

Updated as of January 21, 2021

Services

[Business, Corporate & Securities](#)

[Corporate Finance](#)

[Corporate Governance](#)

[EB-5 Finance](#)

[Franchise and Distribution](#)

[Mergers and Acquisitions](#)

[Private Investment Funds](#)

[Securities Regulation](#)

[Structured Finance and
Securitization](#)

SEC and Corporate Governance Update for 2021

In connection with the Securities and Exchange Commission's ("SEC") ongoing efforts to modernize and simplify public company disclosure, many significant developments took place in 2020 that will impact the 2021 reporting cycle. The following summary is designed to help our clients and friends keep track of the numerous developments as they plan for periodic reports and corporate governance matters in the new year.

Updates for Periodic Reporting

COVID-19. SEC guidance issued on [March 25, 2020](#) and [June 23, 2020](#) encourages registrants to provide disclosure regarding COVID-19's effects on liquidity and capital resources, material challenges imposed by the pandemic, changes related to employee and customer safety and any other material items relating to COVID-19 that are affecting the registrant. Such disclosure may be appropriate in a number of sections of a registrant's periodic reports, including the management's discussion and analysis ("MD&A") and risk factors.

Form 10-K Cover Page. The SEC added a new check box to the cover page of Form 10-K requiring registrants to indicate whether the filing includes an internal control over financial reporting auditor attestation.

Development of Business (Reg. S-K Item 101(a)). Registrants may now limit disclosure to information that is "material" to an understanding of the general development of their business, rather than the previously prescribed 5-year timeframe, and after initial filings, only provide an update of the general development of the business rather than a full discussion (if accompanied by a hyperlink to a prior filing containing the full discussion). The allowance for incorporation by reference applies only to the discussion of the general development of the business, and not to the description of the company's business (i.e., Reg. S-K Item 101(a), but not Item 101(c)). Many registrants may find it challenging to partition the portions of their Item 101 disclosure that are responsive to these different requirements and therefore may not elect to take advantage of this rule change.

Description of Business - Human Capital Resources (Reg. S-K Item 101(c)). Registrants must now describe their "human capital resources" to the extent material to an understanding of their business, including any human capital measures or objectives that the registrant focuses on in managing the business (such as, depending on the nature of the registrant's business and workforce, measures or objectives that address the development, attraction and retention of personnel).

Legal Proceedings (Reg. S-K Item 103). Registrants are now permitted to cross reference or hyperlink to other sections of the filing to meet the legal proceedings disclosure requirements. Additionally, the threshold for disclosures relating to environmental proceedings has been increased to \$300,000, while providing registrants flexibility to adopt a higher threshold in certain circumstances.

Risk Factors (Reg. S-K Item 105). Registrants are now required to include a risk factor summary of two pages or less if their risk factor section exceeds fifteen pages, and the standard for disclosing risk factors has changed from the “most significant” factors to “material” factors. Additionally, registrants are now required to include relevant subsections with headings, with any risk factors that apply to an investment in securities, generally, disclosed at the end under a separate “General Risk Factors” caption.

Selected and Supplementary Financial Data (Reg. S-K Items 301 and 302). The requirement to disclose selected financial information for the last five years has been eliminated (though the SEC encourages “registrants to 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’”), and, for quarterly reports, the requirement to include tabular disclosure of two years of quarterly financial data has been replaced with a principles-based disclosure requirement for material retrospective changes. These changes will be effective February 10, 2021, but compliance is not mandatory until August 9, 2021; however, registrants may apply some or all of the amendments any time after the effective date, so long as they provide disclosure responsive to the amended item in its entirety.

MD&A. Recall that pursuant to the March 2019 amendments to Regulation S-K, registrants may now omit the discussion of the earliest of the three years in the MD&A if such discussion is already included in a prior filing and the registrant includes a statement that identifies the location in such prior filing where the omitted discussion may be found. If registrants did not take advantage of this update in last year’s 10-K, they may consider doing so this year.

MD&A Metrics. January 2020 SEC guidance provides that when a company uses a key metric, it must (i) provide a clear definition of the metric and how it is calculated; (ii) state why the metric is useful to investors; and (iii) indicate how management uses the metric in managing or monitoring the performance of the business. Additionally, when a company changes key metrics from one period to another, it should disclose certain key information related to the reasons for and impact of the change.

November 2020 MD&A Updates. In November 2020, the SEC adopted certain amendments affecting the MD&A, including amendments to:

- reorganize Reg. S-K Item 303 and establish a new section to further clarify the objectives of the MD&A disclosure requirements;
- replace the tabular disclosure of contractual obligations with required disclosure of material cash requirements from known contractual and other obligations;
- clarify and emphasize that registrants must provide a narrative of the underlying reasons for material changes in financial statements from prior periods in both quantitative and qualitative terms;
- require disclosure of prospective information that is “reasonably likely” to have a material impact throughout the MD&A, replacing previously inconsistent disclosure thresholds; and
- require that registrants explicitly disclose critical accounting estimates.

Similar to the Reg. S-K Item 301 and 302 amendments discussed above, compliance with the revised MD&A rules is not mandatory until August 9, 2021, but early adoption is allowed so long as registrants provide disclosure responsive to the amended item in its entirety.

Additional Updates to Consider

- Auditors are now required to include critical audit matters, or CAMs, in the auditor's report, effective for audits of large accelerated filers for fiscal years ending on or after June 30, 2019, and effective for audits of all other companies for fiscal years ending on or after December 15, 2020.
- In November 2020, the SEC adopted amendments to permit the use of electronic signatures in many documents filed with EDGAR, so long as (i) the signatory first manually signs a document attesting that he or she understands the effect of the electronic signature; and (ii) certain procedural requirements are met, including identity authentication, timestamping, non-repudiation of the signature, and attachment of the signature to the signature page or document being signed.

Proxy Statements and Annual Meeting

Definition of "Family Member." Nasdaq revised the definition of "Family Member" to exclude step-children who do not live at home with the director and to include a carve out for domestic employees who share a director's home, though such relationships will still need to be scrutinized by a company's board to affirmatively determine that no relationship exists that would interfere with the exercise of independent judgment in carrying out the director's responsibilities. Listed companies should consider updates to their D&O questionnaires to reflect the updated definition.

Proxy Voting Advice. Proxy advisors like ISS and Glass Lewis must now provide clients/investors with enhanced disclosure about conflicts of interest and adopt policies and procedures designed to give the companies that are the subject of their advice an opportunity to review the advice and respond prior to the time when the proxy advisor disseminates the advice to its clients. Additionally, the SEC codified its prior interpretation that the furnishing of proxy voting advice by proxy advisors generally constitutes a "solicitation" subject to the proxy rules, including their antifraud provisions.

Shareholder Proposal Rules. The SEC has increased the ownership threshold required for submitting shareholder proposals to require that proposing shareholders own at least: (i) \$2,000 of the company's securities for at least three years; (ii) \$15,000 of the company's securities for at least two years; or (iii) \$25,000 of the company's securities for at least one year. Shareholders may continue to rely on the former eligibility threshold to submit proposals for meetings to be held before January 1, 2023. Shareholders may not aggregate their holdings with others to meet these thresholds and may not submit multiple proposals by doing so in both a personal and representative capacity. Likewise, no shareholder representative may submit multiple proposals, even if done on behalf of different investors. The amended rules also increase the level of shareholder support a proposal must receive to be eligible for resubmission at future meetings.

Proposed Changes to Watch

Form S-8. In late 2020, the SEC proposed changes to Form S-8 to (i) eliminate the requirement to describe the tax effect of plan participation on the issuer; (ii) clarify the ability to add multiple plans to a single Form S-8; (iii) clarify the ability to allocate securities among multiple incentive plans on a single

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Form S-8; and (iv) permit the addition of securities or classes of securities by an automatically effective post-effective amendment.

The changes would also simplify share counting and fee payments on the form, including to (i) require the registration of an aggregate offering amount of securities for defined contribution plans; (ii) implement a new fee payment method for registration of offers and sales pursuant to defined contribution plans; and (iii) conform Form S-8 instructions with current IRS plan review practices.

Nasdaq Diversity Requirements. In December 2020, Nasdaq filed a rule proposal with the SEC that would require most companies to disclose the breakdown of their board of directors based on race, gender and sexual orientation. The proposed rule would require that companies have at least two diverse directors that are either female, an underrepresented minority or a member of the LGBTQ community. If a company cannot meet such requirement, it would be required to explain why.

Additional Information

This legal update is merely a high-level summary of the developments discussed herein and does not purport to be a complete discussion of each of the noted rule changes. Complying with the SEC rules and regulations is a complex task within an ever-changing environment. If you have questions about the rules discussed above, please contact your Kutak Rock attorney or one of the authors listed on the left. For more information regarding our practices, please visit us at www.KutakRock.com.

