Vinson&Elkins

Navigating the 2022 Annual Meeting and Reporting Season

January 12, 2022

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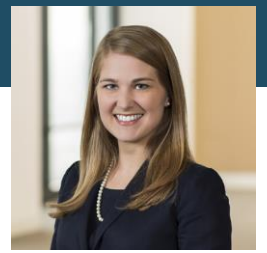

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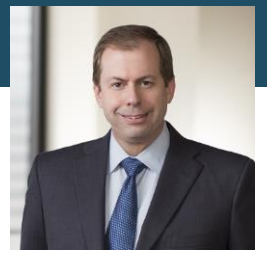

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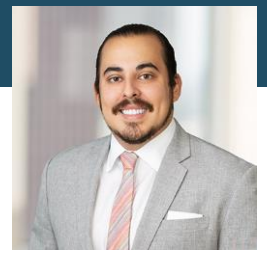

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Disclaimer

- *Nothing in this presentation is to be considered as the rendering of legal advice for specific transactions. This presentation is intended for educational and informational purposes only.*
- *These materials and related commentary represent the views of and summaries by the authors and speakers and are not to be construed as opinions or views of Vinson & Elkins L.L.P.*

SEC Disclosure Updates

9:05 am – 9:55 am

Reminders from 2021

Summary: Previous Changes Implemented

- **Item 101(a) of Reg. S-K (General Development of Business)**
  - In 2020, the Securities and Exchange Commission allowed companies to limit disclosure regarding general developments of business to a discussion of material information, eliminating the five-year requirement. After initial filings, companies may focus on material developments that update previous disclosure rather than repeating the previous disclosure.
- **Item 101(c) of Reg. S-K (Narrative Description of Business)**
  - In 2020, the SEC (1) required companies to describe their human capital resources to the extent material to understanding their business and (2) expanded disclosure of the material effects of regulatory compliance to cover all material government regulations, not just environmental laws and regulations.
- **Item 103 of Reg. S-K (Legal Proceedings)**
  - In 2020, the SEC permitted legal proceedings information to be provided by hyperlink or cross-reference and increased the dollar threshold for certain governmental environmental proceedings from $100,000 to $300,000, while also providing companies the flexibility to select a different, reasonable threshold not exceeding the lesser of $1 million or one percent of the current assets of the company.
- **Item 105 of Reg. S-K (Risk Factors)**
  - In 2020, the SEC permitted companies to focus on material risk factors, required companies to include a summary of risk factor disclosure of no more than two pages if their risk factor section exceeds 15 pages, and required companies to organize risk factor disclosure by using appropriate headings and including a general risk factors summary at the end.

Summary: Previous Changes Implemented – Cont'd

- **COVID-19**
  - In 2020, the SEC issued guidance encouraging companies to provide disclosure regarding the effect of COVID-19 on the business's operations, liquidity, and capital resources. Companies must also disclose any other material effects of COVID-19 on their business, such as employee work arrangements, business continuity plans, and demand for products and services.
- **Management's Discussion and Analysis Key Performance Indicators and Metrics**
  - In 2020, the SEC released guidance asking companies to disclose any material information that may be necessary to understand the metrics disclosed in MD&A that are used by the companies' management and are necessary for investors to understand the companies' performance.
- **Acquisition Financial Statements**
  - In 2020, the SEC adopted amendments to the financial disclosure requirements in Regulation S-X for acquisitions and dispositions of businesses, primarily in Rule 3-05 and Article 11. The amendments reduce the complexity and costs associated with the preparation of historical financial statements and pro forma financial information.

Summary: Previous Changes Implemented – Cont'd

- **Guarantor Exhibit**
  - In 2020, the SEC adopted amendments to Regulation S-X that require companies with registered debt securities to include an Exhibit 22, which requires a list of the company's subsidiaries and affiliates.
- **Electronic Signatures**
  - In 2020, the SEC amended its rules to permit the use of electronic signatures on many documents filed with EDGAR.
- **NYSE Related Party Transaction Rule**
  - In 2021, the SEC approved the NYSE proposal that requires reasonable prior review and oversight of related party transactions.
- **10-K Cover Page**
  - In 2020, the SEC adopted amendments to add a check box to the cover page of annual reports (including Form 10-K) to indicate whether an internal control over financial reporting auditor attestation is included in the filing.
- **Accelerated Filer/Large Accelerated Filer Definitions**
  - In 2019, the SEC altered thresholds for smaller reporting companies to become an accelerated filer and increased exit thresholds.

Redacting Information from Exhibits

- The SEC updated the standard for redacting confidential information in exhibit filings pursuant to Regulation S-K Items 601(b)(2) and 601(b)(10) to align with a 2019 U.S. Supreme Court interpretation of the Freedom of Information Act.
- The final rule amendments, effective as of March 15, 2021, as further amended November 2, 2020, removed the “competitive harm” standard and permit information to be redacted if:
  - it is not material; and
  - it is the type that the company both customarily and actually treats as private or confidential.
- When filing an exhibit with redactions, a company must:
  - include a prominent statement on the first page of the filed version of the redacted exhibit that certain information has been excluded from the exhibit because it both (1) is not material and (2) is the type that the registrant treats as private or confidential;
  - indicate with brackets (such as [***]) in the filed exhibit where the information has been redacted; and
  - include, in the exhibit index of the filing (including an index that incorporates the redacted exhibit by reference), a notation indicating that portions of the exhibit have been omitted.

Acquisition Financial Statements (Rule 3-05 and Article 11 Financials)

- Acquisition financials and pro formas are required in Item 2.01 8-Ks, proxy statements, and registration statements when the acquisition of a business has occurred or is probable. Additionally:
  - Rule 3-05 of Regulation S-X requires audited annual and unaudited interim pre-acquisition financial statements for the target if the business is "significant."
  - When a registrant is required to file Rule 3-05 financials, it must also provide unaudited pro formas prepared in accordance with Article 11 of Regulation S-X.
- Rules adopted in May 2020 made meaningful updates, including:
  - revisions to the Income and Investment Tests to determine significance;
  - revisions to the treatment of multiple acquisitions of individually insignificant businesses;
  - requiring the financial statements of an acquired business to cover no more than the two most recent fiscal years; and
  - conforming the significance threshold and tests for a disposed business to those used for an acquired business.

The Division of Corporation Finance Reporting Manual has not yet been updated to reflect the rule changes. If you plan to dispose of or acquire a business or are a serial acquiror, work in advance with your auditors and legal counsel to determine the historical and pro forma financial statements that will be required in your closing Item 2.01 8-K (if required) or any proxy statements or registration statements.

Use of Electronic Signatures

- On November 17, 2020, the SEC approved amendments to Item 302 of Reg. S-T to allow signatories to use electronic filings to provide e-signatures. Before amendment, Rule 302(b) required hard copies of manual or “wet” signatures to be retained by companies for five years for every electronic filing.
- Under the new rules, the signing process for the electronic signature must:
  - require the signatory to present a physical, logical or digital credential that authenticates the signatory’s individual identity;
  - reasonably provide for non-repudiation of the signature;
  - provide that the signature be attached, affixed or otherwise logically associated with the signature page or document being signed; and
  - include a timestamp to record the date and time of the signature.
- In addition, before a signatory initially uses an e-signature to sign the filing, the signatory must manually sign an electronic signature attestation document, which should be retained by the company in hard copy for at least seven years.
- Electronic filers must also retain for five years electronic copies of signature authentication documents, and such filers must, upon request, furnish to the SEC documents retained pursuant to Rule 302(b).

Reminders from 2021

NYSE Related Party Transactions

- On April 2, 2021, the NYSE amended Section 314.00 of its Listed Company Manual to require each NYSE-listed company's audit committee or other independent body of the board of directors to "conduct a reasonable **prior** review and oversight" of all related party transactions for potential conflicts of interest and to prohibit any transaction that it determined to be inconsistent with the interests of the company and its shareholders.
  - The amendment also defined “related party transactions” as any transaction required to be disclosed pursuant to Item 404 of Regulation S-K, but **without** applying the $120,000 transaction value threshold of Item 404.
  - The rule's exclusion of the $120,000 threshold was inconsistent with the historical practice of many listed companies.
- On August 19, 2021, the NYSE filed an immediately effective rule change with the SEC to conform the related party transactions subject to the NYSE rule to the applicable disclosure requirements of Item 404.
- The new amendment does not change the requirement that the audit committee or another independent body "conduct a reasonable **prior** review and oversight" of all related party transactions.
  - Note that the SEC still allows policies that permit “ratification” of related party transactions.

Accelerated Filer/Large Accelerated Filer Definitions

- Effective April 27, 2020, the SEC revised the definitions of “accelerated filer” and “large accelerated filer” in Rule 12b-2.
  - The testing date for filer status is the last business day of the prior fiscal second quarter.
- Registrants that are eligible to be treated as a smaller reporting company (“SRC”) and that had annual revenues of less than $100 million in the most recent fiscal year are no longer considered “accelerated filers” or “large accelerated filers.”
  - However, an SRC with (1) a public float between $75 million and $250 million, and (2) $100 million or more in annual revenues would still be an “accelerated filer” as well as an SRC.
- Additionally, it increased the thresholds to **exit** accelerated filer status from $50 million to $60 million and increase the threshold to **exit** large accelerated filer status from $500 million to $560 million.
- The determination of a company’s filing status is crucial for determining the deadline for filing periodic reports for the fiscal year, among other requirements.

Accelerated Filer/Large Accelerated Filer Definitions – Cont'd

Relationships between Smaller Reporting Companies and Non-Accelerated, Accelerated, and Large Accelerated Filers under the Amendments		
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

Required Changes in 2022

Summary: Required Changes in 2022

- **Item 301 of Reg. S-K (Selected Financial Data)**
  - Eliminated.
- **Item 302 of Reg. S-K (Supplementary Financial Information)**
  - Eliminated.
- **Item 303 of Reg. S-K (Management's Discussion and Analysis of Financial Condition and Results of Operations)**
  - Significant restructuring, streamlining and other changes.
- **Nasdaq Board Diversity Disclosure** (See Slide [XX-])
  - Nasdaq-listed companies must disclose board-level diversity statistics annually using a matrix template provided under Nasdaq Rule 5606 by the later of August 8, 2022, or the filing date of the company's proxy statement for its 2022 annual meeting.
- **NYSE "Votes Cast" Standard**
  - A company must calculate "votes cast" on a proposal subject to Section 312.07 of the NYSE Listed Company Manual in accordance with its own governing documents and any applicable state law, which may alter the treatment of "abstentions."

Required Changes in 2022

Amendments to Management's Discussion and Analysis of Financial Condition and Results of Operations

- Changes to MD&A (Item 303 of Reg. S-K) are effective with the upcoming 2022 10-K filing.
- MD&A will require "principles-based" disclosure that was previously encouraged in the SEC's interpretive releases.
- Added new Item 303(a) (*Objective*) to require companies to state the principal objectives of MD&A.
  - For example, the MD&A narrative should permit investors to see a registrant "through the eyes of management" and provide a narrative discussion of the "underlying reasons" for material changes from period to period.
- Amended Item 303(a)(1) and (2) (*Liquidity and Capital Resources*) to enhance and clarify disclosure requirements for liquidity and capital resources. For example, registrants will need to provide:
  - material cash requirements, including commitments for capital expenditures, as of the latest fiscal period;
  - the anticipated source of funds needed to satisfy such cash requirements; and
  - the general purpose of such requirements.

Amendments to Management's Discussion and Analysis of Financial Condition and Results of Operations – Cont'd

- Amended Item 303(a)(3) *(Results of Operations*) to clarify and streamline disclosure requirements for results of operations.
  - For example, registrants will now need to disclose known events that are reasonably likely to cause a material change in the relationship between costs and revenues, such as known or reasonably likely future increases in costs of labor or materials or price increases or inventory adjustments.
- Added new Item 303(b)(3) (*Critical accounting estimates*) to require registrants to provide disclosure of critical accounting estimates in MD&A.
- Replaced Item 303(a)(4) (*Off-balance sheet arrangements*) with an instruction to discuss such obligations in the broader context of MD&A.
- Eliminated Item 303(a)(5) (*Tabular disclosure of contractual obligations*) in light of the amended disclosure requirements for liquidity and capital resources.
- Amended Item 303(b) (*Interim Periods*) to state that registrants will be permitted to compare their most recently completed quarter to either (1) the corresponding quarter of the prior year or (2) to the immediately preceding quarter.

NYSE "Votes Cast" Standard

- In November 2021, the SEC approved amendments to Section 312.07 of the NYSE Listed Company Manual to provide that a company must calculate "votes cast" on a proposal subject to that section in accordance with its own governing documents and any applicable state law.
  - Previously, the NYSE required abstentions to be counted as votes "against" the proposal on certain NYSE-required votes.
  - This rule change results in the NYSE and Nasdaq having similar treatment of abstentions.
  - Under Delaware law, abstentions are not considered "votes cast," but companies may elect to alter the voting standards in their governing documents.
- The amendment affects shareholder votes required for:
  - equity compensation plans
  - stock issuances for related party transactions
  - stock issuances of 20% or more
  - changes of control
- NYSE issuers should carefully review their disclosure of voting standards in upcoming proxy statements.

New Rules and Expected Rulemaking

Summary: New Rules and Expected Rulemaking

- **Filing Fee Modernization**
  - In October 2021, the SEC adopted amendments to modernize filing fee disclosures and payment methods, which will generally be effective January 31, 2022. The amendments revise most fee-bearing forms, schedules, and related rules to require companies to include all required information for filing fee calculations in a structured format. They also add new options for ACH and debit and credit card payment of filing fees.
- **10b5-1 Plan Rules and Disclosures**
  - In December 2021, the SEC proposed several amendments and new disclosure requirements to plans adopted under Rule 10b5-1 of the Exchange Act, which provides an affirmative defense to insider trading for parties that frequently have access to nonpublic information (such as corporate officers, directors, and issuers). The amendments require issuers to disclose in their annual reports whether (and if not, why not) they have adopted insider trading policies and procedures (and if so, to describe such policies and procedures), and in their quarterly reports the adoption and termination of Rule 10b5-1 trading arrangements and other trading arrangements by directors, officers, and issuers, and the terms of such arrangements. The SEC has provided a shortened comment period of 45 days after publication of the proposal in the Federal Register (expected soon).
- **Share Repurchase Reporting Obligations**
  - In December 2021, the SEC proposed enhanced disclosure requirements for issuer share repurchasers, including a new Form SR due the next business day after a repurchase is executed. The proposed rules would also require additional periodic disclosure of the issuer's repurchase program and share repurchases. The SEC has provided a shortened comment period of 45 days after publication of the proposal in the Federal Register (expected soon).

Summary: New Rules and Expected Rulemaking – Cont'd

- **Cybersecurity** (See Slides [32 and XX])
  - The SEC announced in June 2021 that it would focus on cybersecurity disclosures made by public companies as part of its regulatory agenda and continued focus on cybersecurity and data privacy. In 2021 the SEC Enforcement Division's Cyber Unit brought a series of enforcement actions against companies for inadequate cybersecurity controls and disclosures. A proposed cybersecurity risk disclosure rule was expected, but not issued, in October 2021. It is possible the SEC will propose a rule in 2022.
- **Rule 144**
  - In December 2020, the SEC proposed amendments to Rule 144 to revise the holding period determination for certain "market-adjustable securities." Principally, the amendments eliminate tacking for these "market-adjustable securities." The amendments also make changes to improve investor access to Form 144 filings and to streamline the filing process. A final rule has not yet been adopted, and the comment period may be reopened in 2022.
- **Clawback of Compensation** (See Slide [XX])
  - The Dodd-Frank Act requires the SEC to adopt rules requiring companies to maintain clawback policies. In 2015, the SEC proposed a clawback rule, but the rule was never adopted. In October 2021, the SEC reopened the comment period for the previously-proposed rule through November 22, 2021. The SEC is expected to announce the final rule in spring 2022.

Summary: New Rules and Expected Rulemaking – Cont'd

- **Proxy Advisor Rules** (See Slide [XX])
  - The SEC announced in June 2021 that it was re-examining the rules and guidance regarding proxy voting advice adopted in 2020 and would not enforce those rules pending the outcome of its review. In November 2021, the SEC proposed amendments that would rescind significant portions of the 2020 proxy voting advice rules. The comment period ended December 27, 2021.
- **Human Capital Resources** (See Slide [XX])
  - In June 2021, Chair Gensler suggested that new human capital management requirements could include metrics such as workforce turnover, skills and development training, compensation, benefits, and workforce demographics including diversity, health and safety. In August 2021, Chair Gensler confirmed that he had asked the SEC staff to propose recommendations for the consideration of new human capital management disclosures in line with those he had suggested.
- **Climate Change Disclosure** (See Slide [XX])
  - Chair Gensler confirmed in July 2021 that the SEC was expected to propose mandatory climate change disclosure regulations by the end of 2021. The proposed regulations have not been released, but they are expected in 2022.
  - In September 2021, the SEC's Division of Corporation Finance issued a sample comment letter regarding climate change disclosures. The comments may anticipate the content of proposed rules.

10b5-1 Plan Rules and Related Disclosures

- On December 15, 2021, the SEC proposed amendments to Rule 10b5-1 to enhance disclosure requirements and investor protections against insider trading.
- The proposed amendments would add new conditions to the availability of the Rule 10b5-1(c)(1) affirmative defense to insider trading liability, including:
  - 10b5-1 trading arrangements entered into by *corporate officers or directors* must include a 120-day cooling-off period before any trading can commence under the trading arrangement after its adoption, including adoption of a modified trading arrangement.
  - 10b5-1 trading arrangements entered into by *issuers* must include a 30-day cooling-off period before any trading can commence under the trading arrangement after its adoption, including adoption of a modified trading arrangement.
  - Officers and directors must certify that they are not aware of material nonpublic information about the issuer or the security when adopting a new or modified trading arrangement.
  - The affirmative defense under Rule 10b5-1(c)(1) will not apply to multiple overlapping Rule 10b5-1 trading arrangements for open market trades in the same class of securities.
  - 10b5-1 trading arrangements to execute a single trade are limited to one plan per 12-month period.
  - 10b5-1 trading arrangements must be entered into and operated in good faith.

10b5-1 Plan Rules and Related Disclosures – Cont'd

- Proposed new issuer disclosures:
  - An issuer must disclose in its annual reports whether (and if not, why not) the issuer has adopted insider trading policies and procedures. Additionally, issuers would be required to disclose their insider trading policies and procedures, if they have adopted such policies and procedures.
  - An issuer must disclose in its annual reports its option grant policies and practices and provide tabular disclosure showing grants made within 14 days of the release of material nonpublic information and the market price of the underlying securities on the trading day before and after the release of such information.
  - An issuer must disclose in its quarterly reports the adoption and termination of Rule 10b5-1 trading arrangements and other trading arrangements by directors, officers, and issuers, and the terms of such trading arrangements.
- Proposed amendments to Section 16 reports:
  - Section 16 officers and directors must disclose by checking a box on Forms 4 and 5 whether a reported transaction was made pursuant to a 10b5-1(c) trading arrangement.
  - Section 16 officers and directors must disclose promptly bona fide gifts of securities on Form 4.

Boards should include review of Insider Trading Policies on upcoming meeting agenda in advance of a potential disclosure obligation.

Rule 144

- In December 2020, the SEC proposed amendments to Rule 144.
- Principally, the proposed amendments would eliminate tacking for certain “market-adjustable securities.”
  - Defined as convertible or exchangeable securities that contain “terms, such as conversion rate or price adjustments, that offset, in whole or in part, declines in the market value of the underlying securities occurring prior to conversion or exchange, other than terms that adjust for stock splits, dividends or other issuer-initiated changes in its capitalization.”
  - This is not the typical convertible preferred where the conversion price or rate is generally fixed at the time of sale, subject to customary anti-dilution adjustments for stock splits or dividends.
- The proposed amendments also:
  - **mandate the electronic filing of all Form 144 notices** (over 99% of Form 144s are filed on paper)
  - eliminate the Form 144 filing requirement for securities of non-reporting companies
  - change the filing deadline for Form 144 to coincide with the filing deadline for Form 4 (two business days following the sale date)
  - make minor changes to Form 144, including eliminating certain personally identifiable information

Filing Fee Modernization

- The SEC is amending most of its fee-bearing forms and schedules to require filers to present the information required for filing fee calculation in a separate exhibit structured in Inline XBRL.
- The amendments also modernize filing fee payment methods by adding options for Automated Clearing House (ACH) payments and debit and credit card payments and by eliminating infrequently used paper check and money order payment options.
- Effective Dates:
  - Amendments generally: January 31, 2022
  - Amendments adding or eliminating payment options: May 31, 2022
  - Amendments requiring Inline XBRL are phased-in depending on filer status:
    - Large Accelerated Filers: July 31, 2024
    - Accelerated Filers: July 31, 2025

[Clawback Rule Proposal Reopening

- Clawback policies authorize companies to recoup compensation from employees upon the occurrence of a triggering event.
- Range of Clawback Policies:
  - Policies can provide for a range of triggering events, including (1) errors in financial performance measures or reporting, (2) the covered individual engaging in fraud or misconduct, or (3) violations of company policy.
  - Policies can cover several forms of compensation but are usually limited to incentive compensation.
  - The group of individuals covered generally includes one or more of the following: (1) all named executive officers in the proxy statement, (2) all Section 16 officers, (3) all directors, (4) selected senior managers or employee groups, and (5) all employees and directors.
  - The amount recouped depends on the trigger, and the amount clawed back can range from:
    - in the case of financial restatement or recalculation of performance metrics, the difference between a payment actually made to the individual and the payment that would have been made based on restated financial results or recalculated or adjusted performance metrics
    - in the case of fraud or misconduct, an additional amount paid, granted or vested relating to fraud or misconduct and any equity award that vested or was exercised after the act of fraud or misconduct
    - in the case of fraud or misconduct, all compensation paid under certain plans or programs
    - in the case of violations of company policy, all compensation paid under certain plans or programs]

[Clawback Rule Proposal Reopening – Cont'd

- Developments Regarding Clawback Policies:
  - Over the last decade, institutional shareholders and governance activists have increasingly focused on clawback provisions as a significant corporate governance and executive compensation issue.
  - 92% of the S&P 500 disclosed clawback policies by 2016; however, these policies range widely in strength and approach.
  - The Dodd-Frank Act requires the SEC to adopt rules requiring companies to maintain clawback policies.
    - In 2015, the SEC proposed a clawback rule, but the rule was never adopted.
    - On October 14, 2021, the SEC reopened the comment period through November 22, 2021.
    - The SEC is currently expected to announce the final rule in spring 2022.

Share Repurchase Reporting Obligations

- Currently, issuers are required to make quarterly disclosure of open market or private repurchases of equity securities by the company or an affiliated purchaser.
- On December 15, 2021, the SEC proposed enhanced disclosure for issuer share repurchases, including a new Form SR due on the ***next business day*** after a repurchase is executed. Form SR is proposed to include:
  - the repurchase date
  - the class of securities purchased
  - the total number of shares purchased, including all company repurchases, whether or not made pursuant to publicly announced plans or programs
  - the average price paid per share
  - the aggregate total number of shares purchased on the open market
  - the aggregate total number of shares purchased in reliance on the safe harbor in Exchange Act Rule 10b-18
  - the aggregate total number of shares purchased pursuant to a Rule 10b5-1 plan

Share Repurchase Reporting Obligations – Cont'd

- The proposed rules would also require additional periodic disclosure regarding the structure of the issuer's repurchase program and its share repurchases:
  - the objective or rationale for the company's program and the process or criteria it uses to determine the amount of repurchases
  - any policies and procedures relating to purchases and sales of the company's securities by its directors and officers during a repurchase program, including any restriction on trading
  - whether the company made its repurchases pursuant to a Rule 10b5-1 plan, and if so, the date that the plan was adopted or terminated
  - whether the company made its repurchases in reliance on the nonexclusive safe harbor under Rule 10b-18
- A new checkbox would be checked if any of the company's directors or officers purchased or sold shares of the same class of a company's stock that is subject to the company's repurchase program within 10 business days before or after announcement of the program.

Comment Letter Trends and Enforcement

Cybersecurity Risks

- In 2018, the SEC adopted guidance on cybersecurity disclosure. The guidance consolidated and bolstered the SEC's prior guidance on disclosure relating to cybersecurity and expanded how companies should disclose material information about cybersecurity risks and incidents in compliance with Regulation S-K.
- In 2021, the SEC Enforcement Division's Cyber Unit brought a series of enforcement actions against companies for inadequate cybersecurity controls and disclosures.
- ***Pearson***
  - In August 2021, the SEC settled charges against Pearson plc for misleading investors about a 2018 cyber intrusion involving the theft of millions of student records. The SEC found that Pearson had insufficient controls and procedures and made misleading statements and omissions about the breach when it:
    - referred to a data privacy incident as a hypothetical risk in its 2019 semi-annual report despite the 2018 cyber intrusion having already occurred;
    - made a media statement in 2019 that the breach "may" include dates of birth and email addresses when it in fact knew that such records were stolen;
    - representing in the statement that it had "strict protections" in place when it had actually failed to patch the vulnerability for six months after it was notified; and
    - failed to disclose in the statement the fact that millions of rows of student data, usernames, and hashed passwords were stolen.

Cybersecurity Risks – Cont'd

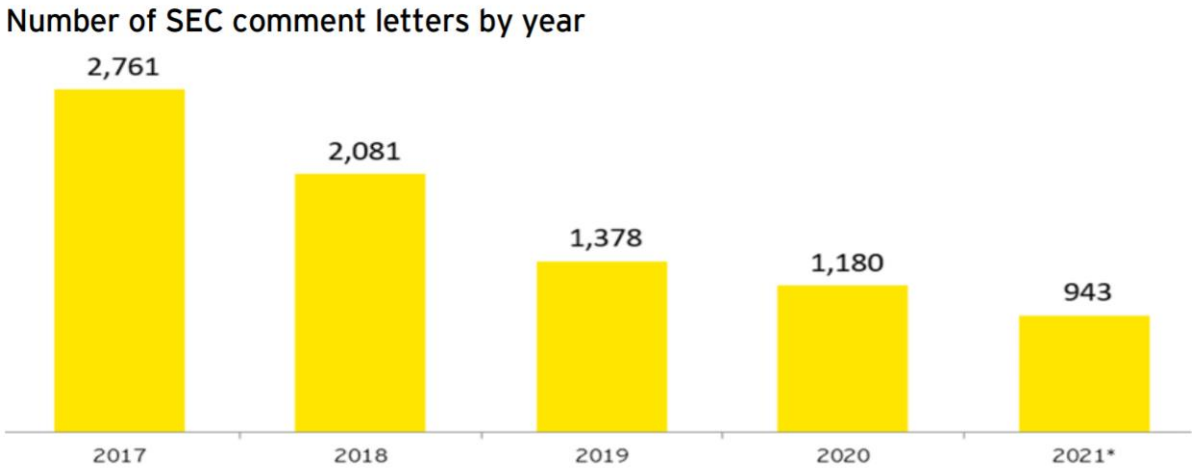
- ***First American***
  - In June 2021, the SEC settled charges against First American Financial Corporation for its disclosure controls and procedure violations after a vulnerability within First American lead to the exposure of 800 million title and escrow document images.
  - The SEC alleged that First American's information security personnel discovered the issue but failed to remediate and escalate it for months. This failure to escalate information about the incident to senior management and others responsible for company disclosures caused First American to file an inaccurate Form 8-K about the incident. The SEC also alleged First American lacked cybersecurity disclosure controls and procedures.
- ***Broker-Dealers and Investment Advisors***
  - In August 2021, the SEC charged eight broker-dealers and investment advisers for multiple cybersecurity failures that led to the exposure of protected personal information of thousands of their customers and clients. The SEC found that the companies failed to:
    - protect the customer/client accounts in a manner consistent with their policies;
    - adopt and implement policies and procedures for reviewing customer communications, which lead to making misleading statements to their customers; or
    - adopt and implement written policies and procedures or company-wide security measures until years after discovering breaches.

Cybersecurity Risks – Cont'd

- ***SolarWinds Inquiry***
  - Beginning in mid-June 2021, the SEC's Division of Enforcement commenced a sweep of hundreds of public companies and other SEC registrants who they believed were potentially affected by the SolarWinds compromise.
  - Although responding to this inquiry was voluntary, the SEC included requests concerning:
    - the effect of the SolarWinds compromise on the company;
    - the company's response to the SolarWinds compromise; and
    - a broad request asking recipients to identify other compromises involving unauthorized access to the company's servers by an external actor lasting longer than one day.
  - The SEC's sweep gives the SEC the opportunity to gather information on vulnerability detection, remediation, and disclosure in the cybersecurity space.

Comment Letter Trends Generally

- The number of SEC staff comment letters has been declining.
  - The volume of SEC comment letters on periodic reports between Q2 of 2020 and Q2 of 2021 declined by approximately 20%. This is a continuation of a downward trend that has been occurring over recent years.
  - The SEC has been focusing on larger companies and reviewing their filings more frequently.



(*Source: EY SEC Reporting Update as of September 23, 2021, based on data from Audit Analytics.)*

  - The two most frequent comment areas have been **non-GAAP financial measures** followed by **MD&A**. We additionally expect the SEC to continue to issue comments regarding **COVID-19** and increasingly issue comments regarding **climate-related disclosures** (See Slide [XX-]).

Non-GAAP Financial Measures – Regulation G and Item 10(e) of Regulation S-K

- A “non-GAAP financial measure” is a numerical measure of historical or future financial performance, financial position, or cash flows that includes or excludes something that GAAP requires to be excluded or included. Examples include:
  - EBITDA, EBIT and variants thereto
  - Free cash flow
  - Adjusted EPS
- Regulation G and Item 10(e) of Regulation S-K were adopted to address concerns associated with companies’ disclosure of non-GAAP financial measures, including:
  - Concern that non-GAAP financial measures were obscuring GAAP results and could therefore result in materially misleading information being released into the marketplace
  - Concern that investor confusion was widespread due to the fact that varying calculation methods existed with respect to non-GAAP financial measures

Think “non-GAAP” when you hear these words: “adjusted,” “excluding” or “including”

Non-GAAP Financial Measures – Presentation Requirements

IN ALL COMPANY COMMUNICATIONS

(including press releases, website, earnings calls, IR presentations, etc.)

- The non-GAAP measure cannot be misleading
- The most directly comparable GAAP measure must be disclosed
- A reconciliation table of the GAAP measure must be provided for the non-GAAP measure

IN SEC FILINGS + EARNINGS RELEASES

- The non-GAAP measure cannot be misleading
- The most directly-comparable GAAP measure must be disclosed
- A reconciliation table of the GAAP measure must be provided for the non-GAAP measure
- The GAAP measure must be presented with “equal or greater prominence” than the non-GAAP measure
- Management must disclose why it believes the non-GAAP measure is useful to investors
- Management must disclose the additional purposes, if any, for which it uses the non-GAAP measure

Non-GAAP Financial Measures – Potentially Misleading Practices

- Non-GAAP measures have long been in the top 10 areas of comments made by the SEC staff.
- Practices that the SEC may regard as misleading include:
  - Presenting a performance measure that excludes normal, recurring cash operating expenses necessary to operate the Company's business
  - Adjusting measures inconsistently from period-to-period without identifying and explaining the difference in adjustments
  - Adjusting measures for non-recurring charges without adjusting for non-recurring gains
  - Presenting performance measures that accelerate revenue recognition relative to GAAP requirements

Non-GAAP Financial Measures – "Equal or Greater Prominence"

- Practices that violate the "equal or greater prominence" requirement include:
  - Omitting the comparable GAAP measure from an earnings release headline or caption that includes a non-GAAP measure
  - Presenting a non-GAAP measure using a style of presentation (*e.g.*, bold or a larger font) that emphasizes the non-GAAP measure over the comparable GAAP measure
  - Preceding a GAAP measure with a non-GAAP measure or providing tabular disclosure of non-GAAP measures without preceding it with an equally prominent tabular disclosure of the comparable GAAP measures or including such GAAP measures in the same table
  - Describing a non-GAAP measure as, for example, "record performance" or "exceptional" without at least an equally prominent descriptive characterization of the comparable GAAP measure
  - Excluding a quantitative reconciliation of a forward-looking non-GAAP measure in reliance on the "unreasonable efforts" exception in Item 10(e)(1)(i)(B) of Regulation S-K without disclosing that fact and identifying the information that is unavailable and its probable significance in a location of equal or greater prominence
  - Providing discussion and analysis of a non-GAAP measure without a similar discussion and analysis of the comparable GAAP measure in a location with equal or greater prominence

The Company should review its earnings releases and other communications carefully for compliance with Regulation G and Item 10(e)

Management's Discussion and Analysis

- Management's Discussion and Analysis is an area that draws some of the most scrutiny from the SEC staff, and the issuance of comment letters regarding MD&A continues to trend upward.
- The SEC staff's comments on MD&A have largely focused on the requirements of Item 303 of Regulation S-K and related disclosure, emphasizing the following:
  - Results of operations, such as the description and quantification of factors, events, and economic changes (*e.g.,* the COVID-19 pandemic) between periods
  - Performance Indicators and Operating Metrics, such as how the metrics used by management to assess the performance of the company are calculated and period-over-period comparisons
  - Critical accounting policies and estimates, such as judgments made in applying significant accounting policies, sensitivity to change, and the likelihood of materially different reported results if different assumptions or conditions were to occur
  - Liquidity and capital resources, such as drivers of cash flow and the trends related to meeting known or reasonably likely future cash requirements
  - Known trends and uncertainties, including discussion of how such trends and uncertainties (*e.g.* COVID-19) are expected to impact future results in the near- and long-term.
  - Location of Non-GAAP Discussion and Reconciliation, specifically presenting comparable GAAP measures with equal or greater prominence to related Non-GAAP measures, such as ensuring that the GAAP measures precede the non-GAAP measures in reconciliations.

COVID-19

- SEC Comment letters over the last year have emphasized COVID-19 accounting and disclosures and non-GAAP financial measures that adjust for COVID-19.
- While the COVID-19 pandemic can affect all major sections of companies' reports, the SEC staff comment letters have largely addressed risk factors and known trends and uncertainties in MD&A related to COVID-19.
  - Risk Factors: the SEC staff have asked companies to provide more specific risk factors tailored to the issuer when the company's disclosure was limited to general statements about uncertainties caused by COVID-19. For example, such requests have included asking the company to address COVID-19-related:
    - Potential supply chain disruptions
    - Material changes to the company's manufacturing process
    - Known or expected adjustments that will be needed to ensure sufficient access to capital
  - MD&A: The SEC staff has issued comments requesting companies to explain their results related to COVID-19 in a way that is more clear and easily understandable for investors. In such circumstances, the staff has asked companies to provide more context. For example, the staff has commented:
    - "Your discussion of changes in international wholesale segment sales attributes the decrease in sales to pandemic-related store closures, which does not appear to provide enough context for the changes in revenue during the periods presented. . . . [P]lease revise to disclose sales volume, changes in average selling price and/or other underlying drivers for the change in international wholesale segment sales."

Annual Meetings, Shareholder Proposals and Proxy Access

10:00 am – 10:30 am

Annual Meetings and Universal Proxies

Meetings: Virtual, Return to In-Person, or Hybrid?

- Given the rise of the Omicron variant and the uncertainty surrounding the constantly evolving COVID-19 pandemic, companies should prepare for the possibility of holding virtual annual meetings for the 2022 proxy season.
- There have been massive shifts away from in-person to virtual annual shareholder meetings in the past two years:

	2019	2020	2021
Virtual Meetings Held (according to Broadridge):	248	1,494	1,929

- Given the substantial time and cost savings of holding a virtual, rather than in-person meeting, some companies may prefer to hold virtual meetings going forward, regardless of the state of the COVID-19 pandemic.
- Requirements to remember for virtual annual meetings:
  - State Law and Corporate Governance Documents:
    - Companies should review their state corporate laws and their corporate governance documents to ensure that they permit the company to conduct a virtual meeting.
    - Note that state law and company corporate governance documents may also restrict the methods in which the company may conduct the meeting.

Meetings: Virtual, Return to In-Person, or Hybrid? – Cont'd

- SEC Guidance:
  - The guidance provided by the SEC in 2020 for conducting shareholder meetings in light of COVID-19 concerns remains applicable.
  - Companies must disclose to shareholders clear directions as to the logistical details of their virtual meetings, including how to remotely access, participate in, and vote at such meetings.
- Glass Lewis Expectations:
  - Companies should provide in their proxy statements robust disclosure assuring shareholders that they will be afforded the same rights and opportunities to participate as they would at an in-person meeting. Such disclosure should include:
    - Guarantees that shareholders will be provided an opportunity to ask questions related to the subjects normally discussed at the annual meeting
    - A timeline for submitting questions, description of types of appropriate questions, and rules for how questions and comments will be recognized and disclosed to the shareholders
    - Procedures for posting appropriate questions received during the meeting and the company's answers on the investor page of their website as soon as practicable after the meeting
    - A manner for addressing technical and logistical issues related to accessing the virtual meeting platform
    - Procedures for accessing tech support to assist in the event of difficulties accessing the virtual meeting

Universal Proxy Statements

- On September 17, 2021, the SEC approved amendments to federal proxy rules to mandate the use of a universal proxy card in public solicitations involving director election contests effective August 31, 2022:

  Proxy cards distributed in contested director elections must include both sides' director nominees, allowing shareholders casting their votes to mix and match nominees from the company's and the activists' slates.

- Additional requirements:
  - Activists must provide companies with notice of their intent to solicit proxies and provide the names of their nominees within 60 days before the anniversary of the previous year's annual meeting.
  - Companies must notify activists of the names of the company's nominees no later than 50 days before the anniversary of the previous year's annual meeting.
  - Activists must file definitive proxy statements by the later of 25 days before the shareholder meeting or 5 days after the company files its definitive proxy statement.
  - Activists must solicit the holders of shares representing at least 67% of the voting power of the shares entitled to vote at the shareholder meeting.
- Likely effects of universal proxies:
  - More contested director elections
  - Potential for cheaper activist election campaigns

Shareholder Proposals

14a-8 Updates

- On November 3, 2021, the SEC Division of Corporation Finance issued new Staff Legal Bulletin No. 14L, which rescinded Staff Legal Bulletins Nos. 14I, 14J and 14K, and provided new guidance addressing:
  - Rule 14a-8(i)(5), the economic relevance exception
  - The Division's views on Rule 14a-8(i)(7), the ordinary business exception
  - Other matters including the use of graphics images, proof of ownership letters, and procedures
- Changes to the ***economic relevance*** exception:
  - The Staff will not agree with the exclusion of proposals that raise issues of broad social or ethical concern related to the company's business, *even if* the relevant business falls below the economic thresholds of Rule 14a-8(i)(5).
  - The Staff will no longer expect companies to include a board analysis regarding the application of the Rule 14a-8(i)(5) exception.
  - **What it means**: when Rule 14a-8(i)(5) arguments are submitted and they involve proposals that raise social issues, to the extent that the proposals are considered by the Staff to raise broad social or ethical concerns, they may be more difficult to exclude than in the past.

14a-8 Updates – Cont'd

- Changes to the ***ordinary business*** exception:
  - Changes to the "nexus" part of the ordinary business exception:
    - The Staff will no longer focus on determining the "nexus" between a significant policy issue and the specific company when assessing whether to concur with exclusion of a proposal on the basis of Rule 14a-8(i)(7) and will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal, considering whether the proposal raises issues with a broad societal impact such that those issues transcend the ordinary business of the company.
    - The Staff will also no longer expect companies to include a board analysis regarding the application of the exclusion.
    - **What it means**: it will be harder for companies to exclude environmental and social proposals on the basis of Rule 14a-8(i)(7).
  - Changes to the micromanagement part of the ordinary business exception:
    - Staff will continue to recognize the micromanagement argument, but it will focus on the granularity sought in the proposal and whether and to what extent it inappropriately limits the discretion of the board or management.
    - Proposals that include the level of detail that is necessary to enable investors to assess a company's impacts, progress towards goals, risks or other strategic matters will generally not be excludable on this basis.
    - In determining whether a proposal probes matters "too complex" for shareholders, the Staff may consider the sophistication of investors generally on the matter, the availability of data, and the robustness of public discussion and analysis on the topic, as well as references to well-established national or international frameworks when assessing proposals related to disclosure, target setting, and timeframes as indicative of topics that shareholders are well-equipped to evaluate.
    - **What it means**: proposals regarding climate change targets and related timeframes are probably not going to be as excludable under the micromanaging prong as they have been in the past, and the same applies for other environmental and social proposals that contain specific targets and timeframes.

14a-8 Updates – Cont'd

- **Other Matters**:
  - Use of graphics in shareholder proposals:
    - The SEC provided clarification, largely by reiterating its SLB 14I guidance.
  - Format for proofs of ownership under Rule 14a-8(b):
    - The SEC updated the suggested format by reiterating its SLB 14K guidance that companies should avoid applying an overly technical reading to proofs of ownership.
    - The SEC also stated that companies should identify any specific defects in a proof of ownership letter, even if the company previously sent a deficiency notice prior to receiving the proponent's proof of ownership if such deficiency notice did not identify the specific defect(s).
  - Email proposals:
    - The SEC recommends that proponents who send proposals via email seek a reply email from the recipient acknowledging receipt of the email, and that both proponents and companies acknowledge receipt of emails when requested.
    - **What it means**: this change could reduce the number of proposals successfully excluded from companies' proxy materials on procedural grounds.

Shareholder Proposal Trends

Proposal Category(1)	2021	2020	2021 vs. 2020(2)	Observations
Governance	287	288	--	Written consent proposals continued to be the most common governance proposal, representing 28% of all governance proposals with 80 submitted (up from 23% in 2020). This reflects proponents' shifting focus since 2017, with the largest subcategory of governance proposals cycling through proxy access (2017), shareholder special meeting rights (2018), independent chair (2019) and written consent (2020).
Social	239	174	↑ 37%	The largest subcategory, representing 54% of all social proposals, continued to be anti-discrimination and diversity-related proposals, with 128 submitted in 2021 (more than doubled from 53 in 2020).

(1) Shareholder proposals are categorized based on subject matter as follows:

- **Governance proposals** include proposals addressing: (i) shareholder special meeting rights; (ii) proxy access; (iii) majority voting for director elections; (iv) independent board chairman; (v) board declassification; (vi) shareholder written consent; (vii) elimination/reduction of supermajority voting; (viii) director term limits; (ix) stock ownership guidelines; and (x) shareholder approval of bylaw amendments.
- **Social proposals** cover a wide range of issues and include proposals relating to: (i) discrimination and other diversity-related issues (including board diversity and racial equity audits); (ii) employment, employee compensation or workplace issues (including gender/ethnicity pay gap); (iii) board committees on social and environmental issues; (iv) social and environmental qualifications for director nominees; (v) disclosure of board matrices including director nominees' ideological perspectives; (vi) societal concerns, such as human rights, employment or workplace policies, animal welfare, and the opioid crisis; and (vii) employment or workplace policies.
- **Environmental proposals** include proposals addressing: (i) climate change (including climate change reporting, climate lobbying, greenhouse gas emissions goals, and climate change risks); (ii) plastics, recycling or sustainable packaging; (iii) renewable energy; (iv) environmental impact reports; and (v) sustainability reporting.
- **Civic engagement proposals** include proposals addressing: (i) political contributions disclosure; and (ii) lobbying policies and practices disclosure.
- **Executive compensation proposals** include proposals addressing: (i) performance metrics, including the incorporation of sustainability-related goals; (ii) compensation clawback policies; (iii) severance and change of control payments; (iv) equity award vesting; (v) executive compensation disclosure; and (vi) limitations on executive compensation.

Shareholder Proposal Trends – Cont'd

Proposal Category[1]	2021	2020	2021 vs. 2020[2]	Observations
Environmental	112	99	↑ 13%	The largest subcategory, representing 75% of these proposals, continued to be climate change proposals, with 83 submitted in 2021 (significantly increased from 54 in 2020, and surpassing the five-year high of 72 in 2018).
Civic Engagement	76	76	--	Lobbying spending proposals once again exceeded political contribution proposals, but by a very narrow margin: lobbying spending proposals (the largest subcategory, representing 46%) decreased to 35 in 2021 from 43 in 2020, and political contribution proposals increased to 34 in 2021 from 27 in 2020, after a steep decline from 61 in 2019.
Executive Compensation	49	56	↓ 13%	Consistent with the last three proxy seasons, the largest subcategory, representing 31% of these proposals, was proposals seeking to include social- or environmental- focused performance measures in executive compensation programs (such as sustainability, cybersecurity, data privacy and risks arising from drug pricing), with 15 submitted in 2021 (compared to 18 in 2020).

(2) Data in this column refers to the percentage increase or decrease in shareholder proposals submitted in 2021 as compared to the number of such proposals submitted in 2020.

Company Options for Responding

- The updates to Rule 14a-8 are likely to result in an increased volume of shareholder proposals, especially relating to ESG matters. The updates will also likely make it more difficult for companies to exclude shareholder proposals.
- Given the Rule 148-a updates, Companies should consider the following when determining whether and how to exclude shareholder proposals:
  - Exclusion on Substantive Grounds
    - The SEC will not take a no-action position supporting a company's exclusion of a shareholder proposal where management expresses its intention to offer a similar proposal *unless* shareholders could not logically vote for both proposals. Unless the two proposals present a direct and irreconcilable conflict, the SEC will view competing shareholder and management proposals as complementary, rather than subject to a disqualifying conflict.
    - By rescinding the "ordinary business" and "economic relevance" exclusions, the 14a-8 rule updates limit the viable substantive grounds that companies may use to seek no-action relief to exclude shareholder proposals.
  - Exclusion on Procedural Grounds
    - Companies can continue to exclude shareholder proposals that do not satisfy the procedural requirements of Rule 14a-8, such as minimum share ownership amounts and time periods, timeliness, proposal length, and attendance at the annual meeting. However, the updates may make doing so more difficult.
    - The updates may require companies to send a second deficiency notice in certain situations, which will, at a minimum, prolong the process and uncertainty around whether the proposal can be excluded.
    - Staff Legal Bulletin No. 14L reiterated that companies should not exclude proposals on "overly technical" positions and may suggest that the SEC wants companies to actively assist proponents in complying with well-established procedural requirements.

Company Options for Responding – Cont'd

- Exclusion without a No-Action Letter:
  - Though companies are not required to obtain no-action relief from the SEC before excluding a shareholder proposal from their proxy statement, they should carefully consider the risks of excluding a proposal without no-action relief before doing so.
  - Excluding a proposal without no-action relief could trigger shareholder litigation and enforcement action from the SEC, which could be even more likely given the updates to Rule 14a-8.
  - Litigation could result in complicating the company's proxy solicitation and annual meeting.
  - Litigation could also result in reputational damage given the optics of the company suing its shareholder(s) to prevent its other shareholders from voting on a proposal.
- Voluntary Withdrawal of a Proposal:
  - Companies can attempt to negotiate with proponents to voluntarily withdraw their proposals.
  - The updates to Rule 14a-8 will likely weaken companies' positions in these negotiations.

Company Options for Responding – Cont'd

- Recommendations
  - Companies should consider sending deficiency notices and other correspondence by more than one method, including through trackable first-class mail.
  - Companies should stay informed on what the staff considers to be significant policy issues given the changes to the ordinary business exclusion.
  - Companies should consider providing email addresses in their proxy statements.
  - Companies should consider sending more than one deficiency notice if any prior deficiency notice did not identify the specific defect(s) in a timely received proof of ownership.

Proxy Advisory Firms and Investor Policy Updates

Glass Lewis Updates

- Beginning in 2022, Glass Lewis will generally vote against the chair of the nominating and/or governance committees:
  - At companies that have fewer than two gender diverse directors or, for boards with six or fewer total directors, one gender diverse director
  - At companies that have not provided required diversity disclosures
  - At companies in the S&P 500 index that have failed to provide diversity disclosure for each of the four categories tracked by Glass Lewis: (1) percentage of racial/ethnic diversity represented on the board, (2) whether the board's definition of diversity explicitly includes gender and/or race/ethnicity, (3) whether the board has a policy requiring women and other diverse individuals to be part of the director candidate pool, and (4) board skills disclosure
  - At companies in the S&P 500 index that do not provide explicit disclosure concerning the board's role in overseeing environmental and/or social issues
  - At companies with a multi-class share structure with unequal voting rights when the company does not provide for a reasonable sunset of the multi-class share structure (generally seven years or less)
  - At companies where the board has waived self-imposed term/age limits two years in a row unless a compelling rationale is provided for the waiver (*e.g.,* consummation of a corporate transaction)
- Beginning in 2023, Glass Lewis will generally vote against the chair of the nominating and/or governance committees:
  - At companies in the S&P 500 index that have failed to provide any disclosure of individual or aggregate racial/ethnic minority demographic information

ISS Updates

- Beginning in 2022, ISS will generally vote against:
  - For companies that are significant greenhouse gas emitters through their operations or value chain (defined as those on the current Climate Action 100+ Focus Group), the responsible incumbent director, committee or full board when the company is not taking minimum steps needed to understand, assess, and mitigate climate-related risks
  - For companies in Russell 3000 or S&P 1500, the chair of the nominating and/or governance committee if the board has no apparent racial or ethnic diversity, unless there was racial/ethnic diversity on the board at the preceding annual meeting and the board makes a firm commitment to return to a racially/ethnically-diverse status within a year
- Beginning in 2023, ISS will generally vote against:
  - The chair of the nominating and/or governance committee for any companies whose boards have no women, unless there was a woman on the board at the preceding annual meeting and the board makes a firm commitment to return to a gender-diverse status within a year

BlackRock Updates

- Beginning in 2022, BlackRock may vote against:
  - Members of the compensation committee where a company has proposed an equity compensation plan that is not aligned with shareholders' interests
  - Boards that appear to have an insufficient mix of short-, medium-, and long-tenured directors (but will defer to boards' determinations regarding whether age limits or term limits are the most efficient and objective mechanisms for ensuring periodic board refreshment, considering average board tenure to evaluate board processes for ensuring adequate renewal)
- Beginning in 2022, BlackRock may vote for:
  - Shareholder proposals asking companies to disclose climate plans aligned with several expectations, which include:
    - Highlighting disclosed metrics that are industry- or company- specific
    - Disclosing any supranational standards adopted, the industry in which they participate, any peer group benchmarking taken, and any assurance processes to help investors understand the company's approach to sustainable/responsible conduct
    - Disclosing their business plans for how they intend to deliver long-term financial performance through transition to global net zero
    - Setting short-, medium-, and long-term scientific-based targets for GHG reductions and demonstrating how such targets are consistent with the long-term economic interests of the shareholders
    - Disclosing how the company's capital allocation across alternatives, transition technologies, and fossil fuel production is consistent with their strategy and targets

BlackRock Updates – Cont'd

- Beginning in 2022, BlackRock may vote for:
  - Shareholder proposals requesting additional disclosure regarding political activities where:
    - BlackRock identifies a material inconsistency between the company's stated position on material policy matters and the material positions taken by industry specific groups of which the company is a member
    - BlackRock feels that further transparency may clarify how the company's political activities support its long-term strategy
- Additional Updates:
  - BlackRock is asking companies to make several diversity related disclosures and encourages each board to have 30% diversity of membership, at least two directors who identify as female, and at least one director who identifies as a member of an underrepresented group.
  - BlackRock expects companies to demonstrate a robust approach to human capital management and provide shareholders with disclosure to understand how the company's approach aligns with its strategy and business model.

Proxy Voting Advice

Proxy Voting Advice

- In July 2020, the SEC adopted final rules governing proxy voting advice that would become effective December 1, 2021, which:
  - codified the SEC's interpretation that proxy voting advice generally constitutes a "solicitation" subject to the proxy rules and
  - added two new conditions (the "Policy Conditions") to the exemptions that proxy advisory firms generally rely on to avoid the proxy rules' information and filing requirements:
    - conflicts of interest disclosure requirements and
    - a requirement that each proxy advisory firm adopt and publicly disclose certain written policies and procedures to ensure that
      - companies that are the subject of proxy voting advice have such advice made available to them at or prior to the time such advice is more widely disseminated and
      - the proxy advisory firms provide their clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding the firm's proxy voting advice by the companies that are the subject of such advice in a timely manner before the shareholder meeting.
  - The 2020 rules also amended the Note to Rule 14a-9 to include specific examples of material misstatements or omissions related to proxy voting advice.
- In June 2021, the SEC Division of Corporate Finance released a statement that until further regulatory action was taken by the SEC, it would not recommend that the SEC take enforcement actions based on the 2020 rules.
- In October 2021, the National Association of Manufacturers ("NAM") announced that it had sued the SEC for its non-enforcement approach while it reviewed potential changes to the 2020 rules, calling the suspension "flatly unlawful."

Proxy Voting Advice – Cont'd

- In November 2021, the SEC proposed amendments to the rules governing proxy voting advice that would rescind significant portions of the two rules applicable to proxy voting advice that were adopted by the SEC in 2020 and opened a comment period on the proposed rules that ended on December 27, 2021.
- Summary of Proposed Changes:
  - Amend Rule 14a-2(b)(9) to remove the Policy Conditions.
  - Amend Rule 14a-9 to remove Note (e) to the rule, which sets forth specific examples of material misstatements or omissions related to proxy voting advice.
- The proposed amendments leave the other aspects of the 2020 rules intact, including:
  - proxy voting advice is a solicitation subject to the proxy rules and
  - proxy advisory firms must provide conflicts of interest disclosure in order to rely on the exemptions to the proxy rules' information and filing requirements.

Environmental, Social, and Governance

10:30 am – 11:00 am

Environmental

Climate Change Disclosure Considerations

Overview of SEC Guidance on Climate Change Disclosure:

- The SEC last issued guidance on climate change disclosure in 2010. While the SEC has yet to issue updated climate change disclosure guidance, it has already moved well beyond the 2010 guidance in its enforcement efforts, and it recently issued a sample comment letter (the "***Comment Letter***") regarding climate change disclosures.

Takeaways from the Comment Letter:

1. ***The SEC is paying attention to voluntarily disclosed sustainability reports***

   The SEC is thinking about the consistency, or lack thereof, between companies' corporate voluntary ESG disclosures and their other disclosures and corporate behaviors. Further, the SEC may be considering requiring companies to incorporate climate and related sustainability information into their annual filings or, at a minimum, explaining why they have chosen not to do so.

2. ***The SEC is expecting non-boilerplate risk disclosures that consider transition, physical, and indirect climate change-related risks***

3. ***The SEC wants companies to stay up-to-date on ESG trends in litigation, policy and regulation***

4. ***The Comment Letter specifically calls for disclosures to identify material capital expenditures for climate-related projects and material compliance costs related to climate change***

5. ***The SEC expects honesty about the downside, risks, costs and uncertainties regarding companies' climate-related risks factors and strategies***

Social

Human Capital Resources: Background

- Human Capital Resources ("HCM") has steadily increased in importance to companies and their shareholders.
  - Institutional investor focus on HCM reached an all-time high in the 2021 proxy season.
  - BlackRock and State Street Global Advisors ("SSGA") have made HCM engagement priorities.
- HCM disclosure is an area of increasing focus for the SEC:
  - The SEC adopted new principles-based HCM disclosure rules (Reg. S-K Item 101) in November of 2020.
  - In June 2021, Chair Gary Gensler signaled that the SEC is considering whether to mandate specific line-item HCM disclosures (for possible consideration in 2022).
  - Upcoming rule proposals may request more quantitative and specific human capital information—possible line-item disclosures include:
    - turnover rates
    - skills and training
    - compensation and benefits
    - workforce demographics
    - health and safety

Human Capital Resources: Disclosure Trends in 2021

- Common areas of HCM disclosure in 2021:
  - Diversity & inclusion
  - Health- and safety-related issues
  - Workforce compensation
  - Company culture or values
  - Community involvement
  - Employee training, recruitment and retention
- Nearly a third of all shareholder proposals submitted in 2021 were related to HCM.
- Proposals on HCM received an average of 45% support in 2021, up from 28% in 2020.

Human Capital Resources: Disclosure Trends in 2021 – Cont'd

Key HCM Proposal Statistics			
	Submitted in 2020	**Submitted in 2021**	**2021 vs. 2020**
Anti-Discrimination and Diversity Related			
Workforce diversity and EEO-1	26	81	↑
Racial equity proposals	7	38	↑
Gender and racial pay equity	13	7	↓
Other HCM			
Paid sick leave	0	7	↑
Employment-related mandatory arbitration	11	3	↓
Sexual harassment proposals	4	2	↓

Human Capital Resources: Practical Considerations

- Determine oversight functions:
  - What functions are appropriate for management supervision and what should be reported and reviewed by the board?
  - Which board committees are tasked with which responsibilities?
- Set HCM key performance indicators/metrics, start collecting quantitative data
- Prepare for institutional investor input:
  - BlackRock expects companies to disclose workforce demographics (such as gender, race and ethnicity) and the steps that they are taking to advance diversity, equity and inclusion.
  - SSGA expects all companies in its portfolio to disclose measures of employee diversity by race, ethnicity and gender, broken down by industry relevant employment categories or levels of seniority, for all full-time employees.

Social

Board Diversity: Increasing Shareholder Focus

- Shareholders are increasingly concerned with board diversity:
  - Anti-discrimination and diversity were the most common shareholder proposal topics during the 2021 proxy season, representing 16% of shareholder proposals.
  - Board diversity shareholder proposals received 82.4% support in 2021, a sharp increase from the 37.2% support received in 2020.
- Proxy advisory firms and institutional shareholders are also increasingly focused on board diversity:
  - ISS and Glass Lewis have both adopted policies on board diversity:
    - ISS and Glass Lewis both generally expect 1 to 2 women on the board.
    - In 2023, Glass Lewis will move to a percentage-based approach and issue negative voting recommendations if a board is not at least 30% gender diverse (which includes individuals who identify as non-binary).
    - ISS additionally expects at least one racially or ethnically diverse director on the board.
  - SSGA has stated that it expects boards to have at least one director from an underrepresented community.
  - BlackRock has stated that boards should aspire to 30% diversity of membership and that it prefers for companies to have at least two directors on their board who identify as female and at least one who identifies as a member of an underrepresented group.

Social

Board Diversity: Nasdaq Board Diversity Rules

- In December 2020, Nasdaq filed a proposal with the SEC to adopt new listing rules related to board diversity. Nasdaq amended the original proposed rule in February 2021, in part to provide companies with additional flexibility. On August 6, 2021, the SEC approved Nasdaq's board diversity proposals.
- Two rules: (1) The "Board Diversity Rule" and (2) the "Board Recruiting Service Rule."
- Board Recruiting Service Rule: provides certain Nasdaq-listed companies with one year of complimentary access for two users to a board recruiting service to promote access to a network of board-ready diverse candidates for companies to identify and evaluate.
- Board Diversity Rule: requires each Nasdaq-listed company to:
  - Publicly disclose, in an aggregated form and to the extent permitted by applicable law, information on the voluntary self-identified gender and racial characteristics and LGBTQ+ status of the company's board of directors.
    - Nasdaq-listed companies must disclose the initial board matrix by the later of (1) August 8, 2022, or (2) the filing date of the company's proxy statement for its 2022 annual meeting.
  - Have, or explain why it does not have, at least two members of its board who are diverse (including at least one director who self-identifies as female and at least one director who self-identifies as an underrepresented minority or LGBTQ+).
    - Generally effective between 2023 and 2026 based on each company's listing tier.
    - The Board Diversity Rule is primarily a "comply or explain" rule. The rule does not impose board diversity mandates or quotas.
- Note that we expect that the NYSE will eventually adopt a rule similar to the Nasdaq rule; perhaps of equal importance, the Nasdaq rule is establishing a new baseline for disclosure.

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Board Diversity: Nasdaq Board Diversity Matrix

To comply with the Board Diversity Rule, Nasdaq-listed companies must provide each director's voluntary self-identified characteristics in a format similar to the Board Diversity Matrix below:

Board Diversity Matrix (As of [DATE])

Total Number of Directors	#			
	Female	**Male**	**Non-Binary**	**Did Not Disclose Gender**
Part I: Gender Identity				
Directors	#	#	#	#
Part II: Demographic Background				
African American or Black	#	#	#	#
Alaskan Native or Native American	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+			#	
Did Not Disclose Demographic Background			#	

Board Diversity: Nasdaq Board Diversity Matrix – Cont'd

- Two approaches to board matrices and diversity disclosure best provide investors with useful information. The primary difference between the two approaches is that one discloses individual director gender and race/ethnicity while the other aggregates some or all of the information. In all cases, however, information is provided on the qualifications and skills of the board members.

Approach 1	Approach 2
▪ Includes each director's voluntarily self-identified gender and race/ethnicity. ▪ Includes the individual qualifications and skills that each director brings to the boardroom. ▪ Includes age and length of board tenure for each director. ▪ Can include the number of outside public-company boards on which each director sits. ▪ Strongest examples include Unum Group and W.W. Grainger, Inc. because these companies (1) explain specifically the importance of each identified qualification in their matrices for the companies' and the boards' oversight and (2) include a separate graphic that provides alternate presentations for their boards' diversity of gender and race/ethnicity.	▪ Directors voluntarily self identify their gender and race/ethnicity, but such information is only disclosed in the aggregate. ▪ Includes the individual qualifications and skills that each director brings to the boardroom. ▪ Can include age and length of board tenure for each director. ▪ Strongest examples include Ameren Corporation, Exelon Corporation, PepsiCo, Inc., and Wells Fargo & Company because these companies include (i) one or more rows in their board matrices for diversity of gender and race/ethnicity and (ii) separate graphics that clarify or highlight such diversity in more detail.

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EEO-1 Disclosure

- EEO-1 Disclosure:
  - The EEO-1 Component 1 report is a mandatory annual data collection that requires all private sector employers with 100 or more employees, and federal contractors with 50 or more employees meeting certain criteria, to submit demographic workforce data, including data by race/ethnicity, sex, and job categories, to the U.S. Equal Employment Opportunity Commission.
  - As of January 2021, only 6% of the Russell 1000 companies publicly disclosed EEO-1 data, but a number of large companies have recently committed to disclose this data in response to investor pressure, including a majority of the S&P 100.
- EEO-1 Disclosure Shareholder Proposals:
  - The number of proposals submitted related to workforce diversity increased significantly to 81 in 2021 (compared to 26 in 2020). Shareholder proposals regarding EEO-1 have been framed to seek disclosure of either the EEO-1 report itself, or the data included in a company's EEO-1 report.

EEO-1 Disclosure – Cont'd

- EEO-1 Disclosure Shareholder Proposals:
  - The significant increase in EEO-1-related proposals was driven primarily by the launch in December 2020 of the New York City Comptroller's campaign calling on companies to publicly disclose the composition of their workforces by race, ethnicity and gender.
  - In 2021, the vast majority of the EEO-1 proposals were withdrawn by the proponent following negotiations between the company and the proponent, which typically resulted in the company committing to disclose its EEO-1 data.

EEO-1 Proposal Submissions and Withdrawals			
	2020	**2021**	**2021 vs. 2020**
Submitted	2	38	↑
Proposals Withdrawn as Percentage of Submitted	0%	82%	--

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Sexual Harassment: Microsoft Shareholder Resolution

- While 2021 saw a decline in shareholder proposals related to sexual harassment and mandatory arbitration, these issues remain salient among some shareholders.
- ISS, in response to increasing support for sexual harassment proposals and client demand in previous proxy seasons, updated its 2021 proxy voting guidelines to specifically address sexual harassment.
- The proposal regarding sexual harassment data adopted by Microsoft's shareholders demonstrates that sexual harassment is an enduring area of importance for shareholders:
  - Following reports of Bill Gates' inappropriate relationships and sexual advances towards Microsoft employees, Microsoft shareholders approved a shareholder proposal brought by Arjuna Capital regarding sexual harassment in 2021.
  - The resolution requires Microsoft to release a transparency report (at reasonable expense, omitting confidential or privileged information) to its shareholders assessing the effectiveness of Microsoft's workplace sexual harassment policies. The report must include:
    - The results of any comprehensive, independent audits, or investigations
    - Analysis of policies and practices
    - Any commitments to create a safe, inclusive work environment
  - Although the Microsoft board recommended that shareholders vote against the proposal, it received 77.79% of all votes and was approved.

Governance

ESG Discussion

11:05 am – 12:00 pm