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**2021 SEC Disclosure &  
Proxy Season Outlook**

*GDC MCLE Blitz January 20, 2021*

**Speakers**

Daniela Stolman, Mike Titera,  
Aaron Briggs

# Panelists



**Daniela Stolman**  
Partner  
Century City



**Mike Titera**  
Partner  
Orange County



**Aaron Briggs**  
Of Counsel  
San Francisco

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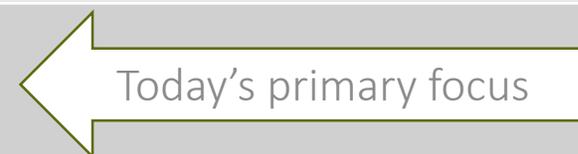
# 1. SEC Rulemaking Developments

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# SEC Modernization and Simplification Amendments Background

The Securities and Exchange Commission is continuing its effort to update and modernize public company disclosure requirements

Adoption Period	When in Effect	Amended Regulation S-K Items
November 2020 Release No. 33-10890	With 10-K after next	Item 301 (Selected Financial Data) Item 302 (Supplementary Financial Information) Item 303 (MD&A)
<b><i>August 2020</i></b> Release No. 33-10825	With next 10-K	<b><i>Item 101 (Description of Business)</i></b> <b><i>Item 103 (Legal Proceedings)</i></b> <b><i>Item 105 (Risk Factors)</i></b>
March 2019 Release No. 33-10618	With last 10-K	Item 102 (Description of Property) Item 303 (MD&A) Item 405 (Compliance with Section 16(a) of the Exchange Act) Item 601 (Exhibits) Other Technical Amendments
August 2018 Release No. 33-10532	With prior year 10-K	Various technical amendments to reduce redundant duplicative and outdated disclosure requirements



# The Debate Over Principles-Based Disclosure

- In discussing the recent amendments, Chairman Clayton highlighted company disclosures relating to the effects of COVID-19 as an *example of effective principles-based disclosure*

*Chairman Clayton noted, “We have seen disclosures shift to emphasize matters such as liquidity, cash needs, supply chain risks, and the health and safety of employees and customers. This has served as a reminder that our rigorous, principles-based, flexible disclosure system, where companies are required to communicate regularly and consistently with market participants, provides countless benefits to our markets, our investors and our economy more generally.”*

- Commissioners Lee and Crenshaw *pushed back on the enhanced, principles-based approach* reflected in the new rules, voicing their dissent at the lack of specific disclosure requirements concerning ESG matters and focused on the absence of prescriptive rules requiring disclosures and metrics on diversity, climate change risk, and human capital
- Some commenters are concerned that the move away from prescriptive disclosure standards will *allow companies to avoid addressing some topics*, while others view that as ignoring the pressures of sophisticated capital markets and investor demands

# Changes to Business Description (Item 101) – Overview

Applies a more principles-based framework and provides more flexibility

## Time Period Covered

- *Eliminates reference to a 5-year timeframe* for general business development, instead requiring disclosure of *events that would be material* to an understanding of the business
- May provide *only updates on material developments in the business/business strategy* since most recent full discussion of business development in a prior filing, if prior disclosure incorporated by reference

## Substantive Disclosure Topics

- Replaces the 12 topics that “shall” be discussed, if material, with *a non-exhaustive list of seven topics* that *may* be discussed
  - *Includes some of the prior 12 topics*, but in many cases removes prescriptive or qualifying standards

## *New Disclosure Topics*

- +
  - +
  - +
  - +
- Human capital management
  - Trends in market demand
  - Changes in strategy
  - Material effects of compliance with all government regs (not just those relating to environment)

# Changes to Business Description (Item 101) – Takeaways

## Focus on Materiality

- *Addresses info that's material to an understanding of the general development of the business* (including as a result of the pandemic)

## Consider Whether to Use “Update” Approach

- May be of utility primarily for companies that do not frequently update their business development disclosures
- While an update can incorporate by reference a single prior disclosure, *interpretive guidance may be needed* on how this provision interacts with the “no double incorporation by reference” provisions of the securities laws

## Assess Whether Prior Disclosure Topics Should Still Be Addressed

- Although certain topics have been dropped from the rule, *companies should continue to evaluate* whether they are material to an understanding of the business, and if so to continue address them
- For example: working capital practices, backlog, rights to return merchandise

# Changes to Legal Proceedings (Item 103)

## Increase in Disclosure Threshold

- *Raises the threshold for disclosure of governmental environmental proceedings* from \$100,000 of potential monetary sanctions to \$300,000+
- *Companies can establish a reasonable alternative disclosure threshold*, not to exceed lesser of:
  - \$1 million, or
  - 1% of current assets
- Alternative threshold must be disclosed in each annual and quarterly report
  - Not common for companies to disclose a self-determined materiality threshold
  - *Interpretive guidance may be needed* to confirm if disclosure required even if there are no such proceedings to report (or only when a proceeding exists involving \$300,000+)

## Explicit Permission to Cross-Reference the Financial Statement Notes

- Confirms you can provide required information *using hyperlinks and cross-references* to disclosure located elsewhere in the document
  - Many companies already cross-reference, though this may lead to more hyperlinks

# Changes to Risk Factors (Item 105) – Overview

- Revised Standard: From “most significant” to “material” factors
- Summary Requirement: Only if risk factors exceed 15 pages
  - Series of concise, bulleted, or numbered statements that is no more than 2 pages
  - To be included “in the forepart” of the document
- Organizational Requirement: Must organize risk factors logically under relevant headings
  - Expect companies to have 4-5 headings
  - Generic risk factors (i.e., apply to any registrant/offering) belong at the end under “General Risk Factors” heading
- Purpose: To counter current trend toward ever-expanding risk factor disclosures

## *Sample Headings to Date*

- Business/industry
- Strategy/operations
- Macroeconomic
- Financial
- Indebtedness
- Legal/compliance
- Intellectual property
- Human capital
- Manufacturing
- Supply chain
- Third-party relationships
- Product specific
- Client demand
- Cybersecurity/IT
- Ownership of securities

*Commissioner Peirce said* she views the risk factors amendment as a “bit of an experiment,” asking whether the “penalty of having to prepare a summary [will] be sufficient to overcome the fear of litigation that pushes companies to disclose many pages of risks.”

# Changes to Risk Factors (Item 105) – Takeaways

- Confirm Content Up-to-Date: Reflects risks presented by current events and conditions, including focus areas for SEC
- Confirm Adequacy of Subcaptions: In describing specific risks, and that risk factors “concisely explain” how each affects the company
- Confirm Accuracy of Hypotheticals: Review risk factors so that they do not speak about events hypothetically (e.g., “could” or “may”) if those events have occurred or are occurring
  - If a risk has manifested itself, that factual event should be appropriately reflected in the body of the risk factors
- Consider Whether to Add a Summary
  - Companies involved in numerous, complex, or highly regulated businesses, or those particularly exposed to class action securities litigation, may want to include >15 pages
  - Many companies already include risk factor summaries in their forward-looking statement disclaimers or in the prospectus summary for registration statements

## *Risks Highlighted by SEC*

- COVID-19
- IP & technology
- Non-US operations
- Environmental
- Privacy
- LIBOR transition
- International trade
- Brexit impact
- Cybersecurity
- Industry-specific

# New Human Capital Management Disclosure – Overview

## Background

- New rules require, to the extent material, *a description of human capital resources*, including the # of persons employed, and any human capital measures/objectives the company uses in managing the business (such as those related to personnel development, attraction, and retention)
- The rules *do not include any specific* reporting framework or define “human capital” instead taking a *principles-based approach* suggesting the analysis should be tailored to your business/workforce

## How to Approach

- Management should begin by
  - *Reviewing existing internal and external statements* regarding key human capital resources, measures, and objectives
  - Reviewing *past engagement with and input from shareholders* on this topic
  - *Reviewing the list of disclosure topics* suggested by SEC (see next slide)
- *Not every aspect of HCM* that the board or management monitors, or that the company voluntarily reports, should be included; focus should be on what’s material

*Chairman Clayton stated* that he expects “to see meaningful qualitative and quantitative disclosure, including, as appropriate, disclosure of metrics that companies actually use in managing their affairs” and that “[a]s is the case with non-GAAP financial measures, [he] would also expect companies to maintain metric definitions constant from period to period or to disclose prominently any changes to the metrics used or the definitions of those metrics.”

# New Human Capital Management Disclosure – Potential Metrics

## Metrics Listed in Proposing Release

- *Number and types of employees*, including the number of full-time, part-time, seasonal, and temporary workers
- Measures with respect to the stability of the workforce, such as *voluntary and involuntary turnover rates*
- Measures regarding *average hours of training* per employee per year
- Info regarding *human capital trends*, such as competitive conditions and internal rates of hiring and promotion
- Measures regarding *worker productivity*
- The *progress that management has made with respect to any objectives* it has set regarding its human capital resources

## Metrics Suggested by Commentators

- *Worker* recruitment, employment practices, and hiring practices
- *Employee benefits and grievance* mechanisms
- *Employee engagement* or investment in employee training
- Workplace *health and safety*
- *Strategies and goals* related to HCM and legal or regulatory proceedings related to employee management
- Whether employees are covered by *collective bargaining agreements*
- Employee *compensation or incentive structures*

# New Human Capital Management Disclosure – Market Practice

## *Precedent Disclosures to Date – From 25 Examples Across Industries in S&P 500*

Focus Area	Frequency	Notes
Workforce statistics	16	Breakdown of employee base by employee classification (full-time, part-time, contractor); geography turnover rates
Recruiting, training, and succession	21	Focus on overarching human capital; talent recruitment and development; retention strategies and goals; succession planning
Culture and engagement	11	How the company monitors its workplace culture; culture initiatives taken by the company
Diversity	19	How the company promotes diversity and inclusion; sometimes including diversity stats (e.g., % male/female, % minority, etc.)
Employee compensation	13	Compensation/incentive mechanisms; potentially pay equity
Governance	6	Organizational and governance structure through which human capital is managed (C-suite level) and overseen (board level)
Health and safety	12	Workplace safety; employee mental health
COVID-19	9	Focus on employee well-being

- Recent FW Cook survey of 50 10-K filings by large companies reveals **significant variation in length** of this disclosure from 9 to 1,582 words (median is 369 words) and topics considered

# New Human Capital Management Disclosure – Takeaways

## Disclosures Likely to Evolve Over Time

- In the initial year, *consider conservative disclosure*, adding as appropriate in subsequent years
- Continue to *monitor peer practices* after the first year
- Expect SEC to be *focused on this disclosure as part of the comment letter process*
  - In the first year, likely to go after low-hanging fruit, but in subsequent years, as industry practices develop, market may inform what’s considered “material” and SEC expectations
- *Maintain consistent definitions of metrics* or disclose changes clearly

## Consider Your Stakeholders

- Human capital has rapidly emerged as *a critical focus area for stakeholders* meaning that companies can’t just consider what’s required to comply with SEC rules
- *64% of institutional investors* said they would focus on human capital management when engaging with boards in 2020 (second only to climate change, at 85%)\*

**BlackRock stated:** “Most companies BlackRock invests in on behalf of clients have, to varying degrees, articulated in their public disclosures that they are operating in a talent constrained environment, or put differently, are in a war for talent. It is therefore important to investors that companies explain as part of their corporate strategy how they establish themselves as the employer of choice...”

# Other SEC Rule Changes – New Requirements for This Year

## E-Signatures

- In November 2020, the SEC approved amendments to Regulation S-T and the EDGAR Filer Manual regarding electronic signatures for SEC filings
  - Expressly provides for use of e-signature methods, *such as DocuSign or AdobeSign*, subject to new authentication procedures
  - Signatory *must first manually sign another document* agreeing use of the electronic signature constitutes the legal equivalent of his/her manual signature
- **Open Question:** SEC guidance does not expressly address use of email authorization

## Form 10-K Cover Page

- In March 2020, the SEC adopted amendments that added a new checkbox to the Form 10-K cover page regarding auditor attestation of internal controls

*Indicate by check mark whether the registrant has filed a report on and attestation to its management's assessment of the effectiveness of its internal control over financial reporting under Section 404(b) of the Sarbanes-Oxley Act (15 U.S.C. 7262(b)) by the registered public accounting firm that prepared or issued its audit report.*

# Other SEC Rule Changes – Reminders From 2019 Amendments

## Overview

- In March 2019, the SEC adopted amendments to help simplify disclosure requirements

### Exhibits

- Confidential treatment
- Personally identifiable information
- Lookback period
- New description of securities

### Description of property

- Auditor's report/critical audit matters
- Compliance with Section 16(a)
- Form 10-K cover
- Other technical items

## Omitting Info From Material Contracts W/O Confidential Treatment Request

- Can omit info from material contract exhibits without requesting confidential treatment from the SEC as long as info is both immaterial and would likely cause competitive harm if disclosed
- SEC has issued comment letters questioning appropriateness of these redactions

## MD&A: 2 Years Instead of 3

- Can omit discussion of earliest year in MD&A if it was already included in a prior filing and company includes a cross-reference identifying location in prior filing
- Most companies so far have continued to disclose the full three-year period

Takeaway: In connection with updating the Form 10-K this year, disclosure controls and procedures should be assessed and potentially adjusted to reflect new and revised requirements

# Other SEC Rule Changes – MD&A and Financial Disclosures

## Background

- In November 2020, SEC adopted amendments to streamline further MD&A/financial disclosure requirements

## Effective Date

- Most companies don't need to comply until early 2022
  - Companies can early adopt

## Revamped Discussion of Drivers

- Must disclose “underlying reasons” for material changes in line items in quantitative & qualitative terms
- Must discuss material changes in line item even if they offset each other
- Can compare periods sequentially or year-over-year

## Other Changes

- ***Eliminated certain requirements***
  - 2-year quarterly financial data table (instead discuss “material” changes)
  - 5-year selected financial data table
  - Contractual obligations table
  - Off-balance sheet discussion\*
  - Inflation impact on net sales
- ***Codified prior SEC guidance to disclose...***
  - Critical accounting estimates
  - Material cash requirements, including CapEx commitments
  - Price/volume drivers for material changes (not increases) in revenue
  - Product lines (if material)

\*No separately captioned section, but still need to discuss if material

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## 2. Trends in SEC Comment Letters

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# SEC Comment Letter Trends – Overview\*

	Comment Letter Topic	Change		Comment Letter Topic	Change
1.	Non-GAAP measures (from #2)	↑	6.	Intangible assets and goodwill (from #5)	↓
2.	MD&A (from #3)	↑	7.	Contingencies (not in top 10 in 2019)	
3.	Revenue recognition (from #1)	↓	8.	Inventory and cost of sales (not in top 10 in 2019)	
4.	Segment reporting (from #8)	↑	9.	Income taxes (from #6)	↓
5.	Fair value measurement (from #4)	↓	10.	Signatures/exhibits/agreements (from #9)	↓

- Number of comment letters *continued to decline*, down 15% from last year (1,180 vs. 1,378)
- **58% of companies** receiving comments had a public float > \$700 million
  - 22% had a public float of \$75 - \$700 million
  - 20% had a public float of < \$75 million

\*Trends generally based on comment letters issued between July 2019 and June 2020, as compared to prior year period. See EY, *SEC Reporting Update: Highlights of Trends in 2020 SEC Comment Letters*

# SEC Comment Letter Trends – Non-GAAP Metrics

37% of comments in 2019 and 2020

## Comment Focus Areas

- *Whether a performance measure* is a non-GAAP measure
- *Equal or greater prominence* of the most directly comparable GAAP financial measure
- Disclosure of *why management believes* the non-GAAP measure is useful to investors
- *Reconciliation* to the most comparable GAAP financial measure
- *Effect of income taxes* on non-GAAP reconciliation
- *Appropriateness of adjustments* to eliminate smooth items identified as non-recurring

## Sample Comment

*“We note your computation of the non-GAAP measure Adjusted EBITDA included deferred revenue. Please tell us why revenue that is required to be deferred under GAAP is added back to your non-GAAP performance measure. Please also tell us the basis for the computation of the amounts added back in each year. Additionally, tell us how you considered whether this is an individually tailored revenue recognition and measurement method...”*

# SEC Comment Letter Trends – MD&A

26% of comments in 2019 and 2020

## Comment Focus Areas

- *Quantifying effects of factors* driving material period-to-period changes
- *Consistency* with discussions in earnings releases or calls
- *Known trends or uncertainties*, including relating to operating results & meeting expected future cash requirements
- *Critical accounting estimates*, including the judgments made in their application, and the likelihood of materially different reported results if different assumptions made
- *Liquidity and capital resources*, including clear discussion of drivers of cash flows

## Sample Comment

*“Please expand your results of operations discussion in future filings to quantify the impact of each factor identified, including offsetting factors, as causing changes in results between periods. For example, we note that your changes in revenue are attributable to a number of factors, including increases in unit volume, net impacts of price increases and changes in product mix. Please quantify the impact of each factor attributing to the increase...”*

# SEC Comment Letter Trends – Revenue Recognition

33% of comments in 2019 and 2020

## Comment Focus Areas

- *Identifying performance obligations*, including the nature of performance obligations, why goods or services are distinct, and disclosure of remaining performance obligations
- *Satisfying performance obligations*, including how and when control transfers
- *Disaggregating revenue*, including consistency with information provided in other parts of the filing or in other forums, such as investor presentations
- *Segment reporting*, including how segments are identified or aggregated (including after a large transaction), and consistency with descriptions across disclosures

## Sample Comment

*“We note your disclosure under ‘identifying the performance obligations’ that service agreements are one performance obligation. Please help us fully understand the nature of the various products and services transferred in these agreements and explain to us how you determined that the products and services in these agreements should be combined...”*

# SEC Comment Letter Trends – Goodwill and Intangibles

8% of comments in 2019 and 2020

## Comment Focus Areas

- *Identifying reporting units*, including factors considered when multiple components have been combined into a single reporting unit due to economic similarities
- *At-risk reporting units*, including info about amount of goodwill and headroom at the unit, discussion of the key assumptions used to determine fair value, and a description of potential events that could negatively affect the key assumptions
- *Triggering events that may indicate that an interim impairment* assessment is necessary
- The *timing of goodwill and intangible asset impairment charges*

## Sample Comment

*“Given the recent and continuing decline of your market capitalization, please tell us if you performed an interim goodwill impairment test ... Also tell us if you consider, both on a current and historical basis, your sole reporting unit to be at risk of failing step one of the goodwill impairment test ... If your reporting unit is not at risk based on your most recent impairment test, please disclose this ... if your reporting unit is at risk of failing step one of the impairment test and a material impairment charge could occur, please disclose the following...”*

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## 3. Other Disclosure Focus Areas

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# Key Performance Indicators – SEC Interpretive Guidance

## Background

- In February 2020, the *SEC issued an interpretive release* providing guidance on KPIs, *reminding companies* to include such further material info, if any, necessary in order to make the presentation of any KPI, in light of the circumstances under which it is presented, not misleading

## Examples of Potentially Material Info That Should Accompany KPIs

- Clear definition and how it's calculated
- Reasons why it's useful info for investors
- How management uses it to monitor the business
- Estimates/assumptions underlying the metric or its calculation
- Description of changes in calculation/presentation from prior periods, including reasons for the changes and effect of the changes (consider also if recast is necessary)

## Other Requirements

- Disclosure should also comply *with any applicable existing regulatory framework* (e.g., any non-GAAP measure must be mindful of Reg. G and Item 10 of Reg. S-K)

# Key Performance Indicators – SEC Enforcement Action

## Background

- Around the same time as the SEC issued the February guidance, the *SEC announced charges against alcohol producer Diageo plc* for failing to make required disclosures of known trends relating to the shipments of unneeded products by its North American subsidiary to distributors

## SEC Allegations

- According to the SEC, the company *pressured distributors to buy products* in excess of demand in order to meet internal sales targets, which resulted in an increase in shipments that enabled the company to meet performance targets and to report higher growth in KPIs that were closely followed by investors and analysts
- The SEC order found that *investors were left with the misleading impression* that the company was able to achieve growth in certain KPIs through normal customer demand

## How It Was Resolved

- The company *agreed to cease and desist* from further violations and to *pay a \$5 million penalty*

# Key Performance Indicators – SEC Comment Letter

## Background

- The *Staff looks at all investor-focused communications and may comment* if a company discloses KPIs in investor presentations, on its website, and/or in a press release, but not in its SEC filings

## Sample Comment

*“We note that during your quarterly earnings calls you refer to certain key performance indicators. To the extent that the measures are key performance indicators used in managing your business, please consider revising to include a discussion of the measures in your MD&A section, along with comparative period amounts, or explain why you do not believe this disclosure is necessary. Refer to Section III.B.1 of SEC Release No. 33-8350 and SEC Release 33-10751.”*

**Takeaway:** Are you disclosing all material KPIs in your SEC filings? Are you including the info specified in recent SEC guidance for KPIs you disclose?

# COVID-19 Impact – SEC Interpretive Guidance

- **Background:** In March 2020 & June 2020, the SEC issued interpretive guidance addressing:
  - *Where, why, and how* COVID-19-related financial reporting disclosure may be warranted
  - Reiterating the heightened *risks of unlawful insider trading and selective disclosure*
  - *Flexibility to use preliminary GAAP results for non-GAAP reconciliations* for earnings releases
- **Principles-Based:** The SEC *embraced principles-based guidance*, designed to elicit company-specific disclosure based facts/circumstances
- **Specific Disclosures to Consider:** The guidance *prompts companies to consider disclosing* potential impacts of pandemic-related operational adjustments, financing activities, government assistance and other actions on the business, financial condition, liquidity, capital resources, and ability to continue as a going concern

## *April 2020 Clayton/Hinman Joint Statement*

*“We urge companies to provide as much information as is practicable regarding their current financial and operating status, as well as their operational and financial planning.”*

- Emphasized up-to-date, high quality, and detailed disclosure
- Recognized that producing forward-looking disclosures could be challenging, but stated taking on the challenge was appropriate
- Companies providing forward-looking information can *leverage FLS safe harbors* in the Securities Act and Exchange Act

# COVID-19 Impact – Best Practices and Current Trends

## Potential Places to Discuss COVID-19 Impact in 10-K

- Description of Business
- Management's Discussion & Analysis
- Known Trends and Uncertainties
- Capital and Liquidity Resources
- Internal Controls
- FLS & Risk Factors
- Financial Notes (Significant Estimates, Going Concern & Impairments)

## Risk Factors

- Many companies provide a single COVID-19 risk factor since it's easier to remove
  - Can include catch-all language that the pandemic may increase the likelihood of other risks occurring and/or worsen the impacts of those risks
- Provide clarity where possible regarding anticipated future impact
  - Having experienced almost four full quarters of impacted operations, avoid blanket statements that it is not possible to anticipate the impacts on your business

## Earnings Guidance

- At the outset of the pandemic, many companies pulled 2020 earnings guidance, but practices differ by industry based on impact (e.g., retail vs. travel & leisure)

# COVID-19 Impact – Non-GAAP Issues

- **Don't Cherry Pick**: Inappropriate for non-GAAP measures to be *used solely to provide a more positive view* of company
- **Explain Why Used**: Recent SEC guidance reminds companies to “*highlight why management finds the measure or metric useful and how it helps investors*”
- **Don't Classify as Non-Recurring if It's Not**: Questions arise as to classification as non-recurring COVID-19 costs *as the pandemic continues* across quarters
- **Don't Adjust Provisions for Expected Credit Losses**: SEC has issued comments asking companies to refrain from this

*Considerations* for an “acceptable” adjustment for COVID-19:

- ✓ Directly attributable to the pandemic
- ✓ Clearly calculable and separable
- ✓ Costs that were incremental to operations/charges before the pandemic

*Examples of appropriate adjustment items*

- Temporary premiums paid to employees
- Deep cleaning and disinfecting costs
- Contract termination fees or penalties
- Certain insurance recoveries

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## 4. Shareholder Proposals and Proxy Updates

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# “Hot” 2021 Shareholder Proposals – Overview

1

Proposals Regarding Diversity and EEO-1 Reporting

2

Diverse Candidate Search Policy for Ordinary Course Employee Hiring

3

Take Steps Necessary to Convert to a Public Benefit Corporation

4

Conduct Racial Equity Audit and Issue Report on Audit

5

Report on GHG Emissions and Conduct Annual Shareholder Advisory Vote on Emissions Reduction Plan

6

Report on Median Racial/Gender Pay Gaps

# “Hot” 2021 Shareholder Proposals – Workforce Diversity

## 1 Proposals Regarding Diversity and EEO-1 Reporting

RESOLVED: That Shareholders request that the Board of Directors adopt a policy requiring the Company to disclose on its website its Consolidated EEO-1 Report, a comprehensive breakdown of its workforce by race, ethnicity, and gender that the Company is required to submit annually to the U.S. Equal Employment Opportunity Commission (EEOC). The Company shall annually disclose its EEO-1 Report no later than 60 days after its submission.

## 2 Diverse Candidate Search Policy for Ordinary Course Employee Hiring

RESOLVED: Shareholders request that the Board of Directors of the Company adopt a policy for improving workforce diversity by requiring that the initial pool of candidates from which new employees are hired by the Company in the U.S. shall include at least one qualified woman and one ethnically or racially diverse candidate (a “Diverse Candidate Search Policy”).

# “Hot” 2021 Shareholder Proposals – Stakeholders

## 3 Take Steps Necessary to Convert to a Public Benefit Corporation

RESOLVED: That Shareholders request the Board to amend the Company’s Restated Certificate of Incorporation to become a Public Benefit Corporation pursuant to Delaware law, and to submit the amended certificate to shareholders for approval. Such a change would go further to encourage the company to operate in a responsible and sustainable manner that balances the stockholders’ pecuniary interests, the best interests of those materially affected by the corporation’s conduct, and the specific public purpose to be named in the Certificate of Incorporation.

## 4 Conduct Racial Equity Audit and Issue Report on Audit

RESOLVED: That Shareholders of the Company urge the Board of Directors to oversee a racial equity audit analyzing the Company’s adverse impacts on nonwhite stakeholders and communities of color. Input from civil rights organizations, employees, and customers should be considered in determining the specific matters to be analyzed. A report on the audit, prepared at reasonable cost and omitting confidential or proprietary information, should be publicly disclosed on the Company’s website.

# “Hot” 2021 Shareholder Proposals – Environment & Pay Equity

5

## Report on GHG Emissions and Conduct Annual Shareholder Advisory Vote on Emissions Reduction Plan

RESOLVED: That Shareholders of the Company request that the Board of Directors disclose at each annual meeting of shareholders ... a report disclosing the Company’s greenhouse gas emission levels (the “Emissions”) in a manner consistent with the Task Force on Climate-related Financial Disclosure recommendations as well as any strategy that the Company may have adopted or will adopt to reduce the Emissions in the future, including any Emissions’ progress made year over year (the “Reduction Plan”), and provide shareholders with the opportunity, at each such annual meeting (starting at the next annual meeting), to express non-binding advisory approval or disapproval of the Reduction Plan.

6

## Report on Median Racial/Gender Pay Gaps

RESOLVED: That Shareholders request that the Company report on median pay gaps across race and gender, including associated policy, reputational, competitive, and operational risks, and risks related to recruiting and retaining diverse talent. The report should be prepared at reasonable cost, omitting proprietary information, litigation strategy, and legal compliance information. Racial/gender pay gaps are defined as the difference between non-minority and minority/male and female median earnings expressed as a percentage of non-minority/male earnings (Wikipedia/OECD, respectively).

# “Hot” 2021 Shareholder Proposals – More on EEO-1 Reporting

- **NYC Comptroller Launches Campaign:** In July 2020, the NYC Comptroller sent letters to CEOs of 67 S&P 100 companies requesting that they “match their recent statements, affirming their commitments to racial equality and diversity and inclusion, with concrete action by publicly disclosing their annual EEO-1 Report data”
- **Background on EEO-1 Reports:** These nonpublic reports, which are filed with the U.S. Equal Employment Opportunity Commission, provide U.S. employee #s for 10 different employment categories based on race, ethnicity and gender
- **The “Stick”:** NYC Comptroller threatened to launch a “vote no” campaign against directors standing for re-election at the next annual meeting at companies that don’t give in to their demand
- **Results of the Campaign:** In September 2020, the NYC Comptroller announced that 34 of the 67 targeted companies have agreed to publicly report their EEO-1 data



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**Section D-EMPLOYMENT DATA**

Employment at this establishment - Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

Job Categories	Number of Employees (Report employees in only one category)														Total Col A-M
	Race/Ethnicity														
	Hispanic or Latino		Not-Hispanic or Latino												
			Male						Female						
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
Executive/Senior Level Officials and Managers	1.1														
First/Mid-Level Officials and Managers	1.2														
Professionals	2														
Technicians	3														
Sales Workers	4														
Administrative Support Workers	5														
Craft Workers	6														
Operatives	7														
Laborers and Helpers	8														
Service Workers	9														
TOTAL	10														
PREVIOUS YEAR TOTAL	11														

1. Date(s) of payroll period used: \_\_\_\_\_ (Omit on the Consolidated Report.)

# Proxy Voting Policy Updates for 2021 – ISS

Topic	Policy Update
<i>Director Elections</i>	
<b>Board diversity – race/ethnicity</b> (Russell 3K / S&P 1500)	<ul style="list-style-type: none"> <li>• <b>For 2021:</b> Will highlight absence of racial/ethnic diversity on board, but will not factor into ISS voting recommendations</li> <li>• <b>For 2022:</b> Will recommend votes against nominating committee chair on this basis (but will consider mitigating factors)</li> </ul>
<b>Environmental &amp; social risk oversight</b>	Will consider “poor risk oversight of environmental and social issues, including climate change” as a material failure to oversee risk, which could trigger an against vote on directors in “highly impactful sectors”
<b>Exclusive forum provisions</b>	Will now generally support Delaware state forum provisions plus federal forum provisions that don’t specify particular court (following recent Supreme Court decision upholding validity), and won’t criticize directors for unilateral adoption
<i>Shareholder Proposals</i>	
<b>Board refreshment</b>	Will now consider supporting case-by-case (as opposed to being against), considering proposal scope, problems at the company, historical refreshment
<b>Report on mandatory arbitration of worker claims</b>	Will now consider supporting case-by-case (as opposed to being against), considering company & peer practices, recent controversies/litigation
<i>Other</i>	
<b>Voting report publication procedures</b>	Will no longer provide provide copies of draft voting reports to S&P 500 companies to review before publication

# Proxy Voting Policy Updates for 2021 – Glass Lewis

Topic	Policy Update
<i>Director Elections</i>	
Board diversity – gender	<p>Expanded previous policy on gender diversity (expected 1+ female on boards)</p> <ul style="list-style-type: none"> <li>• <b>For 2021:</b> Will highlight lack of 2+ females on boards, but will not factor into Glass Lewis voting recommendations</li> <li>• <b>For 2022:</b> Will recommend votes against nominating committee chair due to lack of 2+ females on boards (or 1+ females on boards with &lt;7 directors)</li> </ul>
Environmental & social risk oversight	<ul style="list-style-type: none"> <li>• <b>For 2021:</b> Will note as a concern at S&amp;P 500 co’s where there is no clear public disclosure of board oversight of environmental &amp; social issues</li> <li>• <b>For 2022:</b> Will recommend votes against nominating committee chair at S&amp;P 500 co’s on this basis</li> </ul>
Board refreshment	Will now note as a concern instances where average tenure of non-executive directors is 10+ years plus no new directors in past 5 years (no against votes yet)
<i>Shareholder Proposals</i>	
Workforce diversity reporting	Will now generally support proposals requesting EEO-1 reporting, and will no longer consider industry/operations in evaluating these proposals
Climate change reporting	Will now generally support proposals requesting climate reporting, and will no longer consider industry in evaluating these proposals, but will continue to take into account, e.g., climate impact, board oversight, company/peer practices
Climate change lobbying	Will now generally support proposals requesting info on climate change lobbying activities, but not proposals limiting participation in trade associations

# Proxy Voting Policy Updates for 2021 – Glass Lewis

Topic	Policy Update
<i>Say on Pay</i>	
<b>Short-term incentives</b>	<ul style="list-style-type: none"><li>• Has codified additional factors it will consider in assessing bonus plans, including clearly disclosed justifications for significant changes to structure and instances where performance goals are lowered from prior year</li><li>• Will now consider retroactively prorated performance periods, along with lowering the goals mid-year and increasing payouts, as “upward discretion” in the plan</li></ul>
<b>Long-term incentives</b>	<ul style="list-style-type: none"><li>• Will consider insufficient emphasis on performance-based awards in overall comp mix (i.e., % allocation), including any significant roll backs from historical practice, as a criteria that may contribute to a negative voting recommendation</li><li>• Clarified expectation of seeing clearly disclosed explanations around equity grant practices, significant structural changes, and any use of upward discretion</li></ul>

# Other Proxy Updates – Shareholder Proposal Rule Changes

## Background

- SEC approved September 2020 amendments to shareholder proposal rule, which allows shareholders to include their proposals in company proxy materials
- Effective for 2022 proxy season

## Changes to Eligibility Requirements

- Currently a shareholder proponent must continuously have held at least \$2k or 1% of shares for at least 1 year
- Amendments replace with 3 min. thresholds: at least (i) \$2k of shares for at least 3 years; (ii) \$15k of shares for at least 2 years; or (iii) \$25k of shares for at least 1 year
- Transition period until 2023 for shareholders who continue to satisfy \$2,000 threshold

## Additional Procedural Requirements

- Use of representative to submit proposal requires add'l authorization documentation
- Proponents must state availability to meet with company following submission
- Tougher “one proposal” limits

## Increases to the Resubmission Thresholds

- Currently a company may exclude a proposal if a similar one was last included in the proxy materials in the prior 3 years and if, the last time it was included, it received below a certain level of support
- Amendments revised these thresholds as follows:
  - If proposed once within the last 5 years, <3% support was changed to <5%
  - If proposed twice within the last 5 years, <5% support was changed to <15% support
  - If proposed 3 or more times within the last 5 years, <10% support was changed to <25% support

# Other Proxy Updates – Virtual Meeting Developments

## Recap of 2020

- The 2020 proxy season saw dramatic shift from in-person to virtual annual meetings due to COVID-19
  - 1,494 meetings hosted by Broadridge between January 1 – June 30, almost all were audio-only
  - Where shareholder proposals were considered, the average meeting duration was 34 minutes, average attendance was 146 shareholders/guests, average # of shareholders voting “live” at the meeting was 14, and average # of questions asked was 19 (with the highest being 316 questions)
- Lessons learned from the 2020 experience included tech issues, Q&A practices, and shareholder proposal presentation ... Broadridge recently announced platform enhancements to address some of these

## Looking Ahead to 2021

- Companies got relief in 2020 due to COVID-19; however, different expectations in 2021
  - Certain groups like the Council of Institutional Investors (CII) still expressed significant concerns about the ability of shareholders to directly question management and the board
  - Glass Lewis relaxed its expectations for meetings held last year, but this coming year its standard policy will be in effect, meaning it expects to see robust proxy disclosure addressing shareholder participation in the virtual meeting (or else will recommend against the nominating committee chair)
- Companies holding virtual meetings in 2021 may need to implement certain “best practices” in order to avoid criticism (e.g., provide a live video feed of meeting presenters, allow shareholders to ask questions over a live phone line, commit to posting answers to all Q&A on website after the meeting)

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# 5. Corporate Governance Developments

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# Increasing Focus on Board Oversight of ESG

## Board Oversight of ESG Matters

- Evolving board oversight structures – new committees on ESG vs. expanded role of compensation committees reflected in new titles (“HR and Compensation Committee”)
- Increased disclosure of the board’s oversight role
  - EY 2019 study: 40% of companies surveyed included general disclosure of board/committee oversight of HCM matters
  - Investors increasingly ask for the board to describe how they oversee management of key ESG risks
  - Includes disclosure of board’s role in reviewing corporate ESG disclosures

## ESG Disclosures on Director/Board Matters

- Increased calls for disclosure of individual director diversity
  - Alternative to aggregate disclosures, such as “xx% of the board is ethnically diverse”
  - Leading to increase in diversity questions in D&O questionnaires
- Related to push for adoption of governance policies to increase board diversity – e.g., Rooney Rule

# Board Diversity Issues – California Legislation Overview

## New California Laws

Boards of CA-headquartered companies now required to have minimum specified # of female and minority directors

- Gender diversity quotas, enacted September 2018, went into effect beginning 2019
- Minority diversity quotas, enacted September 2020, go into effect beginning 2021

## Compliance Phase-in

*By 12/31 of each year*

Board size	# Female		# Racially Diverse	
	<u>Initial</u> (2019)	<u>Full</u> (2021)	<u>Initial</u> (2021)	<u>Full</u> (2022)
1-4	1	1	1	1
5	1	2	1	2
6-8	1	3	1	2
9+	1	3	1	3

## Next Steps

Both laws are subject to ongoing legal challenges, but companies are encouraged to develop a compliance strategy

- Unclear whether litigation will be successful, and the court has dismissed one of the gender law challenges
- Regardless of the litigation outcome, board diversity continues to be a focus area for investor community

**Don't wait to start thinking about a compliance strategy**

# Board Diversity Issues – California Legislation Details

## FAQs on the New Laws

- **Who is required to comply?**  
All publicly held companies (defined as a company listed on a major U.S. stock exchange) either (1) incorporated in CA, or (2) whose principal executive offices (as indicated on Form 10-K cover page) are located in CA (no matter where they are incorporated)
- **What is required for compliance?**  
Ensure the board of directors has the required minimum # of female directors and directors who self-identify as underrepresented minorities by 12/31 of applicable years + going forward, as indicated on prior slide
- **What are companies' reporting obligations?**  
Companies are required to indicate compliance on the annual Corporate Disclosure Statement due to California within 150 days of fiscal year end (currently only applies w/r/t gender, but expected to be amended to apply to underrepresented minorities)
- **What are the penalties for violating these laws?**  
If the Secretary of State adopts regulations (not yet adopted, nor proposed), for each law and potentially for each year: (i) \$100k for failure to timely file board member information, as indicated above, (ii) \$100k for the first “missing” female/minority director, and (iii) \$300k for each additional “missing” female/minority director

## Underrepresented Minorities

*Generally aligned with EEO-1 reporting categories*

- Black
- African American
- Hispanic
- Latino
- Asian
- Pacific Islander
- Native American
- Native Hawaiian
- Alaska Native
- Gay, Lesbian, Bisexual, Transgender

# Board Diversity Issues – California Legislation Litigation

## Two Lawsuits Challenging Gender Diversity Law

- **Federal court challenge:** Litigation filed in Eastern District Court of CA by shareholder of CA-HQ'd company alleging law unconstitutional under equal protection clause; court dismissed case this past April on procedural grounds that shareholder lacked standing to sue; plaintiff has appealed to Ninth Circuit Court of Appeals
- **State court challenge:** Litigation filed in Los Angeles County Superior Court by conservative activist group Judicial Watch on behalf of CA taxpayers seeking an injunction prohibiting the CA Secretary of State from enforcing the law; court ruled in June that plaintiffs have standing to sue, and parties are now in discovery

## One Lawsuit Challenging Racial Diversity Law

- **State court challenge:** The same group challenging the gender diversity law in state court (Judicial Watch) has filed parallel litigation challenging the racial diversity law on similar grounds; lawsuit was filed September 30

Both diversity laws are currently subject to pending legal challenges,  
unclear at this point how they'll fare

# Board Diversity Issues – Increasing Investor Focus

## Institutional Investors

**BLACKROCK**

On case-by-case basis, may vote against boards without 2+ female directors



**STATE STREET**

Votes against boards without 1+ female director; started “Fearless Girl” campaign

## Proxy Advisory Firms

**ISS**

Votes against boards without 1+ female; starting 2022, votes against boards without 1+ minority director; launched new U.S. Diversity Index

**GLASS LEWIS**

Votes against boards without 1+ female; starting 2022 votes against boards without 2+ females

## Shareholder Proposal Proponents



**NEW YORK CITY COMPTROLLER**

2020 campaign seeking “Rooney Rule” commitment to include female & minority candidates in all director searches (or face shareholder proposal)

## Shareholder Litigants



Litigation

In July '20, plaintiff's firms began targeting large co's (primarily tech) in derivative suits over lack of racial diversity on board ... at least 8 suits filed

## Trends Among S&P 500

*Source: Spencer Stuart 2020 U.S. Board Index & PwC 2020 Annual Corporate Director Survey*

### Board diversity in '20...

**95%** have 2+ females, vs. 56% in '10

**97%** have 1+ minority, vs. 89% in '10\*

### Directors added in '20...

**47%** female, vs. 46% in '19

**22%** minority, vs. 23% in '19

### Directors supportive of...

**81%** search firm always offer diverse slate

**82%** implementing Rooney Rule policy

\* Top 200 (by revenue) of S&P 500

# Board Diversity Issues – Nasdaq Proposal

## Background

- On December 1, 2020, Nasdaq filed a proposal with the SEC to advance board diversity and enhance transparency of board diversity statistics through new listing requirements

## What It Would Require

- New “comply or disclose” framework requiring Nasdaq-listed companies to either (1) have requisite number of “diverse” directors, or (2) publicly disclose why the board does not satisfy. SEC approval required before rule goes into effect. Specifically, the requisite number of diverse directors is:
  - Within 2 years of SEC approval: 1+ diverse director
  - Within 5 years of SEC approval: 2+ diverse directors (1 female director plus 1 minority director, regardless of board size)
- Foreign private issuers and smaller reporting companies would have more flexibility on this

## Who Would Count as “Diverse”

- Similar to the CA laws, any director who self-identifies as Female, Underrepresented Minority, or LGBTQ+

## Reporting Obligations

- Starting 1 year after SEC approval, Nasdaq companies must annually disclose in the proxy or on the website diversity statistics regarding directors’ voluntary self-identified characteristics

“Our goal with this proposal is to provide a transparent framework for Nasdaq-listed companies to present their board composition and diversity philosophy effectively to all stakeholders; we believe this listing rule is one step in a broader journey to achieve inclusive representation across corporate America.”

-Adena Friedman, President and CEO, Nasdaq

# Board Diversity Issues – Focus Expanding to Workforce

## BlackRock

“Over the past few months, many companies have made public statements of intent regarding diversity targets and racial equity. As Larry Fink communicated in June 2020, ‘To better serve our clients, we will focus on racial equity and social justice in our investment and stewardship activities.’ ***We are committed to advocating for more robust disclosures to better understand how companies are working deliberately to deliver an inclusive and diverse work environment. We look to boards to assess a company’s progress on this goal and to hold executive leadership accountable*** if they fall short in supporting the needs and meeting the expectations of their employees.”

-BlackRock Investment Stewardship Annual Report (September 2020)

## Vanguard

“This proxy season, we saw more proposals asking for diversity disclosures that extend beyond the boardroom. As these types of proposals have evolved, so has our thinking on this topic. ***We have long believed in the importance of diversity in the boardroom.*** The effective boards of today and tomorrow – and the workforces they oversee – should reflect all facets of diversity. ***We have encouraged boards to disclose their perspectives on this topic and have begun encouraging them to be more transparent about other workplace diversity metrics.***”

-Vanguard Investment Stewardship (2020 Annual Report)

## State Street

“The ongoing issue of racial equity has caused us to focus more closely on the ways in which racial and ethnic diversity impacts us as investors. As such, we are writing to inform you that ***starting 2021, State Street Global Advisors will ask companies to articulate their risks, goals and strategy as related to racial and ethnic diversity, and to make relevant disclosures available to shareholders*** ... As long-term investors, ***we are convinced that lack of racial and ethnic diversity and inclusion poses risks to companies that senior managements and boards should understand and manage.***”

-Global Chief Investment Officer Rick Lacaille Letter to Board Chairs (August 2020)

# Overboarding Issues

## Background

- The time directors are able to commit to their board duties remains an area of focus for investors and proxy advisory firms

## What's Changed

- Director bandwidth has become even more critical in light of:
  - Increased board oversight role vis-à-vis E&S matters
  - Board role in crisis response and preparedness due to COVID-19 impacts
- Time commitment concerns are pronounced for directors who currently serve in executive roles – especially sitting CEOs

## Current Market Expectations

Investor	Maximum # Public Company Boards		
	Public Co CEO	Chair/Lead Director	Other Directors
BlackRock	2*	4	4
Vanguard	2*+	4	4
State Street	2*	3	4
ISS	3+	5	5
Glass Lewis	2*	5	5

\*Applies to public company proxy officers (not just CEO)

+Only permits 1 or 2 in addition to where director is CEO/NEO

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# Biographies

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# Daniela Stolman

2029 Century Park East, Los Angeles, CA 90067-3026  
Tel: +1 213.229.7875  
DStolman@gibsondunn.com



*Daniela L. Stolman is a partner in Gibson Dunn's Century City office and a member of the firm's Securities Regulation and Corporate Governance, Capital Markets, Mergers and Acquisitions and Private Equity practice groups.*

Ms. Stolman has extensive experience as a corporate securities and governance lawyer. She advises public companies with respect to securities regulation and corporate governance matters, including periodic reporting and disclosure matters, Section 16, Rule 144, and insider trading. She also advises companies and private equity firms across a wide range of industries, focusing on public and private merger transactions, stock and asset sales, and public and private capital-raising transactions. She has been named as a Rising Star by *Southern California Super Lawyers* since 2014. *The Deal* also named her as a Rising Star, which recognizes new M&A partners who are "deemed by *The Deal* to be one of the most promising of 2019." She was named a 2019 Rising Star by *Law360* for private equity. The list recognizes "attorneys under 40 whose legal accomplishments transcend their age."

Ms. Stolman received her law degree in 2006 from the University of Southern California Law School, where she was elected to the Order of the Coif and was a Senior Editor of the *Southern California Law Review*. She earned a Bachelor of Arts degree in history and economics, *magna cum laude*, from the University of Pennsylvania in 2002.

Ms. Stolman is admitted to practice law in the State of California.

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# Michael A. Titera

3161 Michelson Drive, Irvine, CA 92612-4412  
Tel: +1 949.451.4365  
MTitera@gibsondunn.com



*Mike Titera is a partner in the Orange County office of Gibson, Dunn & Crutcher and a member of the Firm's Securities Regulation and Corporate Governance Practice Group.*

His practice focuses on advising public companies regarding securities disclosure and compliance matters, financial reporting, and corporate governance. Mr. Titera often advises clients on accounting and auditing matters and the use of non-GAAP financial measures. He also has represented clients in investigations conducted by the Securities and Exchange Commission and the Financial Industry Regulatory Authority.

Mr. Titera's clients range from large-cap companies with global operations to small-cap companies in the pre-revenue phase. His clients operate in a range of sectors, including the retail, technology, pharmaceutical, hospitality, and financial services sectors.

Mr. Titera is a frequent author on a range of securities law issues. His recent publications include articles in *Insights* and *Deal Lawyers*. Mr. Titera also co-authors a chapter regarding audit committees in the treatise "A Practical Guide to SEC Proxy and Compensation Rules" and contributed to a chapter about accounting-related matters in "Director's Handbook: A Field Guide to 101 Situations Commonly Encountered in the Boardroom," a recent publication of the American Bar Association.

Mr. Titera received his law degree in 2009 from the UCLA School of Law, where he was elected to the Order of the Coif. He earned a Bachelor of Science degree *magna cum laude* in Accountancy from Brigham Young University in 2006.

Mr. Titera is admitted to practice law in the State of California and the District of Columbia.

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# Aaron K. Briggs

555 Mission Street, San Francisco, CA 94105-0921  
Tel: +1 415.393.8297  
ABriggs@gibsondunn.com



*Aaron Briggs is of counsel in Gibson Dunn's San Francisco, CA office, where he works in the firm's securities regulation and corporate governance practice group.*

Mr. Briggs' practice focuses on advising public companies of all sizes (from pre-IPO to mega-cap), with a focus on technology and life sciences companies, on a wide range of securities and governance matters, including: SEC compliance, corporate governance, ESG and sustainability, investor engagement, annual meetings, shareholder activism, and executive compensation.

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

In 2016, *Corporate Secretary Magazine* named Mr. Briggs Governance Professional of the Year. Mr. Briggs' work has also been recognized by Financial Executives International, ReportWatch, Sustainability Investment Leadership Council, and TheCorporateCounsel.net. Mr. Briggs is a frequent speaker on governance, proxy, and securities disclosure panels and is a member of the Society for Corporate Governance.

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

Mr. Briggs is admitted to practice law in the State of California.

# Our Offices

## Beijing

Unit 1301, Tower 1  
China Central Place  
No. 81 Jianguo Road  
Chaoyang District  
Beijing 100025, P.R.C.  
+86 10 6502 8500

## Brussels

Avenue Louise 480  
1050 Brussels  
Belgium  
+32 (0)2 554 70 00

## Century City

2029 Century Park East  
Los Angeles, CA 90067-3026  
+1 310.552.8500

## Dallas

2001 Ross Avenue, Suite 2100  
Dallas, TX 75201-2923  
+1 214.698.3100

## Denver

1801 California Street  
Denver, CO 80202-2642  
+1 303.298.5700

## Dubai

Building 5, Level 4  
Dubai International Finance Centre  
P.O. Box 506654  
Dubai, United Arab Emirates  
+971 (0)4 370 0311

## Frankfurt

TaunusTurm  
Taunustor 1  
60310 Frankfurt  
Germany  
+49 69 247 411 500

## Hong Kong

32/F Gloucester Tower, The Landmark  
15 Queen's Road Central  
Hong Kong  
+852 2214 3700

## Houston

1221 McKinney Street  
Houston, TX 77010  
+1 346.718.6600

## London

Telephone House  
2-4 Temple Avenue  
London EC4Y 0HB  
England +44 (0) 20 7071 4000

## Los Angeles

333 South Grand Avenue  
Los Angeles, CA 90071-3197  
+1 213.229.7000

## Munich

Hofgarten Palais  
Marstallstrasse 11  
80539 Munich  
Germany  
+49 89 189 33-0

## New York

200 Park Avenue  
New York, NY 10166-0193  
+1 212.351.4000

## Orange County

3161 Michelson Drive  
Irvine, CA 92612-4412  
+1 949.451.3800

## Palo Alto

1881 Page Mill Road  
Palo Alto, CA 94304-1125  
+1 650.849.5300

## Paris

166, rue du faubourg Saint Honoré  
75008 Paris  
France  
+33 (0)1 56 43 13 00

## San Francisco

555 Mission Street  
San Francisco, CA 94105-0921  
+1 415.393.8200

## São Paulo

Rua Funchal, 418, 35º andar  
Sao Paulo 04551-060  
Brazil  
+55 (11)3521.7160

## Singapore

One Raffles Quay  
Level #37-01, North Tower  
Singapore 048583  
+65.6507.3600

## Washington, D.C.

1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036-5306  
+1 202.955.8500