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CONSIDERATIONS FOR PREPARING YOUR 2020 FORM 10-K

To Our Clients and Friends:

As we do each year, we offer our observations on new developments and recommended practices for calendar-year filers to consider in preparing their Form 10-K. In addition to the many challenges of the past year, the U.S. Securities and Exchange Commission ("SEC") adopted and provided guidance on a number of changes to public company reporting obligations impacting disclosures in the 10-K annual report for 2020. In particular, we discuss the recent amendments to Regulation S-K, disclosure considerations in light of COVID-19, a number of technical considerations that may impact your Form 10-K annual report, and other considerations in light of recent and pending changes in the executive branch and at the SEC.

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I. Amendments to Regulation S-K Requirements

A. Amendments to 100 Series of Regulation S-K Requirements (Part I of Form 10-K)

As discussed in our prior client alert,[1] in August 2020, the SEC adopted amendments to Item 101 (Description of Business), Item 103 (Legal Proceedings) and Item 105 (Risk Factors) designed to result in improved disclosure that is tailored to reflect a company's particular circumstances (the "Business Disclosure Amendments").[2] These rules went into effect on November 9, 2020, making the upcoming Form 10-K the first SEC filing for which most calendar-year filers will need to implement these new rules.

1. Business (Part I, Item 1 of For 10-K)

The recent amendments to Item 101 of Regulation S-K (Description of Business) introduce flexibility by replacing certain prescriptive requirements with a more principles-based approach. The amendments also introduce a new area of focus: human capital management.

a. General Development of Business

Principles-based approach. Item 101(a) of Regulation S-K focuses on the general development of a company's business. The Business Disclosure Amendments make the general development of business disclosure more principles-based: first, by providing a non-exclusive list of topics that a company may need to disclose; and second, by requiring disclosure of a topic only to the extent such information is material to an understanding of the general development of a company's business.

General development disclosure topics. Three of the four disclosure topics in the non-exclusive list should be familiar to companies from the pre-amendment requirements: (1) bankruptcy or similar proceedings; (2) material reclassification or mergers, and (3) acquisitions / dispositions of material amount of assets. The fourth (new) topic relates to material changes to a previously disclosed business strategy. In its final rule, the SEC declined to define "business strategy" in order to allow companies to tailor such disclosure as appropriate for their business. The SEC emphasized that the new principles-based approach to this disclosure should mitigate any disincentives in disclosing a business strategy as companies have the flexibility to determine the appropriate level of detail for such disclosure based on materiality.

No longer required. The Business Disclosure Amendments delete the requirement in Item 101(a) of Regulation S-K to disclose the company's year and form of organization and any material changes in the mode of conducting business. In addition, the Business Disclosure Amendments eliminate the five-year prescribed timeframe for disclosure of general developments of the business, allowing companies to focus on the aspects of the development of their business they deem material, regardless of when the developments occurred.

Updates only in lieu of full discussion. The Business Disclosure Amendments eliminate the requirement to provide a full discussion of the general developments of the business each time Item 101 disclosure is required. Instead a company can provide "an update to the general development of its business, disclosing all of the material developments that have occurred since the most recent registration statement or report that includes a full discussion of the general development of its business." If the company provides these updates only, it must also incorporate by reference (including an active hyperlink) the relevant disclosure from such registration statement or report with the latest full discussion of the general development of the business. The SEC staff has explained that it anticipates that this updating method will apply mainly to registration statements.[3] Companies are cautioned that using the updating method in a Form 10-K is likely to cause incorporation issues for registration statements and subsequent Form 10-K filings. Accordingly, including a full description, as opposed to providing an update, is a cleaner, simpler approach that is likely no more burdensome than merely disclosing updates.

b. Description of Business

Principles-based approach. Continuing with the principles-based approach, Item 101(c) of Regulation S-K was also updated to provide a non-exclusive list of the types of information that a company may need to disclose if material to an understanding of the business. This approach is in lieu of the 12 enumerated disclosure topics, some of which the SEC noted may not be relevant to all companies. Item 101(c) now focuses on seven disclosure topics, and continues to distinguish between topics for which segment disclosure should be the primary focus, and those for which the focus should be on the company's business taken as a whole. It should be noted that under the principles-based approach, companies would have to provide disclosure about any other topics regarding their business as well if they are material to an understanding of the business and not otherwise disclosed. A discussion of the seven topics is set forth below.

Segment-level disclosure topics. For the following topics, companies should provide this information with a focus on their reporting segments. Note that when describing each segment, only information material to an understanding of the business taken as a whole is required.

1. "Revenue-generating activities, products and/or services, and any dependence on revenue-generating activities, key products, services, product families or customers, including governmental customers."

This principles-based requirement replaces the prior line-item requirements related to (i) principal products and services and principal markets and methods of distribution, (ii) quantitative disclosure around the percentage of total revenue attributable to a class of product or services, and (iii) disclosure of key customers. Companies should take this opportunity to carefully comb through the disclosures that have historically been included in the Business section to confirm that the information and any metrics provided are still material and to determine whether it would be appropriate to add disclosure regarding any additional revenue-generating activities. Some companies may determine that continued disclosure of the information required by the former prescriptive requirements (e.g., ≥10% customers) is still an appropriate way to communicate the extent to which certain revenue-generating activities are material to an understanding of the business.

> 2. "Status of development efforts for new or enhanced products, trends in market demand and competitive conditions."

This principles-based requirement replaces the current line-item requirements related to (i) status of a new product or services and (ii) competitive conditions in the business. Companies should be mindful of the requirement to disclose trends in market demand to the extent material to an understanding of the business. While discussion of such trends has been required under the MD&A rules, this is the first time trend information has been specifically called for in the Business section. Among other things, it may be important for companies to think through broader societal trends (e.g., increased use of social media, increased use of and access to big data, increased focus on environmental, social, and governance issues, etc.) and whether those are a material to an understanding of the business.

> 3. "Resources material to a [company's] business, such as: (a) sources and availability of raw materials; and (b) the duration and effect of all patents, trademarks, licenses, franchises, and concessions held."

This principles-based requirement is more broad than the prior line-item requirements related to raw materials and intellectual property, asking about resources generally and using those specific items as examples. Companies should think through the resources required to run their businesses (e.g., to determine whether any of those merit additional attention). The previous focus on raw materials made sense in the context of manufacturing, but with an increasing number of digitally focused businesses, resources such as information and technology are becoming increasingly important.

> 4. "A description of any material portion of the business that may be subject to renegotiation of profits or termination of contracts or subcontracts at the election of the Government."
>
> This requirement remained unchanged from the prior line-item requirement.
>
> 5. "The extent to which the business is or may be seasonal."

This requirement remained unchanged from the prior line-item requirement.

Company-Level Disclosure Requirements. For the following topics, companies should provide this information to the extent material to an understanding of the business taken as a whole. Note that if the topic is material to a particular segment, then information should be provided with respect to that segment.

> 6. "The material effects that compliance with government regulations, including environmental regulations, may have upon the capital expenditures, earnings and competitive position of the [company] and its subsidiaries, including the estimated capital expenditures for environmental control facilities for the current fiscal year and any other material subsequent period."

While all companies are impacted by government regulation to one extent or another, not all companies will determine that their compliance with those regulations materially affects their capital expenditures, earnings, or competitive position, so we expect a portion of companies to not provide any new disclosure

in response to this requirement. Even before the Business Disclosure Amendments, it was relatively common for companies, especially those in highly regulated industries, to provide a summary of applicable government regulations. When including a discussion of government regulations for the upcoming Form 10-K filing, companies should consider that the mention of a regulation may suggest that the company views compliance with that regulation as having a material effect on the company. A laundry list of every regulation impacting the company is not required.

> 7. "A description of the [company's] human capital resources, including the number of persons employed by the [company], and any human capital measures or objectives that the [company] focuses on in managing the business (such as, depending on the nature of the [company's] business and workforce, measures or objectives that address the development, attraction and retention of personnel)."

The new disclosure topic regarding human capital received particular attention at the meeting at which the rules were adopted, and we expect this topic and related disclosure will continue to evolve. A discussion of this new topic is set forth below.

c. Spotlight on Human Capital Disclosure

In addition to retaining the former prescriptive requirement to disclose the number of employees, the Business Disclosure Amendments now impose a principles-based requirement to describe the company's "human capital resources . . . and any human capital measures or objectives that the [company] focuses on in managing the business." Although the disclosure is required "to the extent material to an understanding of the business," it will be rare for a company to conclude such disclosure is not material to the business.

The rules do not include any specific reporting framework or define "human capital" instead leaving it to companies to determine what information about human capital resources is material to an understanding of the business. The new rule emphasizes that disclosure will vary depending on the nature of the company's business and workforce. The disclosure should not be boilerplate and should be relevant to each company's facts and circumstances. When preparing your human capital disclosure, reviewing disclosures from companies in the same industry will be the most helpful. Disclosure by a small professional services company headquartered in a major US city will be different than disclosure by a multinational manufacturer of consumer goods that primarily employs low wage workers, because their human capital resources will be vastly different, as will the measures and objectives they employ.

Getting Started. Before putting pen to paper on these human capital disclosures, management should begin the process by reviewing the following:

1. Existing internal and external statements regarding key human capital resources, measures, and objectives (e.g., proxy statement, website, recruiting materials, ESG reports, internal memos, PR videos, employee handbooks);
2. Past and current discussions at the board and executive level regarding human capital topics;
3. Past engagement with and input from shareholders on this topic; and

4. The list of disclosure topics suggested by the SEC. Specifically, depending on the nature of the company's business and workforce: measures or objectives that address the development, attraction and retention of personnel.

Description of Human Capital Resources. The first requirement is to describe the company's human capital resources. Who are the people who make the products or provide the services that generate revenues for the company? There are many different ways in which a company can describe its work force, and the description should be relevant to understanding the company's business as a whole. If, for example, the company has two segments, one of which entails manufacturing products in China and Mexico and the other is providing consulting services to Silicon Valley and Wall Street, then the workforces of these two segments will be very different and may need to be described separately. Companies should also be mindful of what they have said about the composition of their workforce in their CEO pay ratio disclosures.

Examples of Measures and Objectives. While the Business Disclosure Amendments stress the need for each company to consider how to make its human capital disclosure specific to its industry and workforce approach and relevant to its unique facts and circumstances, the proposing release and public comments referred to in the adopting release shed light on potential measures or objectives that might be material and worth discussing, including:

- worker recruitment, employment practices and hiring practices;
- employee benefits and grievance mechanisms;
- employee engagement or investment in employee training;
- strategies and goals related to human capital management;
- legal or regulatory proceedings related to employee management;
- whether employees are covered by collective bargaining agreements;
- employee compensation or incentive structures;
- 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;
- information regarding human capital trends, such as competitive conditions and internal rates of hiring and promotion;
- measures regarding worker productivity;
- measures of employee engagement; and
- workplace health and safety measures.

The amended rule requires disclosure of the number of employees. In addition, companies that run their business through a workforce that includes persons who are not technically employees (e.g., consultants

or management services arrangements) should discuss those non-employee workforce arrangements and the management of that human capital.

Companies should also discuss the progress that management has made with respect to any objectives it has set regarding its human capital resources. Former Chairman Clayton commented that he would expect companies to "maintain metric definitions constant from period to period or to disclose prominently any changes to the metrics."

We have monitored human capital disclosures made by S&P 500 companies since the effective date of the rule through the date of this alert. Based on that benchmarking, common focus areas we have seen addressed include (parenthetical represents the number of companies which included the topic):

- Talent attraction, development and retention (28): Focus on overarching human capital, talent recruitment, retention strategies and goals; talent development; succession planning.
- Diversity (22): Discussion of disclosure and inclusivity programs.
- Workforce statistics (20): Breakdown of employee base by employee classification (full-time, part-time, contractor) and geography; Turnover rates; Diversity representation stats (e.g., % male/female, % minority, etc.). Not all companies include each statistic noted above.
- Employee compensation (19): Compensation/incentive mechanisms; potentially pay equity.
- Health and safety (18): Workplace safety; Employee mental health.
- Culture and engagement (17): How a company monitors its workplace culture; Culture initiatives taken by the company.
- COVID-19 (15): Health and safety of employees in light of COVID-19 and work from home measures.
- Governance (10): Organizational and governance structure through which human capital is managed (C-suite level) and overseen (board level).

Consider Investors and Other Stakeholders. Human capital has rapidly emerged as a growing focus area for stakeholders, which means companies cannot simply consider what is required to comply with SEC rules. In a 2020 survey, 64% of institutional investors said they would focus on human capital management when engaging with boards (second only to climate change, at 91%).[4] BlackRock's approach to engagement on human capital highlights one reason for this focus: "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 for the workers on whom they depend."[5]

Expect an Evolution of Disclosures. We expect human capital disclosures to evolve over time and companies should be prepared to develop their disclosure over the course of the next couple 10-Ks. In the initial year, companies may opt for conservative disclosure, adding additional disclosure as appropriate in subsequent years as they observe peer practices or to address regulatory changes. You

should not be surprised by a growing group of companies that will disclose granular details about human capital, not necessarily because it is material to the company, but because they might perceive other advantages in doing so. We anticipate that the SEC will be focused on this disclosure as part of the comment letter process. In the first year, the SEC staff likely to go after low-hanging fruit (e.g., companies that omit human capital disclosure altogether), but in subsequent years, as industry practices develop, we may see the SEC staff probe deeper into what information is material and should be disclosed in certain industries. The SEC staff may also issue a report of observations regarding human capital disclosure in the first year.

In addition, the recent change in the administration and shift to a Democrat-controlled SEC, as well as increasing attention placed by institutional investors on ESG matters, may result in additional requirements for companies in this area. In this regard, we note that the two Democrat Commissioners' dissent from the adoption of the amended rules pushed back on the principles-based approach and noted the lack of specific disclosure requirements concerning ESG matters and prescriptive requirements for metrics on diversity, climate change and human capital. As further evidence of the SEC likely focus on the area, a senior position was added to the Office of the Chairman devoted exclusively to ESG matters.

2. Legal Proceedings (Part I, Item 3 of Form 10-K)

The Business Disclosure Amendments provided two helpful updates to legal proceedings disclosure. While the requirement of Item 103 of Regulation S-K to disclose any material pending legal proceedings, other than ordinary routine litigation incidental to the company's business, has not changed, the Business Disclosure Amendments expressly allow a company to provide the information required by Item 103 by hyperlink or cross-reference to disclosure located elsewhere in the document. This approach confirms a common practice by many companies to cross-reference to the duplicate or similar disclosure in the notes to the financial statements.

The second update to Item 103 raised the threshold for disclosure of governmental environmental proceedings. Previously, companies were required to disclose environmental proceedings involving potential monetary sanctions of $100,000 or more. That threshold has been raised to $300,000 to adjust for inflation. However, in line with its principles-based approach to business disclosure, the Business Disclosure Amendments acknowledge that a bright-line threshold may not be indicative of materiality on a company-specific basis and therefore allow a company to establish a different disclosure threshold as high as $1 million (or, if lower, one percent of the current assets of the company). Interpretive guidance may be required to confirm whether disclosure of this alternative threshold for environmental proceedings must be disclosed even when the company has no such proceedings to report, or only when a proceeding involves sanctions exceeding the $300,000 threshold. Disclosing the dollar amount of a company-determined materiality threshold is not currently a common practice.

3. Risk Factors (Part I, Item 1A of Form 10-K)

Companies are no doubt familiar with the prior Item 105 of Regulation S-K requirement to disclose the most significant factors that make investing in the company speculative or risky. Developments in

securities litigation and risk profiles have caused risk factor disclosure to grow over the years. The Business Disclosure Amendments attempt to curb the ever-expanding list of risk factors in three ways.

a. Organization of Risk Factors under Headings

Companies are required to organize logically their risk factors into groups under headings that adequately describe the type of risk. Many companies already breakdown their risk factors into 3-4 categories, with some companies presenting subcategories. Examples of such categories include "Risks Related to our Business", "Risks Related to our Assets", "Legal and Regulatory Risks", "Financial Risks" and "Market Risks." With the focus on discouraging lengthy disclosure of generic risk factors, the Business Disclosure Amendments emphasize that the presentation of risks that could apply generically to any company is discouraged; however, to the extent any such risk factors are presented, they must be disclosed at the end of the risk factor section under the caption "General Risk Factors."

b. "Materiality" Replaces "Most Significant" Standard

Continuing with the effort to reduce the use of generic risk factors and shorten the risk factor disclosure, the Business Disclosure Amendments change the standard for disclosure from the "most significant" factors to factors that are "material." The adopting release expresses the view that this will result in risk factor disclosure more tailored to a company's facts and circumstances, with a focus on the risks to which reasonable investors would attach importance in making investment or voting decisions. For most companies, this is unlikely to result in a major overhaul of their risk factors, but rather a review of current disclosure to confirm it is consistent with the new materiality standard.

c. Risk Factor Summary

The third update to Item 105 of Regulation S-K added a requirement that, if the risk factor disclosure exceeds 15 pages, the company must provide a series of concise, bulleted or numbered statements that is no more than two pages summarizing the principal factors that make an investment in the company speculative or risky. The adopting release noted that "the requirement to provide a risk factor summary may create an incentive for companies to reduce the length of their risk factor discussion to avoid triggering the summary requirement." Companies who have already filed their Forms 10-K with risk factor summaries have generally listed the captions or abbreviated versions of the captions of their risk factors. Companies are not required to list all of the risk factors in the bulleted list.

If a risk factor summary is required, it must be included in "the forepart of the … annual report." There is no clear guidance on what is considered the "forepart" of Form 10-K. Placement of the summary in pages preceding Item 1 (Business) seems most consistent with the spirit of the requirement; however, we have also seen the summary included at the beginning of Item 1A (Risk Factors).

d. Cautionary Note about Hypothetical Language

As a reminder for companies when reviewing risk factors for the recent changes, two enforcement cases brought by the SEC in 2019 emphasized the need to revisit risk factor disclosure regularly and treat it as "living" as much as the rest of the Form 10-K. Companies should thoroughly review their risk factor

disclosures so that the disclosures 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. Companies should be careful with how they describe significant events (e.g., material cyber breaches, material events impacting operating results) as well as more routine items (e.g., fluctuations in demand, inventory write-downs, customer reimbursement claims, intellectual property claims, poorly performing investments, and tax audits). If a risk involves a situation that arises from time to time, then it would likely be preferable to refer to the consequences of such situation as a material contingency, instead of referring to the situation as a hypothetical contingency.

B. Amendments to 300 Series of Regulation S-K Requirements (Part II of Form 10-K)

On November 19, 2020, the SEC announced[6] that it had adopted amendments to Item 301 (Selected Financial Data), Item 302 (Supplementary Financial Information) and Item 303 (Management's Discussion and Analysis of Financial Condition and Results of Operations) of Regulation S-K designed to improve disclosure by enhancing its readability, discouraging repetition and eliminating information that is not material, and to "allow investors to view the [company] from management's perspective" (the "Financial Disclosure Amendments").[7]

The Financial Disclosure Amendments will become effective on February 10, 2021, though companies will not be required to comply with the new requirements until their first fiscal year ending on or after August 9, 2021. This means compliance will first be required in the Form 10-K for 2021 for calendar year end companies. Companies are permitted to update their Form 10-K disclosure consistent with the Financial Disclosure Amendments any time after the effective date; provided that, if they choose to apply the amended requirements for one item of Regulation S-K, they must apply all of the provisions of that amended item. As a result, companies filing their Form 10-K prior to February 10, 2021 will be required to comply with the pre-amendment Regulation S-K requirements, but companies filing after February 10, 2021 will have the option of whether to adopt the changes to one, two, or three of the amended items. Companies should exercise caution in early adopting the amendments to any of Items 301, 302 or 303. In light of President Biden's January 21 Executive Order and the change in acting Chairman at the SEC, there is a possibility that, prior to February 10th, effectiveness of the amendments is delayed 60 days and, once the new Chairman is confirmed, the amendments do not become effective. Of course, any company is entitled to early adopt and apply the amended rules once they are effective on or after February 10th, even if the rules are further amended at a later time.

The discussion below provides a high-level summary of the Financial Disclosure Amendments. We also refer you to our prior post, which contains a summary chart and comparative blackline reflecting the Financial Disclosure Amendments.[8]

1. Selected Financial Data (Part II, Item 6)

Elimination of Presentation of Past Five Years of Financial Data. The Financial Disclosure Amendments will "[r]emove and reserve" Item 301 of Regulation S-K and Part II, Item 6 of Form 10-K, completely eliminating the requirement to furnish in the Form 10-K selected financial data in

comparative tabular form for each of the company's last five fiscal years. The SEC has not indicated when it plans to update the Form 10-K pdf available on its forms site, but we suspect it will do so shortly after the February 10, 2021 effective date.

The adopting release emphasizes that, despite removal of this requirement, the material trend disclosures that Item 301 was meant to highlight continue to be elicited by the MD&A requirements, and companies should consider whether trend information for periods earlier than those presented in the financial statements may be necessary as part of MD&A's objective to "provide material information relevant to an assessment of the financial condition and results of operations." The release also encouraged companies to "consider whether a tabular presentation of relevant financial or other information, as part of an introductory section or overview, including to demonstrate material trends, may help a reader's understanding of MD&A."

2. Supplementary Financial Data (Part II, Item 8)

Elimination of Presentation of Quarterly Financial Data. The Financial Disclosure Amendments also eliminate the requirement to disclose in the Form 10-K and Form 10-Qs selected quarterly financial data of specified operating results and variances in these results from amounts previously reported on a prior Form 10-Q.

Replace with Principles-Based Requirement For Material Retrospective Changes. Under the new rule, if there are retrospective changes to the statements of comprehensive income for any of the quarters within the two most recent fiscal years that are material individually or in the aggregate, a company must (a) explain the reasons for the changes, and (b) for each affected quarterly period and the fourth quarter in the affected year, disclose (i) summarized financial information related to the statements of comprehensive income (net sales, gross profit, income from continuing operations, net income, and net income attributable to the entity), and (ii) earnings per share reflecting the changes. Material retrospective changes might include correction of an error, discontinued operations, reorganization of entities under common control, or change in accounting principle.

To comply with this rule, companies should have in place an annual procedure whereby retrospective changes are identified and then evaluated to determine whether disclosure is required. Such a procedure will likely be similar to what companies use to comply with the requirement in the current rule to provide an explanation whenever the amounts disclosed in the Form 10-K table vary from the amounts previously reported on the Form 10-Q.

3. Management's Discussion and Analysis of Financial Condition and Results of Operations (Part II, Item 7)

a. New Item 303(a) – Objectives of MD&A

The Financial Disclosure Amendments add a new first paragraph to Item 303 to emphasize the objective of MD&A for both full fiscal years and interim periods, which incorporates much of the substance of current instructions and codifies the guidance that MD&A should enable investors to view the company from management's perspective. While many companies may ultimately determine that no changes to

their disclosure need to be made in response to this rule, focusing on the objective when preparing and reviewing MD&A is always a worthwhile exercise.

b. Amended Item 303(b) – Full Fiscal Year Presentation

Amended Item 303(b) focuses on the full fiscal year presentation and lists three main components, (i) liquidity and capital resources, (ii) results of operations, and (iii) critical accounting estimates. The primary updates from the Financial Disclosure Amendments are described below.

Liquidity and Capital Resources. The Financial Disclosure Amendments codify past guidance and require each company to describe its "material cash requirements, including commitments for capital expenditures, as of the end of the latest fiscal period, the anticipated source of funds needed to satisfy such cash requirements and the general purpose of such requirements." Companies must identify and disclose all known material cash requirements, not just those needed for capital expenditures (e.g., funds necessary to maintain current operations, complete projects underway, and achieve stated objectives or plans). The adopting release notes that "while capital expenditures remain important in many industries, certain expenditures and cash commitments that are not necessarily capital investments in property, plant, and equipment may be increasingly important to companies, especially those for which human capital or intellectual property are key resources." The adopting release also emphasizes that these changes solicit information that may otherwise be lost with the deletion of the contractual obligations table (discussed below).

Results of Operations. The Financial Disclosure Amendments require a company to disclose events that are reasonably likely to (as opposed to events that "will" or that the company "reasonably expects will") have a material impact on revenue/income or cause a material change in the relationship between costs and revenues, syncing with the disclosure standard used elsewhere in MD&A. This new phrasing emphasizes that the standard for disclosure of trends in MD&A is not an unreasonably high one where forward-looking disclosure is only required in instances where there is certainty about what will happen.

In addition, the Financial Disclosure Amendments codify past guidance and specify that discussion of changes in price/volume and new products is required whenever there are "material changes" to revenue, rather than simply when there are "material increases" in revenue.

Critical Accounting Estimates. The Financial Disclosure Amendments codify past guidance and require companies to provide qualitative and quantitative disclosure necessary to understand the uncertainty and impact a critical accounting estimate has had or is reasonably likely to have on financial condition or results of operations of the company, including why each estimate is subject to uncertainty. This disclosure is only required to the extent the information is material and reasonably available, and should include "[(i)] how much each estimate and/or assumption has changed over a relevant period, and [(ii)] the sensitivity of the reported amount to the methods, assumptions and estimates underlying its calculation."

The adopting release clarifies that this disclosure of critical accounting estimates is not a recitation of what is required under U.S. GAAP. For example, there is no general requirement to disclose underlying assumptions for material accounting estimates included in the financial statements, and U.S. GAAP does

not require a discussion of material changes in the underlying assumptions over a relevant period. The adopting release notes that "[to] the extent the financial statements include information about specific changes in the estimate or underlying assumptions, the [Financial Disclosure Amendments] include an instruction that specifies that critical accounting estimates should supplement, but not duplicate, the description of accounting policies or other disclosures in the notes to the financial statements."

c. Amended Item 303(b) – Items no Longer Required

Inflation and Price Changes. The Financial Disclosure Amendments eliminate the requirement that companies discuss the impact of inflation and price changes on their net sales, revenue, and income from continuing operations. Despite these deletions, companies are still expected to discuss the impact of inflation or changing prices if they are part of a known trend or uncertainty that has had, or the company reasonably expects to have, a material impact.

Off-Balance Sheet Arrangements. The Financial Disclosure Amendments eliminate the requirement to present a separately captioned section discussing off-balance sheet arrangements and instead add a principles-based instruction to discuss certain commitments or obligations (including those formerly disclosed as off-balance sheet arrangements).

Contractual Obligations. The Financial Disclosure Amendments eliminate the requirement to provide a contractual obligations table, as much of the information is included in the notes to the financials under GAAP or elsewhere in MD&A under the new requirements to discuss cash commitments. The Financial Disclosure Amendments add a provision reiterating that material cash requirements from known contractual or other obligations should be discussed in Liquidity and Capital Resources, and also add an instruction that material requirements from known contractual obligations may include, for example, lease obligations, purchase obligations, or other liabilities reflect on the balance sheet. While the Form 10-K and Form 10-Q are no longer required to include a contractual obligations table and material updates, care should be taken that any material cash requirements are discussed elsewhere in the Liquidity and Capital Resources discussion. In addition, a company's accounting personnel should confirm whether there is any information currently contained in the table that is required by GAAP and, therefore, must be added elsewhere in the notes to the financials.

d. Amended Item 303(b) – Clarification on Discussion of "Underlying Reasons" for Period-to-Period Changes

The Financial Disclosure Amendments also clarify that, where there are material changes from period-to-period in one or more line items, companies must describe the underlying reasons for such changes in both quantitative and qualitative terms, rather than only the "cause" for such changes. The Financial Disclosure Amendments also amend the language to clarify that companies should discuss material changes within a line item even when such material changes offset each other. These amendments codify what the SEC staff has been asking companies to include via the comment letter process for some time.

Companies should more closely examine the drivers behind changing operating results and how those drivers are described in the Form 10-K. Superficial discussions of, for example, decreased sales volumes or increased compensation expenses may not be sufficient. Evaluating the disclosure required by this

rule will likely be done in tandem with the evaluation of whether certain trends should be identified in MD&A.

e. Amended Item 303(b) – A Note on Product Lines

The Financial Disclosure Amendments add "product lines" as an example of subdivisions of a company's business that should be discussed where, in the company's judgment, such a discussion would be necessary to an understanding of the company's business. The prior rule requested discussion of "segment information and/or of other subdivisions (e.g., geographic areas) of the company's business." Similar to the rule change in Item 101 requiring disclosure of "any dependence on … product families," this rule change should focus companies' attention on groups of products about which information may be material to investors' understanding of the business.

f. New Item 303(c) – Interim Period Discussion

The Financial Disclosure Amendments permit companies to compare the operating results from their most recently completed quarter to the operating results from either the corresponding quarter of the prior year (as is currently required) or to the immediately preceding quarter. If a company changes the comparison from the prior interim period comparison, the company is required to explain the reason for the change and present both comparisons in the filing where the change is announced. Notwithstanding this change, a discussion of any material changes in the company's results of operations for the most recent the year-to-date period would still need to be compared to the results of operations from the corresponding year-to-date period of the preceding fiscal year.

For companies who choose to adopt new Item 303(c) for their first quarter 2021 Form 10-Q, a new comparison of Q1 2021 to Q4 2020 will be required, as well as the existing comparison of Q1 2021 to Q1 2020 results and an explanation as to the change. Going forward, a comparison of the current quarter to the previous quarter will be sufficient, so long as a comparison of any material changes from the current quarter to the prior year's corresponding quarter is provided. Given the cyclical nature of many businesses, we expect that many companies will not make any changes as result of this amendment; however, companies whose businesses lend themselves to sequential analysis will probably welcome the change.

II. COVID-19 Disclosure Considerations

As we round the one-year mark of the COVID-19 pandemic, it is important for companies to evaluate whether their COVID-19 disclosure adequately and accurately reflects the impact of COVID-19. This should continue to be a focus of disclosure controls and procedures and may continue to draw scrutiny from the SEC staff. While many companies have crafted and tailored this disclosure over the past several months, it is helpful to refer back to prior SEC guidance[9] and SEC enforcement actions, a helpful summary of which is included in our prior client alerts.[10] As we look towards the 2020 Form 10-K filing, we reflect on a few important considerations below.

A. Impact on Management's Discussion and Analysis of Financial Condition and Results of Operations

As reflected in the new MD&A objectives statement in the Financial Disclosure Amendments, the purpose of MD&A is to provide material information relevant to an assessment of the financial condition and results of operations of the company. The company should aim to allow investors to understand the business results through the eyes of management. New Item 303(a) specifically calls out a focus on material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. As companies review their MD&A disclosure, they should pay particular attention to how the COVID-19 pandemic, including (i) actions taken by governments, customers, suppliers, and other third-parties, (ii) work from home measures and employee safety, and (iii) impact on the economy or industry in which they operate, has impacted their results of operations or financial condition. Companies should continue to evaluate whether it is necessary to revise their liquidity and capital resources section to reflect the historical and any future impacts to the COVID-19 pandemic. In characterizing the impact of the pandemic, companies should be specific and clarify the time periods involved in the disclosure. It is no longer appropriate to provide only generic statements about the company's inability to predict the impact of the pandemic, which may have been included in the Form 10-K for 2019.

B. Impact on Risk Factors

A great number companies have included a COVID-19 risk factor in one of their quarterly reports since the outset of the pandemic. As companies review their risk factor disclosure in light of the Business Disclosure Amendments, it is important that the COVID-19 risk factor disclosure be appropriately tailored to the facts and circumstances of the particular company, whether due to (i) risks that directly impact the company's business, (ii) risks impacting the company's suppliers or customers, or (iii) ancillary risks, including a decline in the capital markets, a recession, a decline in employee relations or performance, governmental regulations, an inability to complete transactions, and litigation. The SEC has reiterated that risk factors should not use hypotheticals to address events that are actually impacting the company's operations and brought enforcement actions against certain companies for portraying realized risks as hypothetical.[11] Accordingly, companies should be specific in providing examples of risks that have already manifested themselves.

C. Impact on Non-GAAP Financial Measures

When reviewing 2020 operating results and performance, companies may consider presenting non-GAAP financial measures for historical periods impacted by the COVID-19 pandemic that reflect adjustments from the required GAAP measures. If such non-GAAP measures are presented in the Form 10-K, the disclosure should be clear and the rationale for the presentation explained. Management may articulate the position that these adjustments are critical in order for investors to be able to compare the performance of the business period over period.

Companies should be mindful of the rules relating to non-GAAP supplemental measures under Regulation G and Item 10(e) of Regulation S-K. In guidance issued on March 25, 2020, the Division of

Corporation Finance reminded companies that "we do not believe it is appropriate for a company to present non-GAAP financial measures or metrics for the sole purpose of presenting a more favorable view of the company."[12] Additionally, companies should be mindful of Non-GAAP Financial Measures CD&I 100.02, which states that non-GAAP measures can be misleading if presented inconsistently between periods, and CD&I 100.03, which states that non-GAAP measures can be misleading if they exclude charges, but do not exclude any gains. In addition, to the extent a company discloses any key performance metrics and changes have been made to such metrics to exclude items related to the crises or address such items in a different manner, the company should be clear to call out such changes and provide updated comparable prior period information to the extent practicable.

III. Other Considerations and Reminders

A. Key Performance Indicators (KPIs)

As mentioned in our prior post,[13] the SEC issued an Interpretative Release[14] in January 2020 providing guidance on key performance indicators and metrics discussed in MD&A. The release was a reminder that companies must disclose key variables and other qualitative and quantitative factors that management uses to manage the business and that would be peculiar and necessary for investors to understand and evaluate the company's performance, including non-financial and financial metrics.

The guidance instructs companies that, when including metrics in their disclosure, they should consider existing MD&A requirements and the need to include such further material information, if any, as may be necessary in order to make the presentation of the metric, in light of the circumstances under which it is presented, not misleading. The disclosure of such additional metrics, based on the facts and circumstances, should be accompanied by the following disclosures:

- a clear definition of the metric and how it is calculated;
- a statement indicating the reasons why the metric provides useful information to investors;
- a statement indicating how management uses the metric in managing or monitoring the performance of the business; and
- whether the disclosure of any estimates or assumptions underlying such metric or its calculations are necessary to be disclosed for the metric not to be materially misleading.

In addition, if a company changes the method by which it calculates or presents the metric from one period to another or otherwise, the company should disclose, to the extent material, the differences between periods, the reasons for the changes and the effect of the changes. Changes may necessitate recasting the prior period's presentation to help ensure the comparison is not misleading.

B. Impact of Changes to Filer Definitions

On March 12, 2020, the SEC announced[15] the adoption of a final rule amending the "accelerated filer" and "large accelerated filer" definitions.[16] The amendments became effective April 27, 2020 and first

impacted annual reports on Form 10-K due after the effective date. The amendments exclude from the "accelerated filer" and "large accelerated filer" definitions issuers that are otherwise eligible to be a "smaller reporting company" and that had annual revenues of less than $100 million in the most recent fiscal year for which audited financial statements are available. The most notable effect of these amendments is that a smaller reporting company with less than $100 million in revenues, while obligated to establish and maintain internal control over financial reporting ("ICFR") and have management assess the effectiveness of ICFR, will not be subject to the requirements of Section 404(b) of the Sarbanes-Oxley Act, which requires that an issuer's independent auditor attest to, and report on, management's assessment of the effectiveness of ICFR (i.e., the so-called auditor attestation report). Note that these smaller companies will continue to be subject to a financial statement audit by an independent auditor, who is required to consider ICFR in the performance of that audit, but will not be required to obtain an auditor attestation report.

The amendments also (i) increase the public float transition threshold for an accelerated and a large accelerated filer becoming a non-accelerated filer from $50 million to $60 million and for existing large accelerated filer status from $500 million to $560 million; and (ii) add the Smaller Reporting Company revenue test to the transition threshold for both accelerated filer and large accelerated filer status. Please see our prior post for more information regarding these amendments.[17]

C. Omitting Third Year of MD&A

In 2019, the SEC adopted amendments to modernize and simplify various disclosure requirements, which included the option for companies to omit from MD&A a discussion of the earliest of the three years of financials included in the Form 10-K if such discussion was included in a prior filing with the SEC.[1] When a company takes this approach, the location of the omitted discussion must be identified in the current Form 10-K, but that previous disclosure should not be incorporated by reference. On January 24, 2020, the Division of Corporation Finance issued three new Compliance and Disclosure Interpretations (C&DIs)[18] addressing common questions regarding Instruction 1 to Item 303(a). A brief overview of this guidance is discussed below and in more detail in our prior post.[19]

Question 110.03 – May not Omit Earliest Year if Necessary to Understanding of Financial Condition. Provides that a company may not omit a discussion of the earliest of three years from its current MD&A if it believes a discussion of that year is necessary to an understanding of its financial condition, changes in financial condition and results of operations. When determining whether to omit the earliest year discussion, a company should analyze whether the entirety of the discussion of its financial condition and operating results from three years ago (e.g., 2018 for the 2020 10-K), either as previously reported or updated to reflect trends or developments, is necessary to understand its financial condition, changes in financial condition and results of operations. If so, that discussion should be included in the Form 10-K. In our survey of S&P 500 companies that filed a 10-K between the effective date of the revised instruction through the date of our alert on the topic in early 2020, approximately 54% have opted to exclude the earliest year's discussion in the MD&A.

Question 110.02 – Earliest Year Discussion Not Incorporated Unless Explicitly Stated. Clarifies that when a company omits a discussion of the earliest of three years and includes the required statement that

identifies the location of such discussion in a prior filing with the SEC, such discussion is not incorporated by reference into the filing unless the company expressly states that the information is incorporated by reference. According to our survey mentioned above, less than 10% of companies chose to expressly incorporate the prior discussion by reference.

Question 110.04 – Incorporation by Reference in Registration Statements. Given that the Form 10-K operates as the Section 10(a)(3) update to an effective registration statement, once the Form 10-K is filed without an MD&A discussion for the earliest year of financials, the effective registration statement would not include the MD&A discussion for the earliest year. As such, the company will not incur Securities Act liability on such discussion. When filing a new registration statement or commencing an offering, a company should analyze whether the entirety of the discussion of its financial condition and operating results from three years ago, either as previously reported or updated to reflect trends or developments, is necessary to understand its financial condition, changes in financial condition and results of operations. While in many cases such information will not be material to a current investment decision, in those cases when such information (or any other earlier information) is deemed necessary, companies and their counsel should discuss how best to incorporate such information into the offering documents.

Most companies that choose to exclude the earliest year of financials have tended to include the statement identifying the location of the prior disclosure at the beginning of the MD&A, the beginning of the Results of Operation section, or the end of the Results of Operation section before Liquidity and Capital Resources.

D. Exhibit List Reminders

In 2019, a number of changes were made to the exhibit requirements in Exchange Act reports.[20] While companies may be familiar with these changes in connection with their Form 10-K filing last year, the short summary below serves as a reminder of the key changes to exhibits when preparing the 2020 Form 10-K this year.

1. Exhibit 4 – Description of registered securities

Companies are required to provide a brief description of all securities registered under Section 12 of the Exchange Act (i.e., the information required by Item 202(a) through (d) and (f) of Regulation S-K) as an exhibit to their Forms 10-K. The securities covered by this exhibit are the same as those required to be listed on the cover of the Form 10-K. While many companies prepared this exhibit for their 2019 Form 10-K, the previously filed exhibit should be reviewed for any changes to the information called for by Item 202 of Regulation S-K. If no changes since the prior filing, the company may simply incorporate by reference to the previously filed exhibit.

2. No lookback period for material contracts.

Companies other than “newly reporting registrants” need only disclose material contracts to be performed in whole or in part at or after the filing of their Forms 10-K. Previously, there was a two-year

lookback period with respect to material contracts for most companies, which often resulted in filing copies of stale / terminated contracts. (See Item 601(b)(10)(i) of Regulation S-K.)

3. Omission of schedules to exhibits

Companies may omit entire schedules or similar attachments to exhibits, unless the schedules or attachments contain material information that is not otherwise disclosed in the exhibit or SEC filing. A brief list identifying the contents of the omitted schedules or other attachments must be included in the exhibit, unless the exhibit already includes information that conveys the subject matter of the omitted material. Companies are no longer required to state that they will furnish a copy of the omitted schedules or attachments to the SEC upon request (which was typically done through a notation in the exhibit index); though they must still provide a copy if requested by the SEC. (See Item 601(a)(5) of Regulation S-K.)

4. Omission of information from exhibits without confidential treatment request

Companies are permitted to omit confidential information from material contracts filed under Item 601(b)(10) and agreements filed under Item 601(b)(2) without requesting confidential treatment from the SEC where this information is both (i) not material and (ii) would likely cause competitive harm to the company if publicly disclosed. Companies must mark the exhibit index to indicate that portions of the material contract have been omitted; include a prominent statement on the first page of the redacted material contract indicating certain information has been omitted; and indicate with brackets where this information has been omitted within the material contract.

Companies are also allowed to omit personally identifiable information (such as bank account numbers, social security numbers, telephone numbers, home addresses, and similar information) from all exhibits without submitting a confidential treatment request for this information.

Although companies are no longer required to file confidential treatment requests with respect to exhibits filed pursuant to Item 601(b)(10) and Item 601(b)(2), they are still responsible for ensuring all material information is disclosed and limiting redactions to those portions necessary to prevent competitive harm. The SEC staff will continue to selectively review companies' filings and assess whether companies have satisfied their disclosure responsibility with respect to these redactions.

5. Exhibit 22 – List of guarantors

In March 2020, the SEC adopted amendments to Rules 3-10 and 3-16 of Regulation S-X, which became effective on January 4, 2021. These amendments relate to the financial disclosure requirements applicable to registered debt offerings and were adopted in an effort to "improve the quality of disclosure and increase the likelihood that issuers will conduct debt offerings on a registered basis."[21] Please see our prior post for a detailed description of these amendments, which became effective on January 4, 2021.[22] In connection with the amendments, companies with registered debt securities are required to include a new Exhibit 22, which requires a list, as applicable, the company's subsidiaries and affiliates covered by new Rules 13-01 and 13-02 of Regulation S-X. Specifically the list must include each of the company's subsidiaries that is a guarantor, issuer, or co-issuer of the guaranteed security and each of the

company's affiliates whose security is pledged as collateral for the company's security. For each affiliate, the security or securities pledged as collateral must also be identified.

E. Extending confidential treatment

As discussed in our prior post,[23] on September 9, 2020, the Division of Corporation Finance updated its guidance on confidential treatment requests to provide companies with the ability to transition to the new redaction rules under certain circumstances.[24] When the SEC first amended its exhibit filing requirements to allow redactions without a confidential treatment request in March 2019, companies that had previously submitted confidential treatment requests were not able to simply refile a redacted exhibit, but rather were required to file an extension to their prior request. The updated guidance now provides that:

> "***[if] it has been more than three years since the initial confidential treatment order was issued***, and if the contract continues to be material, ***companies have the option to transition to compliance with the requirements set out in Regulation S-K Item 601(b)(10) and other parallel rules***, referred to here as the redacted exhibit rules. The redacted exhibit rules allow for the filing of redacted exhibits without submitting an explanation or substantiation to the SEC, or providing an unredacted copy of the exhibit, except upon request of the staff.
>
> In order to transition to the redacted exhibits rules in these situations, ***a company would only be required to refile the material contract in redacted form and comply with the legend and other requirements of the applicable redacted exhibit rule, most commonly Item 601(b)(10)(iv) of Regulation S-K***. We anticipate that many, if not most, companies will chose to transition to this process since substantiation of compliance and submission of unredacted materials to the staff is only required upon staff request."

There are two other options that remain available to companies faced with a soon-to-expire confidential treatment. The first alternative is for the company to simply refile the unredacted exhibit. The second alternative is to apply for an extension to the confidential period pursuant to Rule 406 or Rule 24b-2 prior to the confidential treatment order's expiration, which can be done by submitting a short-form application (available here) to CTExtensions@sec.gov (if the initial order was issued less than three years ago) or a complete application (if the initial order was issued more than three years ago).

F. E-signature Rules

On November 17, 2020, the SEC approved amendments to Regulation S-T and the EDGAR Filer Manual relating to the use of electronic signatures for SEC filings, including Form 10-K.[25] The new rules expressly provide for the use of e-signature methods (e.g., "DocuSign" and "AdobeSign"). In general, where a document submitted electronically to the SEC is required to be signed, the signature appearing in the filing must appear in the electronic filing in typed form, not in manual or graphic form. Signatures that are not required in a filing may appear as in manual or graphic form (e.g., the signature in a letter to shareholders included in a Proxy Statement).

Under Rule 302(b) of Regulation S-T, when an SEC filing must be signed, the signatory must either manually sign the actual signature page or electronically sign the signature page or some other document that authenticates, acknowledges or otherwise adopts the signature appearing in the filing. Before allowing a signatory to electronically sign an SEC filing, a company must obtain a manually signed attestation from the signatory agreeing that the signatory's electronic signature of an SEC filing has the same effect as a manual signature. This attestation must be retained for a minimum period of seven years after the date of the most recent electronically signed authentication document for the applicable signatory. Companies who plan on shifting to electronic signatures may wish to send a form attestation to their board for manual signature when sending the Form 10-K to the board for approval. A form of attestation document is included in our prior post,[26] which also discusses other applicable considerations and requirements associated with the Regulation S-T and EDGAR Filer Manual amendments.

G. Cover Page Changes

When the SEC adopted amendments to the definitions of "accelerated filer" and "large accelerated filer" back in March 2020, a new check box was added to the cover page of the Form 10-K to indicate whether an auditor attestation report under Section 404(b) of the Sarbanes-Oxley Act is included in the filing. As a reminder, companies that are large accelerated filers or accelerated filers will be required to tag this new cover page check box disclosure in Inline XBRL. All other companies will be required to comply with the new XBRL tagging requirements for fiscal periods ending on or after June 15, 2021.

H. Critical Accounting Matters

Form 10-Ks for all companies (except emerging growth companies) require a company's auditor to include disclosures in its audit report about critical audit matters ("CAMs") that the auditor identifies during the course of the audit. The audit standard, AS 3101,[27] requires that for each CAM communicated in the auditor's report, the auditor must: (i) identify the CAM; (ii) describe the principal considerations that led the auditor to determine that the matter is a CAM; (iii) describe how the CAM was addressed in the audit; and (iv) refer to the relevant financial statement accounts or disclosures that relate to the CAM. As noted in our previous client alert,[28] companies should consider possible scenarios where this standard might put the auditor in a position of having to make disclosures of original information, and prepare in advance for how to address such situations. Since CAMs will typically address a topic that also is discussed in financial statement footnotes or MD&A, companies should make sure that their language is consistent with the discussion in the CAM.

I. Updates to Disclosure Controls and Procedures

In light of the substantial number of changes to the Form 10-K requirements and disclosure guidance, it is important for personnel and counsel to consider the manner in which the company's disclosure controls and procedures are addressing the changes. It is also important that the disclosure committee and audit committee are briefed on the changes and the company's approach to addressing them.

[1] For further discussion on these amendments, please see our prior client alert "SEC Continues to Modernize and Simplify Disclosure Requirements" (March 26, 2019), *available at* https://www.gibsondunn.com/wp-content/uploads/2019/03/sec-continues-to-modernize-and-simplify-disclosure-requirements.pdf.

[1] *Available at* https://www.gibsondunn.com/a-double-edged-sword-examining-the-principles-based-framework-of-the-sec-recent-amendments-to-disclosure-requirements/.

[2] *See* Modernization of Regulation S-K Items 101, 103, and 105, Release No. 33-10825 (August 26, 2020), *available at* https://www.sec.gov/rules/final/2020/33-10825.pdf.

[3] *See* Transitional FAQs Regarding Amended Regulation S-K Items 101, 103 and 105 (November 5, 2020), Question 3, *available at* https://www.sec.gov/corpfin/transitional-faqs-amended-regulation-s-k-items-101-103-105.

[4] *See* Morrow Sodali 2020 Institutional Investor Survey, *available at* https://morrowsodali.com/insights/institutional-investor-survey-2020.

[5] *See* BlackRock's Commentary, Investment Stewardship's Approach to Engagement on Human Capital Management, *available at* https://www.blackrock.com/corporate/literature/publication/blk-commentary-engagement-on-human-capital.pdf.

[6] *See* "SEC Adopts Amendments to Modernize and Enhance Management's Discussion and Analysis and other Financial Disclosures" (November 19, 2020), *available at* https://www.sec.gov/news/press-release/2020-290.

[7] *See* Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Release No. 33-10890 (November 19, 2020), *available at* https://www.sec.gov/rules/final/2020/33-10890.pdf.

[8] *Available at* https://www.securitiesregulationmonitor.com/Lists/Posts/Post.aspx?ID=432.

[9] *See* CF Disclosure Guidance: Topic No. 9 (March 25, 2020), *available at* https://www.sec.gov/corpfin/coronavirus-covid-19, and CF Disclosure Guidance: Topic No. 9A (June 23, 2020), *available at* https://www.sec.gov/corpfin/covid-19-disclosure-considerations.

[10] *See* "Perspectives from One Month into the COVID-19 U.S. Outbreak: Public Company Disclosure Considerations" (April 9, 2020), *available at* https://www.gibsondunn.com/wp-content/uploads/2020/04/perspectives-from-one-month-into-the-covid-19-u-s-outbreak-public-company-disclosure-considerations.pdf. *See* "SEC Brings First Enforcement Action Against a Public Company for Misleading Disclosures About the Financial Impacts of the Pandemic" (December 7, 2020), *available at* https://www.gibsondunn.com/sec-brings-first-enforcement-action-against-a-public-company-for-misleading-disclosures-about-the-financial-impacts-of-the-pandemic/.

[11] *See* "2019 Year-End Securities Enforcement Update" (January 14, 2020), *available at* https://www.gibsondunn.com/2019-year-end-securities-enforcement-update/.

[12] *See* CF Disclosure Guidance: Topic No. 9 (March 25, 2020), *available at* https://www.sec.gov/corpfin/coronavirus-covid-19.

[13] *Available at* https://www.securitiesregulationmonitor.com/Lists/Posts/Post.aspx?ID=394.

[14] *See* Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations, Release No. 3310751 (January 30, 2020), *available at* https://www.sec.gov/rules/interp/2020/33-10751.pdf.

[15] *See* "SEC Adopts Amendments to Reduce Unnecessary Burdens on Smaller Issuers by More Appropriately Tailoring the Accelerated and Large Accelerated Filer Definitions" (March 12, 2020), *available at* https://www.sec.gov/news/press-release/2020-58.

[16] *See* Accelerated Filer and Large Accelerated Filer Definitions, Release No. 34-88365 (March 12, 2020), *available at* https://www.sec.gov/rules/final/2020/34-88365.pdf.

[17] *Available at* https://www.securitiesregulationmonitor.com/Lists/Posts/Post.aspx?ID=400.

[18] *Available at* https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm#110.02.

[19] *Available* at https://www.securitiesregulationmonitor.com/Lists/Posts/Post.aspx?ID=393.

[20] *See* FAST Act Modernization and Simplification of Regulation S-K, Release No. 33-10618 (March 20, 2019), *available at* https://www.sec.gov/rules/final/2019/33-10618.pdf.

[21] *See* Financial Disclosures about Guarantors and Issuers of Guaranteed Securities and Affiliates Whose Securities Collateralize a Registrant's Securities, Release No. 33-10762 (March 2, 2020), *available at* https://www.sec.gov/rules/final/2020/33-10762.pdf.

[22] *See* "SEC Amends Rules to Encourage Issuers to Conduct Registered Debt Offerings" (March 7, 2020), *available at* https://www.securitiesregulationmonitor.com/Lists/Posts/Post.aspx?ID=396.

[23] *Available at* https://www.securitiesregulationmonitor.com/Lists/Posts/Post.aspx?ID=425.

[24] *See* Confidential Treatment Applications Submitted Pursuant to Rules 406 and 24b-2 (December 19, 2019, Amended September 9, 2020), *available at* https://www.sec.gov/corpfin/confidential-treatment-applications#options.

[25] *See* "Electronic Signatures in Regulation S-T Rule 302, Release No. 33-10889 (November 17, 2020), *available at* https://www.sec.gov/rules/final/2020/33-10889.pdf.

[26] *Available at* https://www.securitiesregulationmonitor.com/Lists/Posts/Post.aspx?ID=431.

[27] *Available at* https://pcaobus.org/Standards/Documents/Implementation-of-Critical-Audit-Matters-The-Basics.pdf.

[28] See "PCAOB Adopts New Model for Audit Reports" (June 2, 2017), *available at* https://www.gibsondunn.com/pcaob-adopts-new-model-for-audit-reports/.

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