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CONSIDERATIONS FOR PREPARING YOUR 2021 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. This alert reviews the recent amendments to Regulation S-K adopted by the U.S. Securities and Exchange Commission ("SEC") and discusses how public companies are reacting to these new requirements. In addition, it discusses other disclosure topics, including Environmental, Social, and Governance ("ESG") issues such as human capital management, climate change, and cybersecurity, that, in light of increasing investor focus and forthcoming rulemaking, continue to be a top priority for public companies.

An index of the topics described in this alert is provided below.

I. Amendments to Financial and Business Disclosure Requirements in Regulation S-K 2
- A. Amendments to 300 Series of Regulation S-K Requirements (Part II of Form 10-K) 2
  1. Selected Financial Data (Part II, Item 6) 3
  2. Supplementary Financial Data (Part II, Item 8) 3
  3. Management's Discussion and Analysis of Financial Condition and Results of Operations (Part II, Item 7) 4
     - a. New Item 303(a) – Objectives of MD&A 4
     - b. Amended Item 303(b) – Full Fiscal Year Presentation 4
     - c. Amended Item 303(b) – Clarification on Discussion of "Underlying Reasons" for Period-to-Period Changes 5
     - d. Amended Item 303(b) – A Note on Product Lines 6
     - e. Amended Item 303(b) – Items no Longer Required 6
     - f. New Item 303(c) – Interim Period Discussion 7
- B. Reminder: Amendments to 100 Series of Regulation S-K Requirements (Part I of Form 10-K) 7
  1. Business (Part I, Item 1 of For 10-K) 8
     - a. General Development of Business 8
     - b. Description of Business 8
  2. Legal Proceedings (Part I, Item 3 of Form 10-K) 9
  3. Risk Factors (Part I, Item 1A of Form 10-K) 10

II. Spotlight on Key Disclosure Topics 11
- A. Human Capital Disclosure 11
  1. Disclosure Topics 11
  2. Industry Trends 12
  3. Disclosure Format 13
  4. Human Capital Disclosure will Continue to Evolve 13
- B. ESG Disclosure 13
  1. SEC Staff Scrutiny of Climate Change Disclosures 14
  2. Implications of ESG for Disclosure and Controls 15

3. Considering ESG when Preparing Your Form 10-K 15
C. COVID-19 Disclosure Considerations 16
1. Specific Areas of Focus 17
2. Use of Non-GAAP Financial Measures Related to COVID-19 17
D. Supply Chain Disruptions / Labor Shortages / Inflation 17
E. Cybersecurity 18
III. Other Considerations and Reminders 19
A. Technical Changes to Form 10-K: Item 9C and Auditor Tagging Requirements 19
B. Disclosure Considerations for LIBOR Transition 20
C. Nasdaq Diversity Disclosure Rule 20
D. Proposed Changes to "Glossy" Annual Reports 20

I. Amendments to Financial and Business Disclosure Requirements in Regulation S-K

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

On November 19, 2020, the SEC announced[1] 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 ("MD&A")) of Regulation S-K. These amendments were designed to improve financial disclosure by enhancing readability, discouraging repetition, and eliminating immaterial information, and to "allow investors to view the [company] from management's perspective" (the "Financial Disclosure Amendments").[2] The key changes resulting from the Financial Disclosure Amendments include:

- elimination of Item 301, Selected financial data;
- revision of Item 302(a), Supplementary financial information, to replace the current requirement for quarterly tabular disclosure with a principles-based requirement for material retrospective changes;
- revision of Item 303(a), Full fiscal years (amended as Item 303(b)), and Item 303(b), Interim periods (amended as Item 303(c)) to revise language around the disclosure of known trends and uncertainties, call for greater disclosure on factors affecting material changes, and revise or eliminate other disclosure requirements;
- replacement of Item 303(a)(4), Off-balance sheet arrangements, with an instruction to discuss such obligations in the broader context of the MD&A;
- elimination of Item 303(a)(5), Tabular disclosure of contractual obligations;
- revision of current Items 303(a)(1) and (2) (amended as Item 303(b)(1)), Liquidity and capital resources, to specifically require disclosure of material cash requirements from known contractual and other obligations as part of an enhanced liquidity and capital resources discussion; and

- inclusion of new Item 303(b)(3), Critical accounting estimates, to clarify and codify the SEC's existing guidance on critical accounting estimates.

The Financial Disclosure Amendments became effective on February 10, 2021; however, companies were not required to comply with the new requirements until the end of their first fiscal year ending on or after August 9, 2021. Accordingly, for calendar year-end companies, the 2021 Form 10-K will be the first time they are required to comply with these amendments. We also refer you to our prior post, which contains a summary chart and comparative blackline reflecting the Financial Disclosure Amendments.[3]

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

Elimination of Presentation of Past Five Years of Financial Data. The Financial Disclosure Amendments "[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. In lieu of the former item title, most companies will likely show the Item 6 caption as "Reserved," consistent with the Form 10-K pdf[4] available on the SEC's website, and leave the remainder of the item blank.

Despite the removal of the requirement to present five years of selected financial data in tabular format, the adopting release emphasized that 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," especially in light of the amendments to MD&A described below.

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 selected quarterly financial data for each full quarter within the two most recent fiscal years and any subsequent period for which financial statements are included. As a result, companies that have not done so already can remove the table of quarterly information from the financial statement footnotes in their upcoming Form 10-K.

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 (either 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 consider establishing 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 used to comply with the requirement in the old 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. Given the narrow scope of this requirement, we do not expect to see many companies with responsive disclosure.

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

The most significant of the Financial Disclosure Amendments were the changes to modernize, simplify, and streamline the requirements of Item 303. While this set of changes will not require most companies to completely rewrite their MD&A, the amendments serve as a good opportunity for companies to take a close look at their existing disclosures and undertake a meaningful refresh.

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 the prior 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 new provision of the rule, focusing on the objective when preparing and reviewing MD&A is a worthwhile exercise that will likely result in improved disclosure overall.

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 changes resulting from the Financial Disclosure Amendments are described below.

Liquidity and Capital Resources. Companies are required to analyze in MD&A their ability to generate and obtain adequate amounts of cash necessary to meet any capital requirements, both on a short-term (i.e., within the next 12 months) and long-term (i.e., beyond 12 months) basis. This includes identifying any known trends, commitments or uncertainties that will or are reasonably like to result in a material change in liquidity. In addition, the Financial Disclosure Amendments codify past guidance requiring 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 also codify past guidance requiring 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, where applicable, 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 requirement to disclose critical accounting estimates is not repetitive of U.S. GAAP. For example, unlike amended Item 303, 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) – 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.

In preparing the upcoming Form 10-K, companies should consider closely examining the drivers behind changing operating results and focus on 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. Complying with this disclosure requirement in the manner envisioned by the SEC may go a long way towards allowing investors to see the company through the eyes of management. We encourage companies to dedicate ample time to evaluate which underlying reasons should be identified, as we believe it is safe to assume that members of the SEC staff reviewing filings will likely be undertaking a similar exercise.

d. 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 a prior 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.

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

Inflation and Price Changes. The Financial Disclosure Amendments eliminate the express requirement for companies to 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 is reasonably expected to have, a material impact. We noticed a few of the companies that already adopted the Financial Disclosure Amendments had minor additions regarding inflation but it is unclear whether these additions were prompted by the amendments or were included as a result of inflation generally.

Caption for 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). We found that some companies that have already adopted the new rules retained this caption, though it is not clear whether that was done inadvertently, in an effort to maintain the structure and organization of MD&A, or for some other reason. Regardless of the potential rationale, we suspect that many companies, either this year or in future years, will likely determine that, absent a compelling reason to include the caption, removing it as allowed by the new rules is appropriate.

Table of Contractual Obligations. The Financial Disclosure Amendments eliminate the requirement to provide a contractual obligations table, as much of the information is already 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 consider confirming 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. Many companies that have implemented the new rules have determined to retain the table with minimal or no changes. Based on our review, many companies that removed the table have, to one extent or another, made additions or tweaks to the liquidity discussion to capture disclosure that would have been lost with removal of the table.

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

For quarterly reports, 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 was previously 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 example, if a company chooses to adopt new Item 303(c) for its Q1 2022 Form 10-Q, a new comparison of Q1 2022 to Q4 2021 will be required, as well as a comparison of Q1 2022 to Q1 2021, along with an explanation for the change. Going forward, a comparison of the current quarter to the previous quarter will likely 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, and we have not noticed this change among the companies we surveyed; however, companies whose businesses lend themselves to sequential analysis may welcome the change.

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

In 2020, the SEC adopted several amendments to Item 101 (Description of Business), Item 103 (Legal Proceedings), and Item 105 (Risk Factors) designed to result in improved disclosure tailored to reflect a company's particular circumstances (the "Business Disclosure Amendments").[5] The Business Disclosure Amendments went into effect on November 9, 2020, making the 2020 Form 10-K the first SEC filing where calendar-year filers implemented these new rules. A brief summary of the changes is included below, along with observations of companies' disclosures since implementation of the changes. More detailed information about

the Business Disclosure Amendments is included in our prior alert regarding considerations for the 2020 Form 10-K.[6]

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

a. General Development of Business

Item 101(a) of Regulation S-K focuses on the general development of a company's business. The Business Disclosure Amendments made 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.

The non-exclusive list of disclosure topics includes (1) bankruptcy or similar proceedings, (2) material reclassification or mergers, (3) acquisitions / dispositions of material amount of assets, and (4) material changes to a previously disclosed business strategy. The SEC emphasized that companies have the flexibility to determine the appropriate level of detail for such disclosure topics based on materiality.

The Business Disclosure Amendments also eliminated 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. 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. From a survey of 2020 Form 10-K filings, we did not notice any discernable trends in updates to disclosure around development of a company's business. In addition, most companies surveyed continue to include a full description, as opposed to providing updates only.

b. Description of Business

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 previous 12 enumerated disclosure topics, some of which the SEC noted may not be relevant to all companies. Under the current iteration, Item 101(c) focuses on seven disclosure topics, and distinguishes 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. The seven topics described in Item 101(c) are listed 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.

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

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.

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.

5. The extent to which the business is or may be seasonal.

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.

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).

For a more detailed review of the new human capital disclosure requirement, please see "Spotlight on Key Disclosure Topics—Human Capital Disclosure" below.

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

The Business Disclosure Amendments provided two helpful updates to legal proceedings disclosure. First, companies are now expressly allowed to provide the information required by Item 103 by hyperlink or cross-reference to disclosure located elsewhere in the document. This approach confirmed 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 was 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 $1,000,000 (or, if lower, one percent of the current assets of the company). Based on a survey of 2020 Form 10-K filings, companies choosing a threshold other than $300,000 tended to use $1,000,000 and disclosed the alternate threshold even in periodic reports where there was no proceeding to disclose based on such threshold.

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

The Business Disclosure Amendments imposed three new requirements on Form 10-K filings in an attempt to curb the ever-expanding list of risk factors.

Organization of Risk Factors under Headings. Companies are required to organize their risk factors logically into groups under headings that adequately describe the type of risk. 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 and explain that, 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."

"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 changed 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. Based on the companies we surveyed, this change did not result in a major overhaul of risk factors in companies' 2020 Form 10-K filings.

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. If a risk factor summary is required, it must be included in "the forepart of the … annual report." While there continues to be no clear guidance on what is considered the "forepart" of Form 10-K, a survey of 2020 Form 10-K filings saw the most common sections to place the risk factor summary was either in pages preceding Item 1 (Business) or at the beginning of the risk factors section. Some practitioners (and, apparently, at least one SEC staffer) have suggested that a risk factor summary could be combined with a company's forward-looking statements disclaimer, so long as the combination would satisfy the requirements of the risk factor summary required by Item 105; however, this does not seem to be an approach commonly adopted in Form 10-K filings. Companies surveyed

who included a risk factor summary typically just listed the headings of various (but not all) risk factors in a bulleted list, grouped by the categories to match the actual risk factor section.

II. Spotlight on Key Disclosure Topics

A. Human Capital Disclosure

A main area of focus for 2020 Form 10-K filings was the new human capital disclosure requirement. As previously discussed, the Business Disclosure Amendments imposed a principles-based requirement in the "Business" section of Form 10-K to describe the company's "human capital resources . . . and any human capital measures or objectives that the [company] focuses on in managing the business." Prior to this amendment, Item 101(c) of Regulation S-K required the registrant to disclose only the number of persons employed by the registrant.

Consistent with the stated desire of the Commission under former Chair Jay Clayton to implement a more "principles-based" disclosure system, the new rules did not define "human capital" or elaborate on specific requirements for human capital disclosures beyond the few examples provided in the rule text. (As discussed in more detail below, this approach is in stark contrast to the approach current Chair Gary Gensler has suggested the SEC should take when it amends the human capital disclosure rules, expected later this year.)

To understand how companies have responded to the current disclosure requirements, we conducted a survey of the substance and format of human capital disclosures made by the S&P 500 and have summarized a few of our observations below. As is to be expected from principles-based rules, companies provided a wide variety of human capital disclosures, with no uniformity in their depth or breadth. For a more detailed summary of our findings from this survey, please see our prior client alert, "Discussing Human Capital."[7]

1. Disclosure Topics

Based on our survey, we identified seven primary categories of human capital disclosure, which could be broken down further into 17 different disclosure topics.

a. *Workforce Composition and Demographics*. While Item 101(c) still only requires companies to include the number of persons employed, some companies provided other quantitative metrics relating to workforce composition, including the split of full-time and part-time employees or the number of seasonal and/or independent contractors and unionized employees. The most common type of disclosure topic across all seven categories was diversity, equity, and inclusion, with the depth of these disclosures ranging from generic statements expressing the company's support of diversity in the workforce to detailed examples of actions taken to support underrepresented groups and increase the diversity of the company's workforce. Some companies also included quantitative metrics on gender or racial representation, either for the entire workforce or for select levels of employees and/or the board of directors.

b. *Recruiting, Training, Succession*. The second most common disclosure topic was talent development. This typically consisted of a qualitative discussion regarding employee training, learning, and development opportunities. Companies generally discussed training

programs such as in-person and online courses, leadership development programs, mentoring opportunities, tuition assistance, and conferences, and a minority also disclosed the number of hours employees spent on learning and development. In addition to talent development, a majority of companies surveyed also discussed efforts to recruit and retain talent, though quantitative metrics on retention, such as turnover rates, were not common. While a few companies included a discussion of succession planning, this was not a primary focus for most companies surveyed, which may be a function of succession being a focus area primarily for executives rather than the workforce more broadly.

c. *Employee Compensation*. Approximately two-thirds of companies surveyed included disclosure relating to employee compensation, generally providing a qualitative description of the compensation and benefits program offered to employees. Discussions around pay equity practices or quantitative measures of pay gaps based on gender or racial representation were rare.

d. *Health and Safety*. Health and safety was a common disclosure topic, with discussions primarily focused on the company's commitment to safety in the workplace and compliance with applicable regulatory and legal requirements. Only a few companies surveyed actually provided quantitative disclosures on workplace safety, such as historical and/or target incident or safety rates. About a quarter of companies surveyed also included a discussion on benefits provided to employees for mental or emotional health.

e. *Culture and Engagement*. Discussions on culture and engagement centered around either practices and initiatives undertaken to build and maintain culture or ways companies monitor culture and employee engagement. Company culture was often also discussed in the context of diversity-related initiatives to help foster an inclusive culture.

f. *COVID-19*. Information regarding COVID-19, particularly its impact on company policies and procedures or on employees generally, was included by a majority of companies surveyed. COVID-19-related topics ranged from work-from-home arrangements and safety protocols taken for employees who worked in person to additional benefits and compensation paid to employees as a result of the pandemic and contributions made to organizations supporting those affected by the pandemic.

g. *Human Capital Management Governance and Organizational Practices*. Only a minority of the companies surveyed discussed their human capital management governance and/or organizational practices (such as oversight by the board of directors or a committee and the organization of the human resources function).

2. Industry Trends

One of the main rationales underlying the adoption of principles-based—rather than prescriptive—requirements for human capital disclosures was that the relative significance of various human capital measures and objectives varies by industry. For example, industries with highly specialized workforces may focus more on talent development and retention, whereas industries such as manufacturing may include a more robust discussion on workplace safety or unionized employees. Please see our prior client alert, "Discussing Human Capital,"[8] for a high-

level summary of the main disclosure topics for 17 different industries based on the companies we surveyed.

3. Disclosure Format

The format of human capital disclosures in companies' annual reports varied greatly. The length of the disclosure ranged from 10 to 2,180 words, with about 25% of companies surveyed including charts or graphics to illustrate statistical data. While the disclosure requirement specifically asks for a description of "any human capital measures or objectives that the registrant focuses on in managing the business," our survey revealed that approximately 25% of companies determined not to include any quantitative metrics in their disclosure beyond headcount numbers. Given the materiality threshold included in the requirement and the fact that it is focused on what is actually used to manage the business, this is not a surprising result. It was common to see companies identify important objectives they focus on, but omit quantitative metrics related to those objectives. For example, a large majority companies discussed their commitment to diversity, equity, and inclusion, but less than half of companies disclosed quantitative metrics regarding gender and racial diversity.

4. Human Capital Disclosure will Continue to Evolve

SEC staff comment letters addressing the new human capital requirements did not reveal additional guidance beyond what was included in the proposing and adopting releases. Comment letters were generally issued to companies whose disclosures about employees were limited to the bare-bones items companies have discussed historically, such as the number of persons employed and the quality of employee relations. From these companies, the Staff simply sought a more detailed discussion of the company's human capital resources, including any human capital measures or objectives upon which the company focuses in managing its business. Based on our review of the responses to those comment letters, we have not seen a company take the position that a discussion of human capital resources was immaterial and therefore unnecessary.

On August 18, 2020, SEC Chair Gensler tweeted: "Investors want to better understand one of the most critical assets of a company: its people. I've asked staff to propose recommendations for the Commission's consideration on human capital disclosure…. This could include a number of metrics, such as workforce turnover, skills and development training, compensation, benefits, workforce demographics including diversity, and health and safety." Until the SEC proposes and adopts new rules governing the disclosure of human capital management, however, we expect the wide variance in Form 10-K human capital disclosures to continue. See below under "ESG Disclosure—Considering ESG when Preparing Your Form 10-K" for a list of considerations when preparing human capital disclosure.

B. ESG Disclosure

The change in the administration last year and shift to a Democrat-controlled SEC, as well as increasing attention placed by institutional investors on ESG matters, have resulted in a growing push for companies to provide more disclosure in these areas. In addition to the previously adopted human capital disclosure requirement discussed above, the SEC is in the process of

proposing other ESG-specific disclosure requirements, including: "rule amendments to enhance registrant disclosures regarding issuers' climate-related risks and opportunities"; "rule amendments to enhance registrant disclosures regarding human capital management"; "rule amendments to enhance issuer disclosures regarding cybersecurity risk and related governance"; and "rule amendments to enhance registrant disclosures about the diversity of board members and nominees."[9] While the timing for these rule proposals remains uncertain, it is expected that the SEC will propose the climate-related rules first (possibly in the first or second quarter of 2022), followed by the amended rules about human capital management and the rules about cybersecurity (possibly later in 2022). Meanwhile, as it continues to consider rulemaking internally, the SEC staff recently refocused companies' attention on climate related disclosure in a less formal manner.

1. SEC Staff Scrutiny of Climate Change Disclosures

In the fall of 2021, the SEC's Division of Corporation Finance issued a number of comment letters relating exclusively to climate-change disclosure issues. The letters were generally similar in nature (although not identical) and contained relatively generic comments drawing from topics and considerations raised in the SEC's 2010 guidance on climate change disclosure. In September 2021, the SEC acknowledged the comment letters and published a sample comment letter on its website.[10]

Companies should not view this initiative, or even the receipt of such a comment letter, as a mandate to include wide-ranging climate-related data and disclosures in future Form 10-K filings. However, the comments serve as a useful reminder that, as part of a company's disclosure controls and procedures, climate-related information should be carefully considered for possible inclusion in a company's periodic reports.

As noted in the SEC's 2010 guidance and reflected in the sample comment letter published by the SEC, some of the current rules may require a company to disclose of climate-related information in its Form 10-K. For example:

- It would be appropriate to discuss transition risks (i.e., policy and legal risks, technology risks, market risks, and reputation risks) in Item 1A (Risk Factors) to the extent they constitute material factors that make an investment in the company speculative or risky. See Item 105 of Regulation S-K. A discussion of transition risks can be found in the Task Force on Climate-related Financial Disclosures Guidance on Risk Management Integration and Disclosure.[11]

- It would be appropriate to discuss the following in Item 7 (MD&A): the indirect consequences of climate-related regulation or business trends (including risks or opportunities); any material past and/or future capital expenditures for climate-related projects; any material increased compliance costs related to climate change; any material effects on the company's business, financial condition, and results of operations from the purchase or sale of carbon credits or offsets; any material expected effect on the company's business, financial condition, and results of operations from decreased demand for goods or services that produce significant greenhouse gas emissions or are related to carbon-based energy sources.

2. Implications of ESG for Disclosure and Controls

To the extent the SEC ultimately requires disclosure of climate or other ESG information in periodic reports, this information will automatically become subject to companies' disclosure controls and procedures—including the quarterly "effectiveness" conclusion reached by management and disclosed in the Forms 10-Q and 10-K. Extending and adapting disclosure controls and procedures to the ESG context poses a couple of key challenges. One is the scope of what falls under the umbrella of "ESG." "ESG" has become the descriptor for a host of non-financial indicators (e.g., sustainability, climate change, human capital management, diversity, equity and inclusion, governance structure and composition) that many view as additional drivers for corporate performance and long-term sustainability. Not all of these ESG factors will be material from a securities law perspective for all companies, nor will all of them be considered meaningful or even relevant for every company and its stakeholders. However, once a company has determined what ESG factors are most relevant for it, the role of disclosure controls and procedures should be to help gather and review relevant information, and enable the company to make disclosure decisions, whether those decisions involve SEC reporting requirements, voluntary disclosure frameworks or simply publishing information the company believes investors and other stakeholders may find relevant.

A second key challenge is to think holistically about the relationship between ESG goals and disclosures, on the one hand, and a company's accounting practices and financial disclosures, on the other. If a company adopts certain ESG goals (e.g., a timeline for carbon neutrality), those may have implications for its accounting and financial statements. In addition, it may be necessary to bring new participants (who may be new to the realm of public reporting) into the disclosure process who are knowledgeable about the company's ESG issues.

3. Considering ESG when Preparing Your Form 10-K

As companies prepare for the upcoming Form 10-K, they should consider the following:

- Confirming (or reconfirming) that the company's disclosure controls and procedures support the statements made regarding ESG information, including human capital disclosures, so that they are reliable, consistent, and appropriately updated, and that there is a robust verification process in place. While many companies have historically provided ESG information in other contexts (e.g., sustainability reports, recruiting materials and company websites), given the potential additional liability attached to disclosures in SEC filings, to revise language around the disclosure of known trends and uncertainties, call for greater disclosure on factors affecting material changes, and revise or eliminate other disclosure requirements more rigorous controls to promote the reporting of accurate and complete information.

- Confirming (or reconfirming) that ESG disclosures included in the Form 10-K remain appropriate and relevant. In this regard, companies may want to compare their own disclosures against what their industry peers did this past year as well as against any internal reporting frameworks (such as ESG information that is regularly reported to senior management and the board or a committee).

- Setting expectations internally that ESG disclosures, and in particular human capital disclosure, will likely evolve. We expect companies will develop their disclosure over the course of the next couple of annual reports in response to peer practices, regulatory changes and investor expectations, as appropriate. The types of disclosures that are material to each company may also change in response to current events.

- Addressing in the upcoming disclosure the progress that management has made with respect to any significant ESG objectives it has disclosed as investors are likely to focus on year-over-year changes and the company's performance versus stated goals.

- To the extent a company discloses historical quantitative metrics related to ESG information, such as quantitative measures on employee composition or compensation, former Chair 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."

- Promoting consistency across disclosures by being mindful of other ESG disclosures the company has already made and what the company has already said about its ESG achievements and objectives in other filings or voluntary statements in sustainability reports, investor outreach, recruiting materials or elsewhere.

- Addressing significant areas of focus highlighted in engagement meetings with investors and other stakeholders. In a 2021 survey, climate change was the number one focus for 85% of institutional investors surveyed when engaging with board, with human capital management and board composition closely behind (each, 64%).[12]

C. COVID-19 Disclosure Considerations

With the COVID-19 pandemic still in full swing around the globe, companies continue to grapple with how to describe its effect on their business. Potential places in the Form 10-K where a discussion of COVID-19 may be appropriate include: Item 1 (Description of Business), including in sections regarding human capital management and government regulation; Item 1A (Risk Factors); Item 7 (Management's Discussion & Analysis), including in sections regarding known trends and uncertainties and capital resources and liquidity; Item 9A (Controls and Procedures); Item 8 (Notes to the Financial Statements), including with respect to significant estimates, going concern accounting, and impairments; and the disclaimer for forward-looking statements.[13]

The guidance[14] issued by the SEC at the beginning of the pandemic, including CF Disclosure Guidance: Topic No. 9 (published March 25, 2020) and CF Disclosure Guidance: Topic No. 9A (published June 23, 2020), continues to provide relevant instruction about appropriate disclosures. With nearly two years of experience dealing with the pandemic under their belts, companies should consider revisiting that earlier guidance and see how it applies to their current situations. It is likely that many disclosures about uncertainties that may have been appropriate in the first half of 2020 are no longer appropriate given the insight and information gained during the past two years. In addition, companies should be mindful of the impacts of COVID-19 on the industry in which they operate, as certain industries may continue to be dealing with ongoing

challenges, while other industries have been able to recover from the initial effects of the pandemic.

1. Specific Areas of Focus

Companies should consider revisiting their discussions of COVID-19 in risk factors to make sure that risks associated with the pandemic are not described using hypothetical language when those risks have actually presented themselves.

Companies should also consider taking a close look at MD&A—both the company's current MD&A disclosure and the rules applicable to MD&A—to make sure that trends and uncertainties related to COVID-19 are described in a way that is clear and accurate and allows investors to see the company's business through the eyes of management.

Specific topics companies should consider taking into account when considering disclosures for their upcoming Form 10-K include: the impact of vaccine mandates (especially for government contractors); the impact of changing work models (e.g., the shift to more remote work); the impact of ongoing facility closures and the general shift away from physical interaction in certain areas; and the impact of the stress the pandemic has put on employees and their health and safety.

2. Use of Non-GAAP Financial Measures Related to COVID-19

As a reminder, care must be taken if a company decides to make non-GAAP adjustments to reflect the impact of the pandemic. Backing costs related to COVID-19 out of operating results would only be appropriate when those costs are directly attributable to the pandemic and clearly calculable and separable (for example, costs that were incremental to operations/charges before the pandemic.) Examples of potentially appropriate adjustment items might include: temporary premiums paid to employees; deep cleaning and disinfecting costs; contract termination fees or penalties; and certain insurance recoveries.

Adding to the complexity normally associated with the presentation of non-GAAP financial measures, as we move into the second full year of the pandemic, companies are grappling with questions of whether certain pandemic-related impacts can appropriately be considered non-recurring. For example, companies that have historically adjusted results to remove deep cleaning and disinfecting costs must consider which of those costs are incremental costs due to COVID-19 (i.e., costs that will likely subside as the pandemic does) versus permanent costs (i.e., costs that the company should expect to incur indefinitely).

In addition, to the extent a company decides to present non-GAAP financial measures related to the pandemic, the company should consider highlighting why management finds the measure or metric useful and how it helps investors.

D. Supply Chain Disruptions / Labor Shortages / Inflation

In addition to the evolving impact of COVID-19, companies have been impacted by other global and economic events during the past year that may require updated disclosure in their 2021 Form 10-K. For example, global supply chain issues have resulted in a variety of

disruptions for manufacturers, retailers, and various other types of companies—from the ability to source and obtain raw materials to delays in shipping and the availability of end user products. Ongoing labor shortages have created challenges for companies across industries, including the manufacturing and transportation industries, further exacerbating supply chain disruptions. As a result of these disruptions, many companies have experienced increased costs, inventory shortages, and temporary shutdowns. In addition to supply chain disruptions and labor shortages, we are seeing increased inflation in the costs of various goods and services. Depending on the extent of the past or expected future impact of these developments and events, it may be appropriate to mention these in one or more of the following places of the Form 10-K: Forward-Looking Disclaimer, Business, Risk Factors, MD&A, and, in limited circumstances, Quantitative and Qualitative Disclosures About Market Risk.

E. Cybersecurity

Disclosure around cybersecurity risks and incidents is a continuing focus for the SEC, especially in light of the increasing amount of cyberattacks experienced by public companies this past year. A recent enforcement action by the SEC against Pearson plc, a U.K. educational publisher, is a good reminder for companies to review and assess their cyber disclosure every year.

In August 2021, the SEC announced a settled enforcement action against Pearson plc for inadequate disclosure of a cyber intrusion. According to the settlement, following a cyberattack, which the SEC deemed to be material, Pearson failed to revise its periodic cybersecurity risk disclosure to reflect that it had experienced a material data breach. Pearson also misstated the significance of the breach by minimizing the scope of the incident and overstating the strength of the company's security measures in a subsequent media statement. The settlement, in which Pearson agreed to pay a $1 million penalty, is the latest indication of the SEC's continuing focus on cyber disclosures as an enforcement priority and an important signal to public companies that, particularly in the face of increasing cyberattacks, accurate public disclosure about cyber events and data privacy is critical.

The Pearson settlement demonstrates the importance of carefully assessing the materiality of a cyberattack. Here, the SEC determined that the data breach was material based on, among other things, the company's business and its user base, the nature and volume of the data exfiltrated, and the importance of data security to the company's reputation, as reflected in the company's existing risk disclosures. However, the order does not assert that there was any adverse impact on Pearson's business as a result of the incident. In fact, Pearson's subsequent filings on Form 20-F expressly stated that prior attacks "have not resulted in any material damage" to the business. Consulting with counsel in making materiality assessments can help mitigate the risk of the government second-guessing materiality judgments in hindsight. For more information, see our client alert titled "SEC Settlement Reflects Increasing SEC Focus on Cyber Disclosures."[15]

This is the second enforcement case in which the SEC has found that a company's disclosures regarding a cybersecurity incident reflected inadequate disclosure controls and procedures. Cases like this reiterate that the SEC is intensely focused on cybersecurity disclosure issues, that public companies should be mindful of SEC disclosure considerations

when responding to or publicly commenting on a cybersecurity issue, and that companies should consider analyzing whether their disclosure controls and procedures appropriately support their cybersecurity response plans.

It is also worth noting that the SEC Enforcement Division recently took an expansive look into cyber disclosures with a sweep related to how companies responded to the widely reported SolarWinds breach, where foreign hackers believed to be tied to Russia used SolarWinds' software to breach numerous companies and government agencies. The SEC asked companies it believed were impacted to voluntarily furnish information about the attack, and offered immunity, under certain conditions, for potential disclosure failings.

Although SEC interpretive guidance on cybersecurity disclosures was just issued in 2018, as previously noted, the SEC intends to undertake additional cybersecurity rulemaking in the coming year.

III. Other Considerations and Reminders

A. Technical Changes to Form 10-K: Item 9C and Auditor Tagging Requirements

New Item 9C was recently added to Form 10-K to address a rule adopted by the PCAOB in September 2021.[16] The PCAOB rule implements the Holding Foreign Companies Accountable Act ("HFCAA"). Item 9C covers the disclosure and submission requirements of the HFCAA. These new disclosure requirements generally only impact "Commission-Identified Issuers," or registrants that have retained a registered public accounting firm to issue an audit report where that registered public accounting firm has a branch or office that is located in a foreign jurisdiction, and the PCAOB has determined that it is unable to inspect or investigate completely because of a position taken by an authority in the foreign jurisdiction. Currently, the only foreign jurisdictions relevant to this new rule are China and Hong Kong. Companies in doubt should confirm with their registered public accounting firm that they will not be impacted by the HFCAA requirements.

As part of the SEC's final rule[17] implementing the disclosure and submission requirements covered by Item 9C, all companies that file financial statements using Inline XBRL will now be required to tag three additional data elements: (i) the name of the auditor providing an opinion related to the financial statements presented in the company's annual report, (ii) the location where the auditor's report has been issued, and (iii) the PCAOB ID Number of the auditor providing the opinion. The new tagging requirements are applicable to any annual report filed for a period ended after December 15, 2021. The adopting release leaves placement of the underlying XBRL tags within the annual report up to the company, and the EDGAR Filer Manual[18] has been revised to state that the new data elements should be tagged "where they normally appear, adjacent to the auditors' opinion." While a standard approach has not yet been established, early discussions with audit firms suggest one approach is to have the underlying tags for the auditor's name and location applied to the information in the audit report and disclose the PCAOB ID Number (and place the underlying tag) on the index to the financial statements preceding the audit report. Companies should confer with their auditor on whether the audit firm has a preferred approach.

B. Disclosure Considerations for LIBOR Transition

In December 2021, the SEC staff issued a statement to market participants on key considerations related to the forthcoming LIBOR transition.[19] The statement included a reminder for public companies of their public disclosure requirements, noting that it is important for companies to "keep investors informed about their progress toward LIBOR risk identification and mitigation and the anticipated impact on the company, if material." Accordingly, companies with material exposure to LIBOR are encouraged to disclose any steps planned or taken to assess this exposure and mitigate any material risks or impacts of LIBOR transition and provide investors, when material, quantitative metrics that give context to the company's transition efforts and related risks. The staff reminded companies to consider providing "detailed and specific disclosure, rather than general statements about the progress of the company's transition efforts to date." Where disclosure on LIBOR transition is provided in response to more than one disclosure requirement within the Form 10-K, companies are encouraged to cross-reference or otherwise summarize the information in such a way to give investors a complete and clear view of the company's plan for the discontinuation of LIBOR and its impact on the company. The staff noted that disclosure on LIBOR transition is expected to evolve over time as transition efforts and the broader market and regulatory response continue to evolve.

C. Nasdaq Diversity Disclosure Rule

On August 6, 2021, the SEC approved a new listing rules submitted by The Nasdaq Stock Market LLC ("Nasdaq") to advance board diversity through a "comply or disclose" framework and enhance transparency of board diversity statistics.[20] In addition to requirements to include at least two diverse directors on their board, certain Nasdaq-listed companies will now be required to annually disclose aggregated statistical information about the board's voluntary self-identified gender and racial characteristics and LGBTQ+ status for the current year and (after the first year of disclosure) the prior year and explain, if applicable, why they do not have at least two diverse directors, including one who self-identifies as female and one who self-identifies as either an "underrepresented minority" or LGBTQ+. For a company listed on Nasdaq prior to August 6, 2021, it must provide the initial board disclosure by August 8, 2022 or the date that the company files its 2022 proxy statement, whichever is later. If a company files its 2022 proxy before August 8, 2022 and does not include the required disclosure, then the company has until August 8, 2022 to provide the matrix in its Form 10-K or on its website. A more detailed summary of these new requirements is included in our client alert, "SEC Approves New Nasdaq Board Diversity Rules."[21]

D. Proposed Changes to "Glossy" Annual Reports

In November 2021, the SEC proposed amendments to update technical filing requirements under the EDGAR system. One of those proposed amendments is to mandate the electronic submission in PDF format of the "glossy" annual report to security holders. If the proposed amendments are adopted, EDGAR would serve as a repository for PDF copies of the glossy annual reports, whether or not registrants also post the reports on their corporate websites.

If adopted, the amendments would supersede the staff guidance provided in 2016 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 paper copies to the SEC. As discussed in the proposed rule, creating an archive of electronic PDF copies of the "glossy" annual reports to security holders would provide long-term access to these reports in a centralized database available to the public.

One technical concern with submitting "glossy" annual reports through EDGAR is file size limitations. The "glossy" annual reports are larger files that typical EDGAR filings. In the proposed rule, the SEC notes that electronic submission in PDF format of the "glossy" annual report should capture the graphics, styles of presentation, and prominence of disclosures (including text size, placement, color, and offset, as applicable) contained in the reports. Accordingly, should the SEC adopt the proposed rule, filers may need to be mindful of the file size of their "glossy" annual report and do "test runs" in advance to make sure that EDGAR is able to handle the file size or if the PDF can be compressed.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding these issues. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work in the Securities Regulation and Corporate Governance and Capital Markets practice groups, or any of the following practice leaders and members:

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[1] *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.

[2] *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.

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

[4] *Available* at https://www.sec.gov/files/form10-k.pdf.

[5] *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.

[6] *Available at* https://www.gibsondunn.com/considerations-for-preparing-your-2020-form-10-k/.

[7] *Available at* https://www.gibsondunn.com/wp-content/uploads/2021/11/discussing-human-capital-survey-of-sp-500-compliance-with-new-sec-disclosure-requirement-one-year-after-adoption.pdf.

[8] *Id*.

[9] *See* Chair Gary Gensler's Fall 2021 Unified Agenda of Regulatory and Deregulatory Actions, *available at* https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3235&csrf_token=F776B34C9AA177272EFCE0D310F5CB7CF9678AB8B95DAFF9745B02A28153F1410823BDEF9E34014DDBDDE8E75F60EE4B611C.

[10] *See* Sample Letter to Companies Regarding Climate Change Disclosures (September 22, 2021), *available at* https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures.

[11] *Available at* https://assets.bbhub.io/company/sites/60/2020/09/2020-TCFD_Guidance-Risk-Management-Integration-and-Disclosure.pdf (page 13).

[12] *See* Morrow Sodali 2021 Institutional Investor Survey, *available at* https://morrowsodali.com/insights/institutional-investor-survey-2021.

[13] *See* "Additional U.S. Public Company Disclosure Considerations Related to the Impact of COVID-19" (June 25, 2020), *available at* https://www.gibsondunn.com/additional-us-public-company-disclosure-considerations-related-to-the-impact-of-covid-19/.

[14] 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.

[15] *Available at* https://www.gibsondunn.com/sec-settlement-reflects-increasing-sec-focus-on-cyber-disclosures/.

[16] *Available at* https://www.sec.gov/files/form10-k.pdf.

[17] *See* Holding Foreign Companies Accountable Act Disclosure, Release No. 34-93701 (December 2, 2021), available at https://www.sec.gov/rules/final/2021/34-93701.pdf.

[18] *Available at* https://www.sec.gov/info/edgar/specifications/edgarfm-vol2-v60.pdf.

[19] *See* "SEC Staff Statement on LIBOR Transition – Key Considerations for Market Participants" (December 7, 2021), *available at* https://www.sec.gov/news/statement/staff-statement-libor-transition-20211207.

[20] *See* SEC Approves New Nasdaq Board Diversity Rules (August 12, 2021), *available at* https://www.gibsondunn.com/sec-approves-new-nasdaq-board-diversity-rules/.

[21] *Available at* https://www.gibsondunn.com/sec-approves-new-nasdaq-board-diversity-rules/.