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SEC and Corporate Governance Update for 2022

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 2021 that will impact the 2022 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

[2020 MD&A Updates Now in Effect](#). In November 2020, the SEC adopted certain amendments to Regulation S-K affecting MD&A disclosure which are now in full effect. As a reminder, the updates included amendments to Item 303 of Regulation S-K to:

- 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;
- remove the requirement to include a separate heading for off balance sheet arrangements, adding a principles-based instruction to discuss such arrangements in the company's broader liquidity/capital resources discussion;
- 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.

[Climate Change Example Comment Letter](#). In September 2021, the SEC provided a [sample comment letter](#) containing various climate-related disclosure issues. Among other things, the sample comment letter focused on whether companies are including adequate climate change disclosure in the MD&A and risk factor sections of periodic reports. Companies should consider and assess whether their current disclosures adequately describe the climate-related risks that the company faces. In addition, in March 2021, the SEC [requested](#) public comment on climate change disclosure and targeted to propose new climate change risk disclosure requirements by the fourth quarter of 2021. While the SEC has missed its initial target, we anticipate that the new proposed rules will be forthcoming in 2022.

Human Capital Management. In November 2020, the SEC implemented new amendments to Item 101 of Regulation S-K requiring disclosure regarding companies' human capital. Entering the second year of implementation, companies should re-assess their human capital disclosures, benchmarking against their peer group or other similar situated companies and ensuring they are adequately covering various trending topics such as diversity and inclusion, health and safety (especially in light of the ongoing COVID-19 pandemic), recruitment and retention, company culture and community involvement.

Proxy Statements and Annual Meeting

Environmental, Social and Governance ("ESG") Matters. ESG matters continue to be front and center for proxy advisory firms, large institutional investors as well as the SEC, with increasing demand for more thorough and meaningful disclosure. This proxy season companies should take a fresh look at their internal ESG practices and current disclosures, focusing on company-specific ESG risks and the company's current ESG oversight policies and processes in order to ensure that the company is not lagging behind its peer group or similarly situated companies or failing to address any recent initiatives.

Board Diversity. In August 2021, the SEC approved Nasdaq's proposed rules regarding disclosure of board diversity. The new rules require Nasdaq-listed companies to (i) disclose either in their proxy statement or on the company website board level diversity statistics using a standard template and (ii) have (or disclose why they do not have) at least two diverse directors on their board. The board diversity matrix disclosure will be required to be included in listed-companies' proxy statements this year. Alternatively, companies may disclose the board diversity matrix on their company website no later than August 8, 2022. The requirement to have at least two diverse directors (or provide explanation why not) will be phased in over time, with listed companies being required to have at least one diverse director by August 7, 2023 and two diverse directors by August 6, 2025. Beyond the SEC, large institutional investors such as BlackRock and State Street as well as proxy advisory firms like ISS and Glass Lewis have recently adopted policies encouraging board diversity, threatening to withhold votes or vote against board leaders of companies not meeting such diversity goals.

NYSE Related Party Transactions. In August 2021, the NYSE amended its rules regarding evaluation of related party transactions, requiring that listed companies now provide reasonable prior review and oversight of related party transactions (defined as those that would be required to be disclosed pursuant to Item 404(a) of Regulation S-K). NYSE-listed companies should assess whether their current related party transaction review processes comply with the new rules and consider updating their current policies in their audit committee charters or corporate governance guidelines.

Universal Proxy Card. In November 2021, the SEC adopted [new rules](#) requiring companies to use universal proxy cards that include all director nominees (including dissident nominees) presented for election in contested elections. These new rules will go into effect and apply to all contested director elections held after August 31, 2022.

BlackRock Client Directed Voting. In October 2021, BlackRock [announced](#) that beginning in 2022 it will be taking steps to expand the opportunity for its clients to participate in proxy voting decisions, allowing its clients to vote their own proxies, choose from a menu of third-party proxy voting policies, vote directly on select resolutions or companies, or rely on BlackRock's internal voting policies.

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Additional Updates to Keep in Mind

E-Signature Policies. 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 inclusion of the signature on the signature page or document being signed.

Proposed Changes to Watch in 2022

Rule 10b5-1 and Insider Trading Reforms. In December 2021, the SEC [proposed](#) amendments to Rule 10b5-1 under the Securities Exchange Act of 1934, which, among other things, would create new elements that must be satisfied to rely on the affirmative defense against insider trading liability under Rule 10b5-1 (including a mandatory cooling off period) and implement additional disclosure obligations regarding companies' insider trading policies and the adoption of Rule 10b5-1 plans by officers and directors.

New Share Repurchase Disclosure Rules. In December 2021, the SEC [proposed](#) new rules that would require companies to file a new form (Form SR) disclosing the execution of share repurchases before the end of the first business day following the repurchase. In addition, the proposed rules would require further disclosure regarding companies' objectives and policies with regards to share repurchases and whether a 10b5-1 plan is utilized.

Re-Opening Proposed Rules on Clawbacks. In October 2021, the SEC [reopened](#) the comment period for rules mandated by the Dodd-Frank Act which were originally proposed in 2015 to establish listing standards that would require companies to adopt policies regarding the recovery of erroneously awarded incentive-based compensation and publicly disclose such policies.

Additional Information

This legal update is merely a high-level summary of the developments discussed herein as of January 31, 2022 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.



