent fiscal year and interim period 	<ul style="list-style-type: none"> Unchanged Unchanged Unchanged Unchanged

Pro Forma Financial Information (cont'd)

Highest Significance Level	Current Rules	Amended Rules
Over 50%	<ul style="list-style-type: none"> Audited financial statements for the three most recent fiscal years Unaudited financial statements for the most recent interim period and corresponding interim period in prior year Pro forma balance sheet as of the date of the registrant's most recent interim balance sheet Pro forma annual and interim income statements for the most recent fiscal year and interim period 	<ul style="list-style-type: none"> Audited financial statements for the two most recent fiscal years Unchanged Unchanged Unchanged

Pro Forma Financial Information

- Current Rules: Current rules permit limited adjustments to the pro forma financial information
 - Income Statement Adjustments must be (i) directly attributable to the transaction, (ii) expected to have a continuing impact on the registrant, and (iii) factually supportable
 - Balance Sheet Adjustments must be (i) factually supportable and (ii) directly attributable to the transaction
- Amendments: Completely replace the existing pro forma adjustment criteria with simplified requirements that are broken down into three categories:
 - Transaction Accounting Adjustments
 - Autonomous Entity Adjustments
 - Management's Adjustments