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**2022 SEC Disclosure &
Proxy Season Outlook**

*Gibson Dunn MCLE Marathon Blitz
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Agenda

1

Changes for
Upcoming
Form 10-Ks
Plus
Ethical
Considerations
for Securities
Lawyers

2

Other SEC
Rulemaking
Developments

3

Trends in SEC
Comment
Letters

4

Other
Disclosure
Focus Areas
Including
Enforcement
Actions and
Ethical
Considerations

5

Shareholder
Proposals &
Proxy Advisor
Updates

6

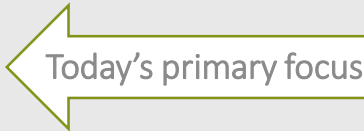
Proxy Season &
Corporate
Governance
Developments

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1. Changes for Upcoming Form 10-Ks

SEC Modernization and Simplification Amendments Background

SEC continues its effort to update and modernize public company disclosure requirements

Adoption Period	When in Effect	Amended Regulation S-K Items
<i>November 2020</i> <i>Release No. 33-10890</i>	<i>With upcoming 10-K</i>	<i>Item 301 (Selected Financial Data)</i> <i>Item 302 (Supplementary Financial Information)</i> <i>Item 303 (MD&A)</i> 
August 2020 Release No. 33-10825	With last 10-K	Item 101 (Description of Business) Item 103 (Legal Proceedings) Item 105 (Risk Factors)
March 2019 Release No. 33-10618	With prior year 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August 2018 Release No. 33-10532	With prior year 10-K	Various technical amendments to reduce redundant duplicative and outdated disclosure requirements

Changes to MD&A – Overview

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
 - Some companies early adopted

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 in quarterly reports

Other Changes

- ***Eliminated certain requirements***
 - 2-year quarterly financial data table (discuss only material retrospective changes to quarterly financials)
 - 5-year selected financial data table
 - Contractual obligations table
 - Off-balance sheet caption*
 - 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

Changes to MD&A – Approach

Management Lens to “allow investors to view the [company] from management’s perspective” and give companies “flexibility to determine what may be material and necessary to be disclosed”

Principles-Based Approach

- Amendments employ a purely principles-based approach to MD&A disclosure
- Previous rules employed a combined principles- and rules-based approach
- Amendments focus on enhancing MD&A’s readability and eliminating information that is repetitive or not material

Focus Areas

- Results of Operations
- Liquidity and Capital Resources
- Critical Accounting Estimates

Takeaway: In connection with updating the MD&A this year, focus on material drivers, trends & uncertainties, with forward-looking info encouraged

Changes to MD&A – Results of Operations

“Reasonably Likely” Threshold

- Amendments require disclosure of trends or uncertainties that have had or are *reasonably likely* to have a material impact on net sales or revenues or income from continuing operations
 - If a company knows of events that are reasonably likely to cause (instead of “will cause”) a material change in the relationship between costs and revenues, that change must be disclosed
 - SEC noted that amended Item 303(a) clarifies that “whether a matter is ‘reasonably likely’ to have a material impact on future operations is based on ‘management’s assessment’”

How to Approach

- Management should begin by:
 - Considering whether a known trend, demand, commitment, event or uncertainty is “likely” to come to fruition and “reasonably likely” to have a material effect
 - If a known trend is “not remote” or management cannot make an assessment as to likelihood, and is “reasonably likely” to have a material effect, then disclosure required if material to investors

Changes to MD&A – Liquidity and Capital Resources

Disclosures Removed*

- 5-Year Contractual Obligations table
- Off-Balance Sheet Arrangements

Disclosures Added

- Disclosure of company's ability to meet its material cash requirements and plans
 - In the short-term (i.e., next 12 months) and in the long term (i.e., beyond next 12 months)
 - From contractual and other obligations
- Disclosure must include the *type of obligation* and the *relevant time period* for “known” and “reasonably likely” cash requirements

Disclosures Not Limited to Capital Expenditures

- Includes “any other obligations” such as human capital or intellectual property expenditures
- SEC intentionally did not define or limit “other obligations” to focus management's attention on material cash requirements
 - Includes lease obligations, purchase obligations and liabilities reflected on the balance sheet, and off-balance sheet arrangements
- Continues to require disclosure of any known trends, demands, commitments, events or uncertainties that will or are reasonably likely to result in a material change to liquidity

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

Changes to MD&A – Liquidity and Capital Resources

Capital Resources

- Disclose *anticipated source of funds needed to satisfy material cash requirements* and the *general purpose* of these cash requirements
- Continues to require disclosure of *internal and external sources of liquidity*, as well as any *known material trends*, favorable or unfavorable, in the company's capital resources, including *any reasonably likely material changes in the mix and relative cost of such resources*

Liquidity and Capital Resources Takeaways

- Separately disclose known and reasonably likely requirements and plans for material cash requirements (1) for next 12 months and (2) beyond the next 12 months
- For capital resources, must disclose anticipated source of funds needed, general purpose for material cash requirements and known material trends, including likely material changes in mix and cost

Changes to MD&A – Other Changes

Critical Accounting Estimates

- New rules require companies to ***discuss critical accounting estimates*** that involve (1) ***“significant level of estimation uncertainty”*** and are (2) ***“reasonably likely to have a material impact*** on the financial condition or results of operations”
 - Explain why each estimate is subject to uncertainty, and
 - If material and reasonably available, how much each estimate/assumption has changed and sensitivity of the reported amount to calculation methods, assumptions and estimates

Other Changes

- Codification of guidance that increases *and* decreases in revenue should be described
- Eliminates requirement to discuss impact of inflation / price changes (unless known trend / uncertainty)
- In quarterly reports companies may choose to discuss material changes in results of operations to either (1) the corresponding quarter in the prior year ***or*** (2) the immediately preceding quarter
 - If (2), it must provide summary financial information that is the subject of the discussion for that quarter or identify the prior filing on EDGAR
 - If a registrant changes its comparison, it must explain the reason for the change and present both comparisons in the first filing in which the change is made

Technical Changes

New Item 9C

- In September 2021, the PCAOB adopted a rule implementing the *Holding Foreign Companies Accountable Act*, which prohibits foreign companies from listing on U.S. exchanges if the company has been *unavailable for PCAOB inspection / investigation 3 consecutive years*
- New Item 9C added to address disclosure / submission requirements of the HFCAA
 - For “Commission-Identified Issuers”
 - Currently, the only foreign jurisdictions impacted are *China and Hong Kong*
 - Takeaway: Confirm with your auditor whether you may be impacted by HFCAA

Proposed Changes to “Glossy” Annual Report

- In November 2021, the SEC proposed amendments to mandate the electronic submission in PDF format of the “glossy” annual report to security holders
 - Amendments would supersede 2016 staff guidance stating that the SEC would not object if registrants post their “glossy” annual reports to security holders on their corporate websites for at least one year in lieu of furnishing copies to the SEC
 - Takeaway: If adopted, glossy annual reports would need to be filed on EDGAR, whether or not posted on the corporate website

Ethical Considerations for Securities Lawyers

Reminder: Ethical considerations for securities lawyers are not limited to complying with and helping clients comply with the antifraud rules of the securities laws

There are numerous situations where California's ethics rules come into play

Relevant rules are contained throughout the code, but the following chapters have particular relevance for corporate lawyers:

- Chapter 1. Lawyer-Client Relationship
- Chapter 8. Maintaining the Integrity of the Profession

California Rules of Professional Conduct

Chapter 1. Lawyer-Client Relationship

- Rule 1.1 Competence
- Rule 1.2.1 Advising or Assisting the Violation of Law
- Rule 1.6 Confidential Information of a Client
- Rule 1.8.2 Use of Current Client's Information

Chapter 8. Maintaining the Integrity of the Profession

- Rule 8.4 Misconduct
- Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

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2. Other SEC Rulemaking Developments

Human Capital Disclosures Year 2 – Overview

Background

- New human capital disclosure rules went into effect with last year's 10-K
- Requires, to the extent material, **a *description of human capital resources***, including # of persons employed, and any HC measures used in managing the business (such as those for personnel development, attraction, and retention)
- No specific reporting framework or definition of “human capital” instead taking ***principles-based approach*** suggesting the analysis should be tailored to your business/workforce

General Approach

- ***Sources of disclosure***
 - ***Existing internal and external statements*** regarding key human capital resources, measures, and objectives
 - ***Past engagement with and input from shareholders*** on this topic
 - ***List of disclosure topics*** suggested by SEC (see next slide)
 - ***Peer benchmarking***
- ***Focus on materiality, don't need to include in the 10-K every aspect of HCM the company monitors or voluntarily discloses on website***

Former 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.”

Human Capital Disclosures Year 2 – Reminder of Potential Metrics from Prior Rulemaking Process

Metrics Listed in Proposing Release

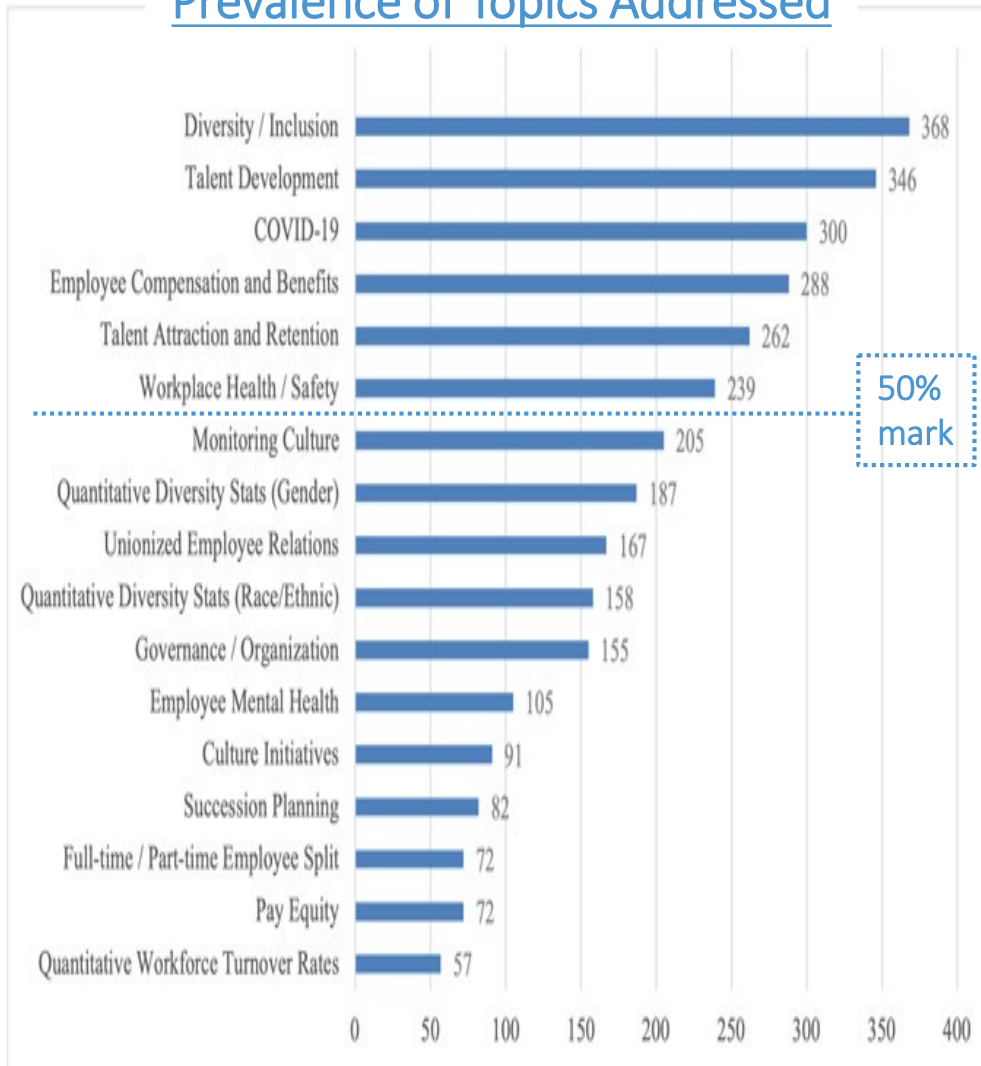
- *Number and types of employees*, including the number of full-time, part-time, seasonal, and temporary workers
- Measures with respect to the stability of the workforce, such as *voluntary and involuntary turnover rates*
- Measures regarding *average hours of training* per employee per year
- Info regarding *human capital trends*, such as competitive conditions and internal rates of hiring and promotion
- Measures regarding *worker productivity*
- *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*

Human Capital Disclosures Year 2 – What We Saw In Year 1

Prevalence of Topics Addressed



Selected Industry Trends

	Most Common Disclosure Topics
Aerospace	Talent dev., D&I, health/safety (all 70%+)
Biotech	D&I (100%), COVID (72%), health/safety (66%)
Finance	Employee comp (70%), diversity stats (61/70%)
Manufact.	Health/safety (85%), talent dev. (80%)
Services	D&I, talent dev. & employee comp (all 70%+)
Tech	Talent dev. (66%), recruitment/retention (58%)

Other Takeaways

- **Length:** significant variation, ranging from 10 words to ~2,200 (median 765)
- **Quantitative metrics:** ~75% included something beyond # of employees
- **SEC comment letters:** ~25 issued on the new rules, generally only to those with bare-bones disclosure that didn't appear to have been updated for the new rules

-Based on Gibson Dunn's Review of 451 Examples Across S&P 500-

Human Capital Disclosures Year 2 – Key Action Items Ahead of Upcoming 10-K

- 1. Vet disclosure controls:** verify that DCPs support your human capital disclosures so they are reliable, consistent & accurate (controls remain a key SEC focus area)
- 2. Conduct external/internal check:** confirm disclosures remain appropriate/relevant:
 - Year 1 peer disclosures (particularly important given industry-specific impact)
 - Internal reporting frameworks (e.g., what does the board see)
 - Other public disclosures (consistency is another key SEC focus area)
 - Investor and other stakeholder feedback
- 3. Validate methodologies:** calculation of quantitative metrics should be consistent year-to-year or else changes should be prominently disclosed
- 4. Consider additional disclosures if relevant:** addressing progress regarding any significant publicly disclosed goals (e.g., workforce diversity targets, pay equity), return-to-work policies, vaccine mandates, challenges in light of the “Great Resignation”
- 5. View through SEC lens:** comments in Year 1 didn’t have “teeth,” but likely will get more sophisticated/probing as market develops
- 6. Manage expectations:** set expectations that disclosures likely will evolve over several years in response to peer practices, investor views & new SEC rulemaking

The Debate Over Principles-Based Disclosure

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

Former 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 principles-based approach* reflected in the 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 *allows companies to avoid addressing some topics*, while others view that as ignoring the pressures of sophisticated capital markets and investor demands

SEC Upcoming Rulemaking – ESG Disclosures

Climate Change

- **Background:** SEC has been increasing its focus on climate change (e.g., Enforcement Taskforce, dedicated staff, climate change comment letters); Chair Gensler announced in July staff is drafting new disclosure rules
- **Likely focus areas:** Both qualitative (energy transition risks, progress on announced goals) and quantitative (e.g., GHG emissions, material costs)
- **Timing:** Proposal expected in Q1 of 2022, with compliance likely not until early 2023, at the earliest

Human Capital

- **Background:** SEC indicated that it plans to revisit HCM disclosure requirements with a view towards adopting more prescriptive rules
- **Likely focus areas:** Per Chair Gensler, metrics such as workforce turnover, demographics such as diversity, info on skills and development training, compensation, benefits, health and safety
- **Timing:** Proposal expected in first half of 2022, with compliance likely not until early 2023, at the earliest

Cybersecurity

- **Background:** SEC has for years been increasing its focus on cyber controls & disclosures (e.g., Feb. '18 interp. guidance, recent enforcement actions), and has announced it expects to propose specific cyber disclosure requirements
- **Likely focus areas:** Cyber preparedness, governance and related risks, as well as incident reporting and disclosure controls
- **Timing:** Proposal expected in first half of 2022, with compliance likely not until early 2023, at the earliest

SEC Proposed Rules – 10b5-1 Trading Plans & Share Repurchases

On December 15, 2021, the SEC proposed 2 amendments with 45-day comment periods

Rule 10b5-1 Trading Plans

- ***New requirements for 10b5-1(c)(1) defense***
 - 120-day cooling off period for S16 insiders (30-day for public co's)
 - S16 insider certification of no MNPI + plan entered into in good faith
 - No overlapping plans
 - Only 1 single-trade plan every 12 mos.
 - Plans must be operated in good faith
- ***New disclosure requirements***
 - Companies: annual disclosure (ITPs, NEO equity grants w/in 14 days of releasing MNPI) & quarterly disclosure (detailed info on 10b5-1 plans adopted, modified or terminated in quarter)
 - S16 reports: disclose 10b5-1 plans on Forms 4 / 5; report gifts w/in 2 days

Share Repurchase Disclosures

- ***New daily disclosure*** of detailed info re share repurchases
 - What: # of shares, average price, # purchased on open market, # under 10b-18 safe harbor, # with 10b5-1 plan
 - When: new Form SR to be filed next business day after repurchase
- ***New quarterly (10-Q) disclosure***
 - Mostly benign: e.g., rationale & process for repurchase, insider trading policies, reliance on 10b5-1 & 10b-18
 - Except: new checkbox indicating if insiders purchased/sold w/in 10 days of announcing buyback

Previous SEC Rule Changes – Reminder on 2020 Amendments

Principles-Based Approach to Business Description (Item 101)

- *Eliminates reference to a 5-year timeframe*, instead focusing on materiality
- Replaces the 12 topics that “shall” be discussed, if material, with *a non-exhaustive list of seven topics* that may be discussed

Increased Disclosure Threshold for Legal Proceedings (Item 103)

- *Raises the threshold for disclosure of governmental environmental proceedings* from \$100k in potential monetary sanctions to \$300k or higher amount up to \$1M if reasonable/disclosed

Summary and Organizational Requirements Added to Risk Factors (Item 105)

- Summary requirements if risk factors *exceed 15 pages*
- Must organize risk factors logically under relevant headings and move generic risks to end

Form 10-K Cover Page

- New checkbox on the Form 10-K cover page regarding auditor attestation of internal controls

E-Signatures

- Expressly provides for use of e-signature, though signatory *must first manually sign another document* agreeing use of e-signature constitutes legal equivalent of his/her manual signature

Previous SEC Rule Changes – Reminder on 2019 Amendments

Exhibit List Simplification

- No longer a “2-year tail” on material contracts for most companies
- 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
- Can omit personally identifiable info as well as immaterial schedules/other attachments to exhibits without CTR
- New exhibit for description of securities; important to consider updates each year

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

Other Changes











- *Description of property*: clarified only need to discuss material properties
- *Delinquent Section 16 filings*: no more 10-K cover page check-box, new proxy requirements
- *Critical audit matters*: phased in last year for all companies

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 recent changes

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3. Trends in SEC Comment Letters

SEC Comment Letter Trends – Overview*

	Comment Letter Topic	Change		Comment Letter Topic	Change
1.	Non-GAAP measures		6.	Signatures/exhibits/agreements (from #10)	
2.	MD&A		7.	Intangible assets and goodwill (from #6)	
3.	Segment reporting (from #4)		8.	Contingencies (from #7)	
4.	Revenue recognition (from #3)		9.	Inventory and cost of sales (from #8)	
5.	Fair value measurement		10.	Income taxes (from #9)	

- Number of comment letters *continued to decline*, down 20% from last year (943 vs. 1,180)
- **72% of companies** receiving comments had a public float > \$700 million
 - 18% had a public float of \$75 - \$700 million
 - 10% had a public float of < \$75 million

*Trends generally based on comment letters issued between June 2020 and June 2021, as compared to prior year period. See EY, *SEC Reporting Update: Highlights of Trends in 2021 SEC Comment Letters*

SEC Comment Letter Trends – Non-GAAP Metrics

37% of comments in 2020 and 2021

Comment Focus Areas

- *Whether a performance measure* is a non-GAAP measure
- *Equal or greater prominence* of the most directly comparable GAAP financial measure
- *Appropriateness of COVID-related adjustments*, including methods used to calculate the adjustments
- Whether an individually tailored accounting principle *may be misleading*
- Disclosure of *why management believes* the non-GAAP measure is useful to investors

Sample Comment

“Your non-GAAP results include adjustments for occupancy charges at stores temporarily closed and payroll and benefits for store employees during the period stores were closed. It appears that these are normal, recurring cash operating expenses. Please tell us how you considered the guidance in Question 100.01 of the Non-GAAP Financial Measures Compliance and Disclosure Interpretations...”

SEC Comment Letter Trends – MD&A

37% of comments in 2020 and 2021

Comment Focus Areas

- *Quantifying effects of factors* driving material period-to-period changes
- *Key performance metrics* used by management, including how they correlate to material changes in the results of operations
- *Known trends or uncertainties*, including relating to operating results
- *Reportable segment information*, and disclosing results at a more disaggregated level
- *Liquidity and capital resources*, including clear discussion of drivers of cash flows

Sample Comment

“Where a material change is attributed to two or more factors, including any offsetting factors, the contribution of each identified factor should be described in quantified terms....Please consider quantifying the factors in tabular form with the remaining written narrative focused on analyzing the reasons for such changes. In addition, please avoid vague terms such as ‘primarily’ or ‘partially offset’...”

SEC Comment Letter Trends – Revenue Recognition

19% of comments in 2020 and 2021

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

7% of comments in 2020 and 2021

Comment Focus Areas

- *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
- The *timing of goodwill and intangible asset impairment charges*
- *Impairment testing policies*, including consideration of COVID-19
- *Disclosure of the methodologies, estimates and underlying assumptions* in the impairment analysis

Sample Comment

“We note as a result of the uncertainty and challenging operating environment created by the COVID-19 pandemic, you completed an interim impairment review of the goodwill and other long-lived assets of [certain] reporting units....Please explain why an interim impairment review was not triggered for your other reporting units...”

SEC Comment Letter Trends – Climate Change(!)

Comment Focus Areas – *discuss in the 10-K, to the extent material...*

- *Capital expenditures* for climate-related projects
- *Compliance costs* relating to climate change
- *Litigation risks* relating to climate change and the potential impact to the company
- *Regulation*, including indirect consequences of climate-related regulation or trends
- *Carbon offsets / credits*, including any purchases or sales and any material effects
- *Business trends*, including decreased demand for products
- *Physical impact* on operations and results
- *Consistency* with discussions in the ESG report

Sample Comment

“To the extent that you expect decreased demand for your goods or services that produce significant greenhouse gas emissions or are related to carbon-based energy sources, please disclose any material expected effect on your business, financial condition, and results of operations...”

Takeaway: Comments issued across industries this past year plus “Dear CFO Letter” posted to SEC website; likely a SEC fact-finding mission to inform upcoming rulemaking on climate change

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4. Other Disclosure Focus Areas

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

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 2 full years 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

MD&A Considerations – Global Developments

Brexit	LIBOR	Cybersecurity	Climate Change
<p>–Corp Fin Director Statement on Risks (Mar. '19)</p>	<p>–Staff Statement on LIBOR Transition (Jul. '19)</p>	<p>–SEC Statement on Cyber Disclosures (Feb. '18)</p>	<p>–Sample Comment Letter (Sept. '21)</p>
<ul style="list-style-type: none"> Review existing material contracts for contractual risk Consider financial statement impacts such as inventory write-downs, long-lived asset impairments, assumptions underlying fair value measurements Likely no longer appropriate to say “we are still assessing” 	<ul style="list-style-type: none"> In addition to company contracts, consider customer exposure If no fallback language, what risk mitigation steps are necessary for material contracts? New risks from alt reference rates? Note that some LIBOR rates extended to June 2023 & others phased out 12/31/21 	<ul style="list-style-type: none"> Disclose holistically Assumption that most cyber events material Consider impact on disclosure controls, insider trading procedures (e.g., blackout), Reg FD policy SEC Enforcement Division has been very active bringing cases 	<ul style="list-style-type: none"> Describe effect of material pending or existing legislation Identify material past or future capital expenditures/compliance costs Discuss consequences of legislation or business trends on demand, competition, resources Discuss effects on physical plant
<p>If you have significant ops in UK, how are you managing business, regulatory & supply risks?</p>	<p>If you have material LIBOR contracts extending post-LIBOR, how are you managing transition?</p>	<p>If you have a cyber incident, what’s the expected impact on the financials? Do you have the right DCPs in place?</p>	<p>Are there known trends / uncertainties from climate change matters?</p>

SEC Focus – Enforcement Actions

	Form 12b-25	Sales Efforts	KPIs	Non-GAAP
Company	Eight Companies (2021)	HP Inc. (2020)	BMW (2020)	Fiat Chrysler (2020)
Alleged Issue	Failed to disclose required details regarding anticipated changes in results	Failing to disclose the impact of sales practices undertaken in an effort to meet quarterly sales and earnings targets	Offering dealers incentives to designate vehicles as loaners so they could be counted as sales (Non financial KPI: U.S. retail sales volume)	Failure to disclose limited scope of internal audit to confirm vehicles met emissions regulations. Results of audit included in press release and annual report
Settlement	\$25k-\$50k per co.	\$6M	\$18M	\$9.5M
Significance	Targets identified by analysis of filings of Forms 12b-25 followed by restatement	Consider impact on future periods if sales are made in earlier periods than anticipated	Case brought on the basis of a Rule 144A bond offering in the U.S.	Reminder to consider scope and rigor of ESG analyses when disclosing in SEC reports or marketing green investments

Ethical Considerations for Reporting Up and/or Out

SEC Standards of Professional Conduct for Attorneys

Appearing and Practicing Before the Commission in Representation of An Issue

- 17 CFR Part 205
- Required by the Sarbanes-Oxley Act of 2002

VS.

CA Rules of Professional Conduct

- Rule 1.6 Confidential Information of a Client

State Bar of California: “The Part 205 Rules have created an ethical conundrum for California attorneys as portions of the Part 205 Rules seemingly conflict with our statutory duty to protect confidential client information. The Corporations Committee of the Business Law Section and the Committee on Professional Responsibility and Conduct have jointly prepared this ethics alert to warn California lawyers about these important issues. ”

California Rule 1.6 – Confidential Information of a Client

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent,* or the disclosure is permitted by paragraph (b) of this rule.
- (b) *A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) to the extent that the lawyer reasonably believes* the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes* is likely to result in death of, or substantial* bodily harm to, an individual, as provided in paragraph (c).*
- (c) *Before revealing information* protected by Business and Professions Code section 6068, subdivision (e)(1) to prevent a criminal act as provided in paragraph (b), a **lawyer shall**, if reasonable* under the circumstances:
 - (1) *make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act*; or (ii) to pursue a course of conduct that will prevent the threatened death or substantial* bodily harm; or do both (i) and (ii); and
 - (2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b).
- (d) In revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known* to the lawyer at the time of the disclosure.
- (e) A lawyer who does not reveal information permitted by paragraph (b) does not violate this rule.

CA Confidentiality Implications: *Generally, no conflict; CA rules permit attorneys to report up the ladder, while Rule 205 requires attorneys to report up*

Part 205 Rules – Duty to Report a Material Violation

Duty to Report: §205.3(b) imposes a duty on attorneys *appearing & practicing* before the SEC to report *evidence of a material violation* of securities laws or breach of fiduciary duty

- *Appearing & practicing:* expansive definition, does not require direct interaction with SEC
- *Evidence of material violation:* credible evidence; reasonably likely that a material violation has occurred, is ongoing or is about to occur
- *Report up the corporate ladder* until you have a *reasonable belief* that an *appropriate response* has been provided within a *reasonable time*



CA Confidentiality Implications: *Generally*, no conflict; CA rules *permit* attorneys to report up the ladder, while Rule 205 *requires* attorneys to report up

Part 205 Rules – Permissible Disclosures of Confidential Info

Permissible Disclosure of Confidential Info:

§205.3(d) permits an attorney to reveal to the SEC, *without the issuer's consent*, *confidential information* related to representation, to the extent reasonably believed necessary to:

- i. Prevent a material violation likely to cause substantial injury to issuer / investors
- ii. Prevent fraud on the SEC (i.e., prevent issuer from committing perjury)
- iii. Rectify consequences of a material violation that caused, or may cause, substantial injury to issuer / investors, in the furtherance of which the attorney's services were used

CA Confidentiality Implications:

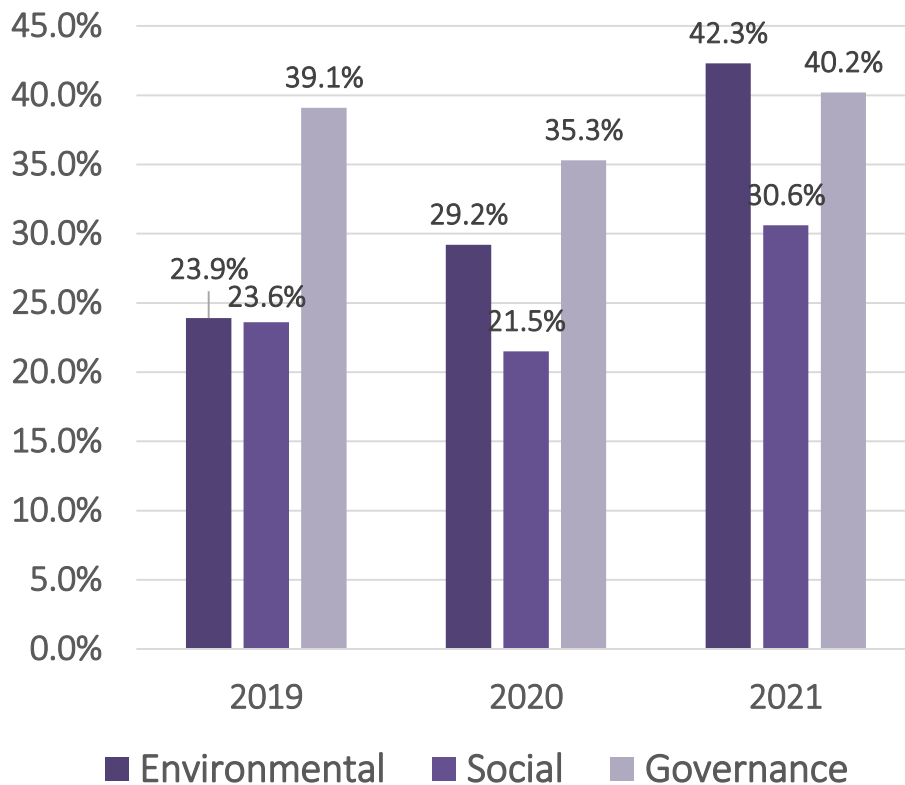
- **Conflict between SEC and CA rules**
 - CA Rules of Professional Conduct and Business & Professions Code require attorneys to maintain client confidences
 - Strong CA public policy favoring confidentiality
- **SEC preemption**
 - Rule purports to preempt state law if attorney “complies in good faith”
 - However, this remains unresolved
- **Possible state bar discipline and / or breach of fiduciary duty claims**
 - Disclosure of confidential info under Rule 205 remains risky

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5. Shareholder Proposals & Proxy Advisor Updates

Shareholder Proposal Trends in 2021

Vote Result Trends*



Proposals averaging 50%+ support: declassify board, supermajority voting, board diversity, EEO-1 report, majority voting, climate change

Key Stats*

- 11%** YoY increase in # of proposals submitted, reversing 5-yr trend
- 2x** YoY increase in % of proposals withdrawn by proponent
- 48%** YoY increase in # of proposals receiving majority support

2021 Observations

- **E&S issues dominate agenda:** representing 44% of >800 proposals submitted, with most frequent being diversity and climate
- **Small investors dominate process:** 40% individual investors & 20% SRI; Chevedden & associates responsible for 31%
- **Overall support levels increase:** 36% in '21 vs. 31% in '20; >70 proposals passed (incl. 11 climate change & 9 diversity, incl. EEO-1)
- **BlackRock and Vanguard** support for E&S up significantly, in some cases >3x

*Source: Gibson Dunn Client Alert, Shareholder Proposal Developments During the 2021 Proxy Season (August 2021)

Key Takeaways from 2021 SEC Staff Guidance

No-Action Letter Decisions

- **Proponents given benefit of doubt on procedural grounds:** COVID impact on timeliness, delivery method, failure to attend prior annual meeting
- **Higher burden for companies to prove substantive grounds:** substantial implementation, micromanagement, ordinary business
- **Rare company win on vagueness grounds:** based on single materially misleading item in the supporting statement re existing shareholder rights

Staff Legal Bulletin 14L

- **Rescinds “Clayton Era” SLBs**
- **More difficult for companies to win on substance:** reverses company-specific approach to evaluating whether an issue is a SPI (no longer need board analysis); reverses course on broader acceptance of micromanagement arguments
 - Climate change
 - Human capital
- **More leniency to proponents on procedural issues:** e.g., how proof of ownership letters are interpreted

Other Learnings

- **Back to written responses:** after foregoing written responses for a couple of years, Staff has reversed course & will issue individual letters starting in 2022
- **Timeline may be a challenge:** NARs due 80 days before filing proxy, but if you need decision before then, incumbent on you to get NARs submitted earlier

Staff views consistent with SEC prioritization of climate change & human capital issues

Preview of Shareholder Proposal Focus Areas for 2022

Expected Hot Proposal Topics

- Requests to adopt Scope 1, 2 and 3 GHG emission reduction targets
- Climate lobbying
- Racial equity audits
- EEO-1 reports
- More of the same on corporate governance matters:
 - Special meetings/lower threshold
 - Written consent
 - Independent chair
 - Conversion to public benefit corporation

Takeaway: 2022 should be more of the same (ESG, climate change, diversity)

Rule 14a-8 Changes Effective for 2022

- ***Background:*** SEC approved amendments in 2020, effective beginning with 2022 proxy
- ***Changes to eligibility:*** increase share ownership thresholds to be able to submit (old: \$2k for 1 yr, new: \$2-25k for 3-1 yrs)
- ***Changes to resubmission:*** significant increase in vote support threshold in order to resubmit proposal in a future year
- ***Additional procedural requirements:*** ability to use a rep to submit; engagement availability; tougher on “1 proposal”
- ***But, not yet the final word?*** Changes were controversial, rules have been challenged in court by investor groups and a “new” SEC has indicated possibility of revisiting rules this year

Proxy Advisor Voting Updates for 2022 – ISS

Topic / Applicability	Policy Update
<i>Director Elections</i>	
Board diversity – ethnicity (Russell 3K / S&P 1500)	Will recommend against nominating committee chair of boards with no racially/ethnically diverse members; announced last year subject to 1-year transition; exception for director retirements + commitment to appoint another
Board diversity – gender (New: all companies)	For 2023: Will recommend against nominating committee chair at <u>all</u> companies (not just R3K/S&P1500) where no women on board (similar exception as above)
Unequal voting rights (New: all companies)	For 2023: Will recommend against directors at <u>all</u> companies (not just newly public companies after 2015) with unequal voting rights (e.g., multi-class stock, non-voting stock, loyalty shares); exception for sunsets of up to 7 years
Climate change – board accountability (high-impact companies)	Will recommend against responsible committee chair if company on Climate Action 100+ list isn't taking minimum steps needed to assess & mitigate climate change risks, including TCFD-aligned disclosures + setting GHG reduction targets
<i>Other Proposals</i>	
Capital authorization proposals	Simplified voting policy + no longer will penalize companies in the bottom 10% on TSR performance
Equity plan proposals	New calculation for burn rate, using “value-adjusted” methodology
Say-on-climate proposals	Will recommend votes case-by-case on both management & shareholder proposals, with factors including completeness and rigor of the climate plan (e.g., TCFD-aligned disclosures, GHG emissions reporting, net-zero commitment)

Proxy Voting Policy Updates for 2022 – Glass Lewis

Topic	Policy Update
<i>Director Elections</i>	
Board diversity – gender (Russell 3K)	<ul style="list-style-type: none"> • For 2022: Will recommend against nominating committee chair due to lack of 2+ females on boards (or 1+ females on boards with <7 directors)* • For 2023: Will recommend against nominating committee chair if the board is not at least 30% gender diverse* <i>*Plus must meet applicable state law regulatory requirements</i>
Board diversity – ethnicity (S&P 500)	<ul style="list-style-type: none"> • For 2022: May recommend against nominating committee chair due to failure to disclose % diverse, diversity definition, Rooney Rule, board skills • For 2023: Will recommend against nominating committee chair due to failure to provide aggregate/individual disclosure about board ethnic makeup
Unequal voting rights	Will recommend against nominating committee chair due to multi-class share structures with unequal voting rights if no “reasonable” sunset (up to 7 yrs)
Waiver of retirement / tenure policies	Will recommend against nominating committee chair due to waiver of policies for 2+ years in a row, absent “compelling rationale”
Climate change – board oversight (Russell 1K / S&P 500)	<ul style="list-style-type: none"> • For Russell 1K: Will note as a concern failure to provide “clear disclosure” re board-level oversight of E&S issues • For S&P 500: Will recommend against nominating committee chair due to failure to provide “explicit disclosure” re board oversight of E&S issues

New policy for applying vote recommendation: if a committee chair is not up for re-election due to a classified structure, GL may issue negative recommendations for other committee members up for election

Proxy Voting Policy Updates for 2022 – Glass Lewis

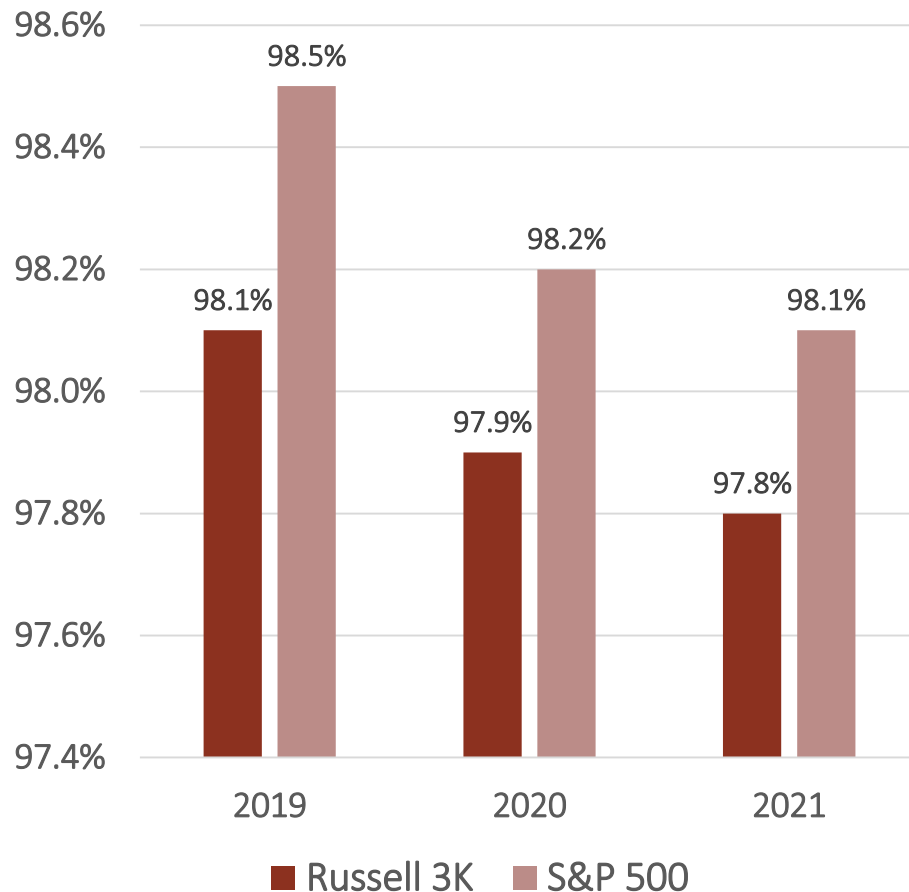
Topic	Policy Update
<i>Shareholder Proposals</i>	
Written consent	Will generally recommend votes in favor of lowering the ownership threshold if a company has no special meeting right or the special meeting ownership threshold is over 15%
<i>Other</i>	
Climate change – say on climate	<ul style="list-style-type: none"> • Management proposals: Will recommend votes case-by-case, taking into account the board’s role in setting strategy in light of the vote, how the board intends to interpret the results, the company’s engagement efforts and the quality of the plan • Shareholder proposals: Will generally oppose
SPAC – governance	Added voting guidelines specific to the SPAC context, including applying a higher overboarding limit of 5 public company boards if a director’s only executive role is at a SPAC

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6. Proxy Season & Corporate Governance Developments

Proxy Season – Director Elections

Vote Result Trends*



Key Stats*

6.1% directors receiving <80% support in '21, ↑80bps vs. '20

19 “vote no” campaigns in '21, more than '20 + '19 combined

0.02% E#1's ownership stake in Exxon, where it won 25% of the board

2021 Observations

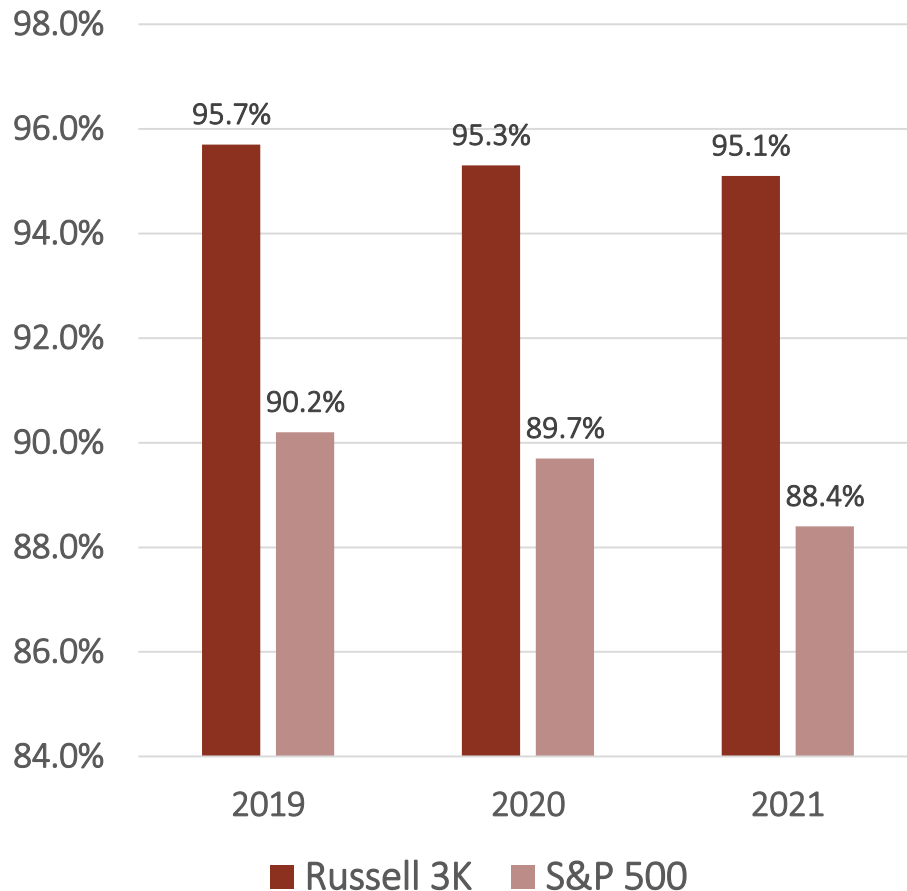
- **Failed director elections still rare:** 0.4% of R3K directors in '21, up from 0.3% in '20
- **But dissent levels continue to tick up:** large investors increasingly dissenting; Vanguard & BlackRock support ↓20-50bps**
- **ESG continues to play a bigger role:** board diversity, SASB/TCFD reporting, climate strategy, in addition to governance issues

*Source: ISS, Director Elections & Governance Proxy Season Review (September 2021)

**Source: Insightia, Proxy Season Voting Snapshot (September 2021)

Proxy Season – Say on Pay

Vote Result Trends*



Key Stats*

2.6% failure rate, the highest since say on pay became mandatory

17 S&P 500 failures in '21, equal to '20 + '19 combined

\$13M median S&P 500 CEO pay, ↑5% to an all-time high

2021 Observations

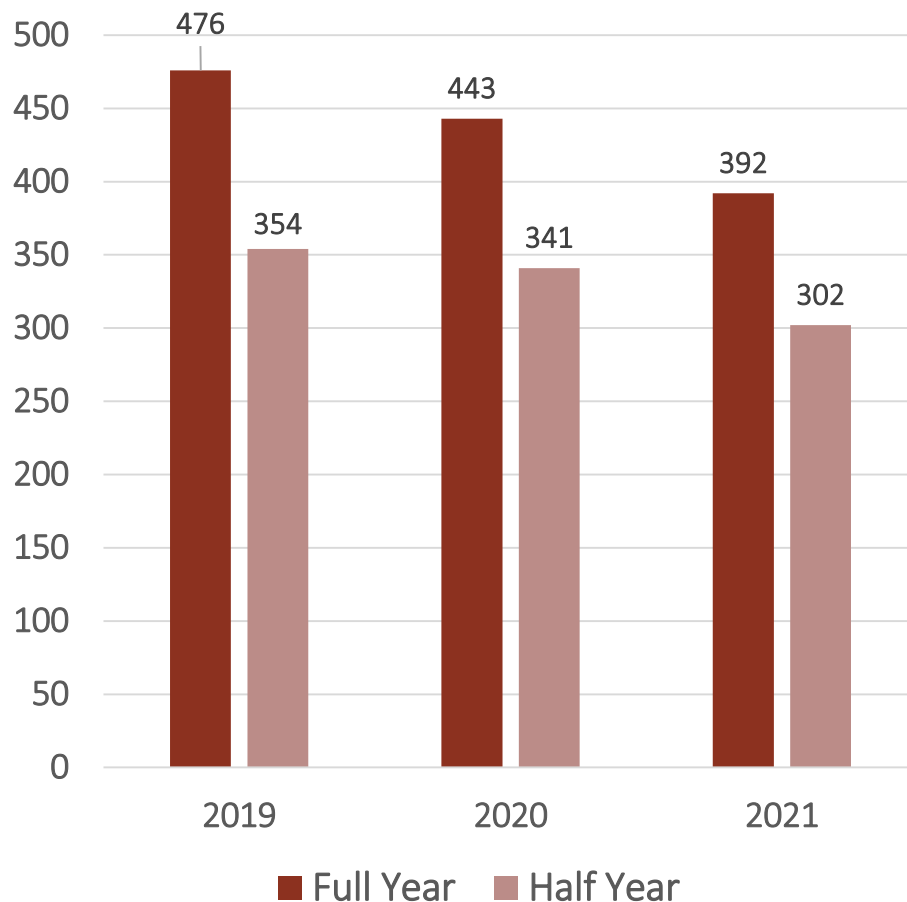
- **Challenging year for most companies:** balance of incentivizing execs during pandemic (special awards + bonus plan adjustments), and mitigating investor ire
- **High-profile say on pay failures:** AT&T, GE, IBM, Intel, Starbucks, Walgreens
- **Large investors increasingly voting against:** BlackRock & SSgA support ↓50-100bps**

*Source: Russell 3K data – ISS, Compensation Proxy Season Review (August 2021); S&P 500 data – proxy solicitor Morrow Sodali

**Source: Insightia, Proxy Season Voting Snapshot (September 2021)

Proxy Season – Activism

Number of U.S. Campaigns*



Key Stats*

- 15%** of campaigns target each of tech & consumer cyclical (most targeted)
- 19%** of campaigns target small-caps, down slightly from prior years
- ~20%** of proxy contests went to a vote, in line with past years

2021 Observations*

- **Industry:** consumer cyclical & tech most targeted sectors; healthcare among top 4
- **Focus areas:** held steady versus prior year, with top 3 being board-related, governance & M&A/break-up
- **Proxy contest outcomes:** # of seats won both by shareholder vote & settlement fell from prior years

*Source: Insightia, Shareholder Activism in H1 2021 (July 2021). Full year data for 2021 extrapolated based on H1 trends

Governance Update – Investors

E&S Issues Increasingly Influencing Voting Decisions on Directors

- Start-up activist **Engine No. 1** won 3 of 12 board seats in proxy fight at **Exxon Mobil** based on climate change issues
- **BlackRock** and **Vanguard** voted against hundreds of directors due to insufficient progress on board diversity
- “Vote no” campaign against **P&G** directors on climate issues
- **State Street** policy for 2022 of voting against nom/gov chairs over board racial/ethnic diversity, EEO-1 reporting, ESG scores

ISS & Glass Lewis Strengthen Policies

- **Diversity:** ISS will vote against nom/gov chair at boards with 0 URMs (in addition to when there are 0 females); GL will look to applicable legal requirements (e.g., CA, Nasdaq) + expects 2+ females and increased disclosure on diversity
- **Board oversight of E&S:** ISS will vote against directors if there’s been a material risk oversight failure, including on E&S; GL will vote against directors if it’s unclear who on board is charged with overseeing E&S issues

Key Takeaways

Investors taking tough stance on E&S

- Critical to proactively engage with key investors
- Increasingly important to articulate compelling, but accurate story on E&S issues
- Consider whether to publish EEO-1 workforce diversity data

Governance Update – Exchanges

Nasdaq Adopts Board Diversity Requirements

- **Comply or explain:** unlike CA requirements, option to either comply or explain why not
- **Specific quota requirements:** less stringent than CA, requiring only 2 diverse (1 female + 1 URM); special rules for SRCs (can satisfy with 2 females) & small boards (1 female or 1 URM)
- **Other requirements:** proxy disclosure of aggregate board diversity stats using a prescribed form of matrix
- **Phase in:** disclosure in '22, 1 diverse in '23, 2 diverse in '25/'26
- **But,** now subject to legal challenge in 5th Circuit

NYSE Updates RPT Approval Requirements

- **Final rule changes less drastic** than originally proposed (e.g., retain \$120k threshold), but generally require RPTs to be approved by indep. committee in advance, not ratified

NYSE Proposes Changes to Voting Requirements

- **Historically,** NYSE required a majority of “votes cast,” counting abstentions as against, for matters it subjected to SH approval
- **New rule** would default to company’s governing docs or state law on required vote standard, aligning with Nasdaq

Key Takeaways

Further differentiating listing requirements

- For Nasdaq companies, assess compliance vis-à-vis diversity quotas and prepare early mock-up of new proxy table
- For NYSE companies, review and update RPT policy & related procedures as needed in light of rule amendments

Governance Update – California

CA Board Diversity Quotas Continue Phase In

- **Gender:** full phase in @ end of 2021 (1 @ <5 member boards, 2 @ 5 member boards, 3 @ 6+ member boards)
- **Race/ethnicity/LGBTQ:** partial phase in @ end of 2021 (1 URM); full phase in @ end of 2022 (1 @ <5 member boards, 2 @ 5-8 member boards, 3 @ 9+ member boards)

But, Legal Challenges to These Quotas Progress

- **Federal court challenge to gender law:** last June, 9th Circuit reversed district court’s dismissal; preliminary injunction denied
- **State court challenge to gender law:** discovery now complete, summary judgment motion denied, trial commenced in December
- **Federal court challenge to URM law:** filed in November 2021, pending answer to complaint
- **State court challenge to URM law:** discovery almost done, trial could commence following February SJ motions as soon as March

Enforcement Situation Currently Murky

- **No fines yet:** CA Secretary of State to date has not proposed regs to implement fines or actually imposed fines; said during trial that compliance essentially “voluntary” at this point
- **But, public shaming?** Annual reports on compliance (including list of companies and their compliance status)

Various Approaches

Time to decide on compliance strategy

- **Fully comply:** ISS/GL & investors expect this + “right thing to do”
- **Comply on own terms:** time w/ planned BoD refresh + disclose
- **Wait & see:** no fines yet, but unclear if CA will apply retroactively
- **Move out of CA:** a possibility depending on HQ structure

Governance Update – Delaware

DE Chancery Court Allows Failure of Oversight Claim to Proceed Against Boeing Directors

- In September, **court denied motion to dismiss** SH lawsuit against BoD for failure of oversight following plane crashes
- **Allegations include** failure to implement BoD reporting system (e.g., no committee charged with monitoring safety, failure to regularly include safety issues on BoD agenda or report to BoD, failure to follow-up on issues when reported)
- **Court found** “complete failure to establish a reporting system for airplane safety” and board “turn[ed] a blind eye”

Reflects Court’s Increased Willingness in Recent Years to Sustain Oversight Failure Claims

- Historically, such claims – which must show utter failure to monitor risks or respond to red flags – rarely survived MTD
- Since 2019, **survival rate of these claims has increased**, meaning discovery commences + settlement value soars

Key Takeaways

- Important to regularly include key risks on Board agenda
- Critical to follow up on any issues that arise
- Consider forming specific committee to handle mission-critical risks
- Minutes should show robustness of Board oversight activities

How to Approach: Focus on identifying and monitoring “essential and mission-critical” risks

Panelists – Thank you!



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