2021 ANNUAL REPORTING AND PROXY SEASON:

SUMMARY OF CHANGES AND ACTION ITEMS FOR CONSIDERATION

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Part I – SEC Updates

Description of Business – Item 101 of Regulation S-K Updates

In August 2020, the Securities and Exchange Commission, or SEC, issued sweeping changes to Item 101 of Regulation S-K and thus the business section of Form 10-K, including how companies describe and report on their business.[1] The SEC emphasized principles-based disclosure for this section, and in particular materiality and non-repetition of information. Below is a summary of the updates to Item 101 of Regulation S-K.

- **Eliminated Prescribed Timeframes for Discussion of Business**: The SEC amended Item 101(a) for accelerated filers and large accelerated filers, and Item 101(h) for smaller reporting companies to eliminate the prescribed timeframe for disclosure of the development of the company's business. A materiality standard will apply instead, and as a result companies may need to consider developments outside of five years for accelerated filers and large accelerated filers, and three years for smaller reporting companies. Such developments may include significant mergers and acquisitions, spin-offs, new or old products and product lines, or other consequential events in the lifespan of the company.

- **Allowed for Incorporation By Reference and Later Updates**: Amended Item 101(a)(2) for accelerated filers and large accelerated filers, and Item 101(h) for smaller reporting companies, allows companies to incorporate by reference a previous filing providing a description of the company's business and then provide any material updates in the current filing. In the applicable adopting release, the SEC specifically noted that only one previous filing may be used using this procedure.[2] Consequently, companies cannot "stitch together" this disclosure by incorporating multiple filings, which may limit its overall utility for a number of companies.

- **Revised Principles-Based Disclose Topics**: Disclosure under Item 101(a) is now determined solely on a materiality standard, and in connection with this change, the SEC elected to revise the list of suggested disclosure topics in Item 101(a) regarding the development of the business.

    - **The Non-Exclusive Four Factors**: The SEC specifically adopted four non-exclusive disclosure topics that companies should consider in their analysis. Most notably, the list above now includes "any material changes to a previously disclosed business strategy" to highlight the importance of keeping public information about the direction of the business fresh. The SEC elected to not require public companies to disclose their business strategy in general, and the amended Item 101(a) does not take a stance on whether disclosing a company's business strategy is "material to an understanding of the general development of the business."[3]

    - **Other Updates**: Other updates to the Item 101 topics include removing material changes that impact the company's operations—as this is already covered by Item 303 of Regulation S-K (Management's Discussion & Analysis, or MD&A)—and removing the company's date and form of organization from the disclosure topics.

[1] Securities and Exchange Commission, Modernization of Regulation S-K Items 101, 103, and 105, available at https://www.sec.gov/rules/final/2020/33-10825.pdf.
[2] *Id.* at 17.
[3] *Id.* at 23.

- **Revised Item 101(c) Covering Description of a Company's Business**: Amended 101(c) revised the list of disclosure topics that companies may consider in the description of the company's business. While companies should review the entire list contained in Item 101(c), as several current disclosures have been reorganized, special consideration should be paid to the following updates:

    - **Compliance with Government Regulations**: The SEC expanded the requirement to disclose material effects of compliance with environmental laws to instead require disclosure of 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.

    - **Human Capital Resources**: Instead of requiring disclosure of the number of employees, the SEC introduced a new disclosure topic regarding human capital. Under amended Item 101(c)(2)(ii), companies should focus on the description of the company's human capital resources, including the number of persons employed, and any human capital measures or objectives that the company focuses on in managing the business (such as, depending on the nature of the business and workforce, measures or objectives that address the development, attraction and retention of personnel).

Item 101 – Action Items for Consideration

1. **Take a fresh look at business disclosure through a time-neutral lens**: Given that the SEC removed timeframes regarding the development of the business, consider reviewing previous Form 10-Ks to obtain a new perspective on the business.
    - What are the material events that stockholders want to know about the business that have occurred over the life of the company?
    - Are there recent events that were disclosed that can be traded for older events or vice versa?
    - What is material with respect to the revised list contained in Item 101(c)?
    - Can the organization of the business section change to better present the most material aspects of the business?

2. **Consider whether to use the incorporation by reference model in future filings**: The SEC's updated incorporation by reference rules offer flexibility, but planning ahead is critical in order to use such rules effectively. The number and type of offerings that the company intends to conduct, the amount of time that the company has been public, and the development of the company's business will be, among others, important factors in making this disclosure decision.

3. **Collaborate with human resources department on human capital disclosures**: Based on the disclosure we have seen to date, working with the human resources and talent department to consider and validate the applicable human capital disclosures will be important in order to provide the salient responses and provide back-up for those statements.

Legal Proceedings – Item 103 of Regulation S-K Updates

In addition to the Item 101 disclosures, in August 2020, the SEC updated the requirements regarding presentation of legal matters contained in Item 103 of Regulation S-K. While not as wide-ranging as the

Item 101 updates, the SEC focused on two updates that will be useful for most companies in crafting their disclosure, summarized below.

- **Incorporation By Reference Allowed**: To reduce duplicate disclosure, amended Item 103 expressly permits companies to incorporate separate legal discussions by cross-reference or hyperlink. This matches the practice that many companies already follow—by incorporating the contingencies footnote in the financials or a discussion of legal matters in the MD&A into the legal matters section.

- **Higher Threshold for Environmental Disclosures**: Amended Item 103 increased the dollar threshold that applies to the disclosure of certain environmental proceedings from $100,000 to $300,000. However, companies may elect to use a higher threshold as long as it is "reasonably designed to result in disclosure of any [applicable environmental] proceeding that is material to its business or financial condition." Such threshold may not exceed the lesser of $1,000,000 or one percent of the company's current assets on a consolidated basis, and public companies must disclose the threshold and any changes thereto in each periodic report.

Item 103 – Action Items for Consideration
1. **View Form 10-K litigation disclosures holistically**: Litigation disclosures are often contained in the contingencies footnote to the financials and the MD&A. In light of the company's litigation profile and set of ongoing cases or matters, consider whether to bifurcate the disclosure in each section or otherwise add headings in order to easily incorporate by reference into the legal matters section without providing overbroad disclosures. 2. **Consider whether updating the additional environmental threshold is worth the ongoing disclosure burden**: Per the SEC's rules, any update to the lesser of $1,000,000 or 1% of the company's current assets is required to be made in subsequent periodic reports. While for many large accelerated filers the threshold will remain at $1,000,000, any smaller company with environmental disclosures should consider whether it wishes to adopt that standard and provide updates in subsequent filings against that standard.

Risk Factors – Item 105 of Regulation S-K Updates

In addition to Items 101 and 103, in August 2020, the SEC updated the form and presentation of risk factors under Item 105 of Regulation S-K. The SEC observed that over time, the risk factor section of many companies' annual reports contained risk factors that were of general applicability, the length of the risk factors ballooned, and the risks presented were less likely to be material. In response, the SEC significantly changed the rules for Item 105, as summarized below:

Old Rules	**New Rules**
"Most Significant" risk factors required to be disclosed	"Material" risk factors required to be disclosed
No limit on the length of risk factors section	If longer than 15 pages, then the company must provide a risk factor summary
No specific organization of risk factors	Risk factors must be grouped by relevant headings

The approach to this update will focus on the length of a company's current risk factor coverage. For those companies with risk factors longer than 15 pages, such companies will want to consider whether to provide a risk factor summary or to try and eliminate the number or substance of the current risk factors to conform to the 15-page limit. An additional consideration will depend on the company and their current risk profile. Particularly in light of the COVID-19 pandemic and its impact on operating performance and liquidity, companies may determine the risks facing the business require additional risk factor coverage that will require a summary.

Item 105 – Action Items for Consideration
1. **In the annual review, group similar risk factors together for the purpose of preparing headings, but wait until initial reviews have been completed**: As the risk factors are updated, consider looking at each risk factor separately and rearranging them once they have been reviewed to better show the year-to-year changes in the initial draft. 2. **Communicate impact of additional disclosures to internal and external reviewers**: For companies that provide risk factors to internal groups (such as a disclosure committee or risk committee) or external groups (audit committee, governance committee or external advisors such as auditors and legal counsel), communicate the impact of additional disclosure if your company is near the 15-page limit. 3. **If drafting a risk factor summary, start early**: Because the risk factors are often a moving target as the Form 10-K is developed, consider starting an outline of the summary before sending the risk factors to internal and external reviewers.

For more reading, please see Jenner & Block's update linked below.

"SEC AMENDS DISCLOSURE REQUIREMENTS FOR BUSINESS, LEGAL PROCEEDINGS, AND RISK FACTORS SECTIONS OF REGISTRATION STATEMENTS AND PERIODIC FILINGS"

Updated Form 10-K Cover

In April 2020, the SEC updated the cover of Form 10-K to include an additional prompt regarding auditor attestation under the Sarbanes-Oxley Act. Between the emerging growth company prompt and the shell company prompt, companies should add the following disclosure:

Indicate by check mark whether the registrant has filed a report on and attestation to its management's assessment of the effectiveness of its internal control over financial reporting under Section 404(b) of the Sarbanes-Oxley Act (15 U.S.C. 7262(b)) by the registered public accounting firm that prepared or issued its audit report. ☐

Note that this is not a "yes" or "no" box—there is only one box to check on the cover.

Planning Ahead for Proxy Advisor Rules

In July 2020, the SEC issued rules regarding proxy advisory firms.[4] The rules set forth revised standards regarding liability, disclosure, and other procedural requirements for certain reports issued by proxy advisory firms. The rules are not effective for the 2021 proxy season. While the rules have been subject to challenge, companies should consider the game plan for responses during the 2021 proxy season, assemble a deadline calendar, and any internal checklists so that during the 2022 proxy season, responses can be considered efficiently.

For more reading, please see Jenner & Block's update linked below.

"**SEC AMENDS RULES GOVERNING PROXY SOLICITATION AND VOTING ADVICE BY PROXY ADVISORY FIRMS**"

Considerations Regarding Shareholder Proposals Under Rule 14a-8

In September 2020, the SEC issued final rules regarding Rule 14a-8 under the Exchange Act, or Rule 14a-8.[5] These rules revised the amount of securities and time period for holding such securities in order for a shareholder to use the shareholder proposal process under Rule 14a-8. For calendar year-end companies, the existing rules will still be in effect, so there is no substantive update regarding the procedures for the 2021 proxy season. However, because the rules are forward-looking, additional updates should be considered to reflect the shareholder proposals that will be received later in 2021 for the 2022 proxy season.

Rule 14a-8 – Action Items for Consideration
1. **Disclose "regular business hours" in shareholder proposals section**: The revised Rule 14a-8 contains a "meet and confer" step to encourage negotiation. To encourage this step, companies should consider disclosing their regular business hours to put shareholders on notice of the times that are available for such meetings in the future.
2. **Review summary of rules**: Some companies provide a brief summary of Rule 14a-8 in their shareholder proposals section. In light of the revised thresholds, consider whether to provide information to shareholders regarding the new thresholds or to alert them to the fact that the standards have changed.

For more reading, please see Jenner & Block's update linked below.

"**SEC REVISES THRESHOLDS AND PROCESSES FOR SHAREHOLDER PROPOSALS UNDER RULE 14A-8**"

[4] Securities and Exchange Commission, Exemptions from the Proxy Rules for Proxy Voting Advice, Release No. 34-89372 (July 22, 2020), available at https://www.sec.gov/rules/final/2020/34-89372.pdf.
[5] Securities and Exchange Commission, Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (Sept. 23, 2020) available at https://www.sec.gov/rules/final/2020/34-89964.pdf.

MD&A/Items 301, 302 and 303 Updates

In November 2020, the SEC adopted fundamental changes to Items 301, 302, and 303 of Regulation S-K.[6] In the adopting release, the core rules are effective 210 days after publication in the Federal Register, so calendar year-end companies are not **required** to make such sweeping changes on short notice. However, companies may adopt amended items 30 days after publication in the Federal Register, as long as such amended items are adopted in their entirety.[7] One item that companies may consider for early adoption is the deletion of Item 301, the five years of selected financial data as required by Item 6 of Part II of Form 10-K. The rules were published in the Federal Register on January 11, 2021, with an effective date of February 10, 2021.

In January 2020, the SEC issued a Compliance and Disclosure Interpretation, or C&DI, regarding the use of incorporation by reference in the MD&A. Specifically, Question 110.02 requires companies to specifically state that the material is incorporated by reference rather than noting where the information can be found.

MD&A Action Items for Consideration
1. **Continue current disclosures if you prefer**: The overall structure of the MD&A and selected financials will carry over from last year's 10-K to the current year's 10-K, so if you prefer, you can keep the current disclosures. 2. **Review incorporation by reference language if using a previous year's filing**: In light of the SEC's C&DI, draft appropriate language to specifically incorporate any materials by reference and design the current year's MD&A to be easily incorporated if the company wishes to continue to use this incorporation by reference feature.

For more reading, please see Jenner & Block's update linked below.

"**SEC REVISES DISCLOSURE REQUIREMENTS REGARDING MANAGEMENT'S DISCUSSION AND ANALYSIS, SELECTED FINANCIAL DATA, AND SUPPLEMENTARY FINANCIAL INFORMATION**"

[6] Securities and Exchange Commission, Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, (Nov. 19, 2020) available at https://www.sec.gov/rules/final/2020/33-10890.pdf.
[7] *Id.* at 104-05 ("For example, upon effectiveness of the final amendments, a registrant may immediately cease providing disclosure pursuant to former Item 301, and may voluntarily provide disclosure pursuant to amended Item 303 before its mandatory compliance date. In this case, the registrant must provide disclosure pursuant to each provision of amended Item 303 in its entirety, and must begin providing such disclosure in any applicable filings going forward.")

Part II – COVID-19 Related Updates

COVID-19: Operational and Financial Disclosures

The most significant business development of 2020 was the novel coronavirus, or COVID-19, pandemic. The SEC's Division of Corporation Finance issued significant guidance regarding COVID-19 disclosures under CF Disclosure Guidance Topic No. 9 [8] and CF Disclosure Guidance Topic No. 9A[9] with the emphasis around MD&A and liquidity disclosures. For many calendar year-end companies, this will be the first time that COVID-19 disclosures will be considered on a fiscal year basis rather than the quarterly and year-to-date reporting basis that has occurred thus far. For most companies, this will be a continuation of the reporting, which has occurred since March of 2020.

The questions raised by the SEC are set forth in Appendix A.

For more reading, please see Jenner & Block's updates linked below.

"**SEC'S DIVISION OF CORPORATION FINANCE ISSUES GUIDANCE ON FINANCIAL REPORTING AS A RESULT OF THE ONGOING OUTBREAK OF COVID-19**"

"**GUIDANCE FROM SEC'S DIVISION OF CORPORATION FINANCE ON COVID-19 FINANCIAL REPORTING**"

COVID-19: Compensation Disclosures – Eight Considerations

As noted above, the SEC's guidances issued in March and June of 2020 largely concerned operational and financial disclosures. As companies consider how to disclose the compensation paid to their named executive officers for the 2020 year in the Compensation Discussion and Analysis, or CD&A, we would suggest examining the following considerations as a starting point.

1. *Global Consideration – How COVID-19 Impacted Your Compensation Program*: A fundamental question to address in this year's CD&A will be how COVID-19 impacted the compensation paid to or awarded to the named executive officers. For many companies this issue will be the most material consideration when drafting compensation disclosures for the 2020 fiscal year. When crafting disclosures, think about how each compensation element plays into the company's overall financial and operating performance and any impacts due to COVID-19. This includes each line item of salary, cash bonuses (paid under a plan or otherwise), equity awards, other stock awards, and other various other compensation-related items.

2. *Salaries – Adjustments*: In 2020, we observed a number of companies adjusting salaries for named executive officers, including amounts that were reduced during the year for certain executives. Some reductions were later restored while others remained in place for the 2020 fiscal year. Telling the story of how salaries were reduced, why they were reduced, how reductions impacted the bonuses paid (if at all), and whether stock ownership requirements

[8] Securities And Exchange Commission Division of Corporation Finance, CF Disclosure Guidance: Topic No. 9 (March 25, 2020), available at https://www.sec.gov/corpfin/coronavirus-covid-19.
[9] Securities And Exchange Commission Division of Corporation Finance, Coronavirus (COVID-19) — Disclosure Considerations Regarding Operations, Liquidity, and Capital Resources (June 23, 2020), available at https://www.sec.gov/corpfin/covid-19-disclosure-considerations.

were adjusted in 2020 or will be adjusted in 2021 as a result of salary adjustments will be disclosures that investors will look for.

3. *Salaries – Forgoing Amounts*: Under Item 402(c)(2)(iii) of Regulation S-K, salary that is not earned is not tallied. Thus, any salary that is foregone is not required to be considered for purposes of determining the named executive officers or reported in the Summary Compensation Table. However, some companies elected to compensate such executives in stock rather than cutting salaries. We remind such companies to consider Instruction 2 to Item 402(c)(2)(iii), which provides that the salaries foregone in a such a manner must be reported in the salary column (with applicable footnote disclosure), and then potentially in the grant of plan-based awards table (to the extent that equity was granted in the 2020 fiscal year).

4. *Cash Bonuses vs. Plan Bonuses*: For some companies, the financial impact of COVID-19 may have resulted in no bonuses being paid out under applicable cash bonus plans. Compensation committees should consider whether use of spot bonuses or how the company's various compensation plans allow for committee discretion to pay bonuses when the company metrics do not support payment of bonuses. Companies should consider how those bonuses were earned, paid, and reported, whether under the "bonus" column under Item 402(c)(2)(iv) of Regulation S-K, or under the "Non-equity incentive plan compensation" column under Item 402(c)(2)(vii) of Regulation S-K.

5. *Optics Regarding Use of Equity in March 2020*: For many companies, the trading price of their stock declined during March and bottomed out at or around March 23, 2020. Depending on the timing of equity grants to various executives, the number of shares that were granted at or around March 2020 may appear on the outside to be "rich" compared to previous grants. Companies should explain why the number of shares that were granted in fiscal 2020 may have deviated from previous amounts due to temporary decreases in stock prices. This may be particularly important if the equity granted results in a high "burn rate" as calculated by proxy advisors, as the "burn rate" impacts the recommendations for amendments to equity plans to increase the number of shares. In addition, large equity amounts may later impact the "compensation realized" disclosures for companies that elect to provide those disclosures or consider "compensation realized" in setting compensation.

6. *Disclosure of 2021 Compensation Decisions*: Generally speaking, the CD&A covers compensation awarded to, earned by or paid to the named executive officers in the current year. However, we recommend reviewing Instruction 2 to Item 402(b) and C&DI Question 118.07 for Regulation S-K in thinking about the compensation paid in 2020 compared to compensation awarded in 2021. For a number of companies, disclosure of 2021 compensation will be necessary to understand the compensation that was paid in 2020. In particular, disclosure of 2021 compensation in response to business benefits or interruptions caused by COVID-19 or to retain, motivate and incent employees in a non-standard operating environment will be the best method to provide the material compensation decisions required by Item 402(b) of Regulation S-K.

7. *Pay Versus Performance – Breaking Bad News*: For some companies, 2020 may be a poor financial performance year relative to plan. In our experience, adjusting the CD&A to tell a story of "bad news" takes additional rounds of drafting for tone and content. While "we failed to meet expectations and no bonuses were paid" can satisfy the applicable SEC requirements, investors may be looking for additional color about compensation decisions beyond the minimum.

8. *Review Smaller Reporting Company Definition*: In April 2020, the SEC modified the definition of "smaller reporting company." This definition resulted in additional companies with certain market cap and revenue amounts qualifying for scaled reporting under Item 402(m) of Regulation S-K. For those companies which qualify as smaller reporting companies due to the impact of COVID-19 on their market capitalization, consider whether to take advantage of scaled disclosure allowed under Item 402(m) of Regulation S-K. Generally speaking, the scaled disclosure for a smaller reporting company means no CD&A and fewer named executive officers to report, which may be attractive for a number of reasons.

CEO Pay Ratio for 2020

In 2020, we observed significant changes in compensation practices for a number of companies. Some companies enacted additional "hazard pay" or COVID-19 bonuses. Some companies laid off or furloughed a significant number of employees without pay. Some companies have seen compensation increases due to workload increases. As a result, companies should revisit their CEO pay ratio processes to ensure that they are still reliable. Companies should consider the following issues in thinking about how to present their CEO pay ratio disclosure. This applies to companies revising their median employee calculation on the three-year schedule as set forth in applicable SEC rules and those companies that have revised the median employee within the previous three years.

1. **Compensation Practices**: Is the median employee identified in the past still accurate in light of COVID-19 compensation practices?
2. **Employee Population**: Did the employee population change such that the median employee is no longer accurate?
3. **Mitigating Factors**: Are there any factors around the CEO's compensation or median employee's compensation that require additional disclosure in light of 2020 compensation practices?
4. **Thinking Ahead:** If the company is selecting the median employee in 2020, are there factors to believe that the employee will not be the median employee in future years?

Finally, it is worth noting that major municipalities have adopted or are considering adopting taxes based on the CEO Pay Ratio,[10] so accuracy with this measure is critical.

Perquisites and COVID-19

In September 2020, the SEC's Division of Corporation Finance issued updated guidance on whether certain perquisites, or perks, provided to executive officers as a result of COVID-19 are required to be considered "all other compensation" and potentially disclosed in the company's proxy statement.

As companies have shifted to remote working arrangements due to COVID-19, companies considered whether the provision of certain perks to their executives required for working from home would be considered "all other compensation" under Item 402(c)(2)(ix)(A) of Regulation S-K.

[10] For example, Portland, Oregon, adopted a "Pay Ratio Surtax" where additional taxes are due for companies that have certain pay ratios that exceed 100:1 or 250:1. For a summary, see https://www.portlandoregon.gov/citycode/article/663142. Voters in San Francisco, California, recently passed a similar measure. For a summary, see San Francisco voters approve taxes on highly paid CEOs, big businesses, Associated Press, L.A. Times, available at https://www.latimes.com/world-nation/story/2020-11-05/san-francisco-voters-approve-taxes-on-ceos-big-businesses.

C&DI Question 219.05 confirms that companies should use the traditional two-step analysis set out in Release 33-8732A for determining whether a perk is considered as "all other compensation." Under this analysis, a company must consider whether the benefit is "integrally and directly related to the performance of the executive's duties" or "generally available on a nondiscriminatory basis to all employees."

Most importantly, the SEC noted in C&DI Question 219.05 that what is "integrally and directly related" to an executive officer's duties may be different during the COVID-19 pandemic as compared to past years.

For example, "enhanced technology needed to make the executive's home his or her primary workplace upon imposition of local stay-at-home orders would generally not be a perquisite or personal benefit because of the integral and direct relationship to the performance of the executive's duties." But likewise, "items such as new health-related or personal transportation benefits provided to address new risks arising because of COVID-19, if they are not integrally and directly related to the performance of the executive's duties, may be perquisites or personal benefits even if the company would not have provided the benefit but for the COVID-19 pandemic, unless they are generally available to all employees."

Part III – Additional Updates

ISS and Glass Lewis Policy Updates

Significant ISS Updates

In November 2020, Institutional Shareholder Services, or ISS, released its proxy voting policy updates for the 2021 proxy season.[11] The updates are effective for annual meetings on or after February 1, 2021. While the updates largely impact the 2021 proxy season, companies will need to consider in greater detail racial and ethnic diversity in their board composition for the 2022 proxy season. The most significant updates are summarized below.

Director Voting – Governance Failures: ISS, in a universal update, expanded the type of governance failures that might result in voting against a director or the entire board to include poor oversight of environmental and social issues. While ISS specifically noted climate change as an environmental risk, it did not specify other "social issues" that would be risks. However, in the proposed rules, ISS noted that "the clarification is expected to impact a small number of directors each year" and the change merely made explicit that ISS would have the ability to take these considerations into account. As a result, we believe that this change is less drastic than it might appear on paper.

Director Voting – Gender Diversity: In 2019, ISS announced that 2020 would be a transitional year for gender diversity, whereby companies that did not have a female director could make appropriate additions without receiving negative voting recommendations. In accordance with its previously announced update, for 2021, ISS will generally vote against the chair of the nominating committee (or other directors on a case-by-case basis) for any Russell 3000 or S&P 1500 company that does not have at least one female director. Should a company be compliant with the gender diversity standard (i.e., at least one member of the board is a female) in 2020, but no longer satisfy the gender diversity standard in 2021, ISS will make an exception if the company commits to adding at least one female director at its next annual meeting.

Director Voting – Racial-Ethnic Diversity: ISS is committed to a similar game plan regarding vote recommendations for racial/ethnic diversity as with gender diversity. For 2021, ISS will highlight companies in the Russell 3000 or S&P 1500 that do not have apparent ethnic or racial diversity. In 2022, ISS will generally vote against the chair of the nominating committee (or other directors on a case-by-case basis) for any Russell 3000 or S&P 1500 company that does not have at least one director who is racially or ethnically diverse. Should a company be compliant with the racial/ethnic diversity standard in 2021, but no longer satisfy the racial/ethnic diversity standard in 2022, ISS will make an exception if the company commits to adding at least one diverse director at its next annual meeting. It is worth noting that ISS takes the position that aggregate diversity statistics provided by the board will only be considered if specific to racial and/or ethnic diversity. Thus, stating that "5 out of 10 directors are diverse" (without stating the diversity standard) will not provide the requisite information ISS is seeking.

For more reading, please see Jenner & Block's update linked below.

[11] Institutional Shareholder Services, Proxy Voting Guidelines-Updates For 2021 available at https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf.

"INSTITUTIONAL SHAREHOLDER SERVICES ANNOUNCES POLICY UPDATES FOR THE 2021 PROXY SEASON"

Significant Glass Lewis Updates

Similar to ISS, Glass Lewis provided updated policies for the 2021 proxy season in the fall of 2020.[12] While some of the considerations relate to S&P 500 companies, the updates provide Glass Lewis' general direction regarding board composition and disclosure. The most significant policy updates consist of the following.

Gender Diversity Standard: Glass Lewis has adopted a similar policy as to ISS regarding gender diversity. Beginning in the 2021 proxy season, Glass Lewis will note as a concern boards that have fewer than two female directors. The overall voting recommendations for the 2021 proxy season will be based on Glass Lewis' current requirement of requiring companies to have at least one female board member.

For stockholder meetings held after January 1, 2022, Glass Lewis will tighten this standard. For those companies with fewer than two female directors, Glass Lewis will generally recommend voting against the nominating committee chair of a board. For boards with six or fewer total members, Glass Lewis' current voting policy that requires a minimum of one female director will still be in effect.

Note that Glass Lewis may extend this recommendation to additional members of the nominating committee in cases where the committee chair is not standing for election due to a classified board, or based on other factors, including the company's size and industry, applicable laws in its state of headquarters, and its overall governance profile.

As part of Glass Lewis' voting recommendations, it will carefully review a company's disclosure of its diversity considerations and may refrain from recommending that shareholders vote against directors of companies outside the Russell 3000 index, or when boards have provided a sufficient rationale or plan to address the lack of diversity on the board.

Board Refreshment: Beginning in the 2021 proxy season, Glass Lewis will note as a potential concern instances where the average tenure of non-executive directors is 10 years or more and no new independent directors have joined the board in the past five years. Although Glass Lewis will not make voting recommendations solely on this basis in 2021, it will consider insufficient board refreshment as a contributing factor in its recommendations when additional board-related concerns have been identified.

Director Diversity Disclosure: In the 2021 proxy season, Glass Lewis will begin tracking the quality of diversity disclosures in company proxy statements. Glass Lewis' reports for companies in the S&P 500 index will include an assessment of company disclosure in the proxy statement relating to board diversity, skills and the director nomination process. This includes how a company's proxy statement presents:

- the board's current percentage of racial/ethnic diversity;
- whether the board's definition of diversity explicitly includes gender and/or race/ ethnicity;

[12]Glass Lewis, Proxy Paper Guidelines available at https://www.glasslewis.com/wp-content/uploads/2020/11/US-Voting-Guidelines-GL.pdf.

- whether the board has adopted a Rooney-Rule style policy requiring women and minorities to be included in the initial pool of candidates when selecting new director nominees; and
- board skills disclosure.

Glass Lewis specifically stated that it will not be making voting recommendations solely on the basis of this assessment in 2021, giving companies time to consider their disclosures. Glass Lewis did not state that such ratings will help inform its assessment of a company's overall governance and may be a contributing factor in its recommendations when additional board-related concerns have been identified.

State Laws on Diversity: Several states have enacted legislation regarding director diversity matters, including California. In its update, Glass Lewis specifically states that, for meetings held after December 31, 2021, if a company headquartered in California does not have at least one director from an underrepresented community on its board, or does not provide adequate disclosure to make this determination, it will generally recommend voting against the chair of the nominating committee.

ESG Oversight: Beginning in the 2021 proxy season, Glass Lewis will note as a concern when boards of companies that are listed in the S&P 500 index do not provide clear disclosure concerning the board-level oversight afforded to environmental and/or social issues. Consequently, for shareholder meetings held after January 1, 2022, Glass Lewis will generally recommend voting against the governance chair of an S&P 500 company that fails to provide explicit disclosure concerning the board's role in overseeing ESG issues. Note that Glass Lewis did not specifically define the exact scope of "environmental and/or social issues." In addition, Glass Lewis noted that such oversight can be effectively conducted by specific directors, the entire board, a separate committee, or combined with the responsibilities of a key committee rather than the board being responsible for the entire suite of ESG matters.

Directors and Officers Questionnaires

Despite a number of new corporate governance and disclosure considerations issued during 2020, directors and officers questions, or D&O Questionnaires, should remain fairly stable. Some considerations for updates include the following:

- **Definition of "Family Member" under Nasdaq Rules**: In February 2020, the SEC approved NASDAQ's changes to the definition of "family member."[13] Pursuant to the revised definition, stepchildren who do not share the director's home and domestic employees who reside in the director's home will not be considered "family members" under Nasdaq Listing Rule 5605(a), unless there are other facts that classify such persons as family members.

- **Questions on Self-Identification of Diversity**: As states and proxy advisors consider the diversity of board membership, consider whether you want to provide directors and officers the ability to self-identify any diversity characteristics within their D&O Questionnaires.

- **Perquisite Disclosures**: To the extent that you request information from perquisites from directors and officers as a disclosure control, consider noting the impact of COVID-19 guidance on what is a perquisite.

[13] Securities and Exchange Commission, Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, to Amend the Definition of Family Member in Listing Rule 5605(a)(2) for Purposes of the Definition of Independent Director, February 13, 2020, available at https://www.sec.gov/rules/sro/nasdaq/2020/34-88210.pdf.

Trading in Company Securities

As companies transition into 2021, **we recommend taking a fresh look at both the timing of annual stock grants and the timing and terms of 10b-5-1 plans**. While the SEC did not issue any specific guidance in 2020 regarding these topics, we witnessed scrutiny for the timing (and documentation) of stock grants relative to the release of material information.[14] Such grants resulted in SEC investigations and outside counsel review, bringing reputational risk and potential control issues to what normally should be a fairly routine process. Similarly, outgoing SEC Chairman Jay Clayton remarked about the "cooling off period" between the adoption of 10b-5-1 plans and trading in the company's stock.[15] Mr. Clayton suggested periods of four months or six months as potential cooling off periods.[16] While Mr. Clayton's statements are not official guidance from the SEC, they illustrate the risks and current thinking regarding such plans.

Shareholder Proposals – Five Key Takeaways from 2019-2020 Proposals

Shareholder proposals under Rule 14a-8 continued at a consistent pace in 2020. We reviewed 109 shareholder proposals voted on for 30 US-based, large-cap companies from the 2019-20 proxy season. As part of the review, we divided the shareholder proposals into three broad categories that correspond to the initials of "ESG": environmental, social and governance.

- **Environmental** proposals consisted of proposals requesting reports on various climate, environmental, and other ancillary matters. Approximately 9% of the overall proposals in the data set related to environmental matters.

- **Social** proposals consisted of proposals requesting reports or other information on matters such as pay equity, human rights, political and lobbying disclosures, health issues, and other related matters. Approximately 27% of the overall proposals in the data set related to social matters.

- **Governance** proposals, or corporate governance proposals, consisted of proposals modifying the rights of stockholders or concerning the control, voting, and corporate processes of the company. Approximately 64% of the overall proposals in the data set related to governance matters.

Of these proposals, the average support received was 23.7%, with only five proposals receiving enough support (over 50%) to pass. While each proposal contained additional considerations not summarized here, the following is a summary of five key takeaways from this data set, which should provide some insight on what companies may expect in the coming months. For additional information on the proposals, please contact the authors.

- **The proposals that passed were largely company or industry specific**: Our data set included five proposals that passed:

    - An independent board chair proposal at a large aerospace company;
    - A report on a climate lobbying proposal at a large oil and gas company;

[14] For example, see Kodak Says Ex-Executives Sold Stock Options They Didn't Own, Kimberly Chin, Wall Street Journal, available at https://www.wsj.com/articles/kodak-says-ex-executives-sold-stock-options-they-didnt-own-11605107967.
[15] For example, see SEC Chairman Urges Corporate Insiders to Avoid Quick Stock Sales, Paul Kiernan, Wall Street Journal, available at https://www.wsj.com/articles/sec-chairman-urges-corporate-insiders-to-avoid-quick-stock-sales-11605637892.
[16] *Id.*

- A special shareholder meeting proposal at a large telecom company;
- A report on opioid-related risks proposal at a pharmaceutical company; and
- A simple majority voting proposal at a media company.

In each instance, the specific facts regarding each proposal and the company likely played a more significant role in their support, rather than generalized stockholder support of these proposals across all companies within our data set.

- **Proposals receiving 40-49.9% support largely concentrated in corporate governance and environmental issues**: Our data set included 13 proposals that received between 40 to 49.9% support, illustrating a high level of support for the proposal. There was no dominant proposal in this category, but corporate governance proposals generally fared better than environmental and social proposals. Proposals receiving such levels of support include:

  - Three proposals for an independent board chair;
  - Three proposals for stockholders to act by written consent and one proposal to lower the ownership threshold to call special meetings;
  - Two proposals concerning reports on environmental matters; and
  - Two proposals concerning reports on social matters (freedom of expression and political disclosure).

- **Social proposals generally lagged behind corporate governance proposals and environmental proposals**: The average corporate governance proposal received 25.8% support and the average environmental proposal received 26.3% support, whereas the average social proposal received 17.8% support. It is worth noting that only two proposals received more than 60% support in the data, illustrating that deference to management is still strong. In light of the revised thresholds for re-submission adopted by the SEC for Rule 14a-8, many social proposals will be unable to be re-submitted in upcoming years without additional support.

- **Equity in pay proposals varied, but received low support in 2019-2020**: 10 companies in our data set received shareholder proposals relating to the disclosure of employee pay disparity. Eight of the 10 proposals related to disclosing pay disparity by gender and race, and such proposals received just short of 10% support on average. Conversely, the two proposals requesting only the disclosure of pay disparity by gender received considerably more support—29.6% at a large software company and 38.1% at a pharmaceutical company.

- **Virtually every proposal was presented**: Out of the data set, only one proposal was not presented due to lack of the proponent showing up to present the proposal.

Appendix A: COVID-19 Guidance from the Securities and Exchange Commission

CF Disclosure Guidance: Topic No. 9
Issued March 25, 2020

- **Financial Condition and Results of Operations**: How has COVID-19 impacted your financial condition and results of operations? In light of changing trends and the overall economic outlook, how do you expect COVID-19 to impact your future operating results and near- and long-term financial condition? Do you expect that COVID-19 will impact future operations differently than how it affected the current period?

- **Capital Resources**: How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook? Has your cost of or access to capital and funding sources, such as revolving credit facilities or other sources, changed, or is it reasonably likely to change? Have your sources or uses of cash otherwise been materially impacted? Is there a material uncertainty about your ongoing ability to meet the covenants of your credit agreements? If a material liquidity deficiency has been identified, what course of action has the company taken or proposed to take to remedy the deficiency? Consider the requirement to disclose known trends and uncertainties as it relates to your ability to service your debt or other financial obligations, access the debt markets, including commercial paper or other short-term financing arrangements, maturity mismatches between borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral, and counterparty or customer risk. Do you expect to disclose or incur any material COVID-19-related contingencies?

- **Balance Sheet Issues**: How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets? For example, will there be significant changes in judgments in determining the fair value of assets measured in accordance with US GAAP or IFRS?

- **Impairment Analysis**: Do you anticipate any material impairments (e.g., with respect to goodwill, intangible assets, long-lived assets, right-of-use assets, investment securities), increases in allowances for credit losses, restructuring charges, other expenses, or changes in accounting judgments that have had or are reasonably likely to have a material impact on your financial statements?

- **Financial and Operational Issues and Internal Controls**: Have COVID-19-related circumstances such as remote work arrangements adversely affected your ability to maintain operations, including financial reporting systems, internal control over financial reporting, and disclosure controls and procedures? If so, what changes in your controls have occurred during the current period that materially affect or are reasonably likely to materially affect your internal control over financial reporting? What challenges do you anticipate in your ability to maintain these systems and controls?

- **Business Continuity Plans**: Have you experienced challenges in implementing your business continuity plans or do you foresee requiring material expenditures to do so? Do you face any material resource constraints in implementing these plans?

- **Demand Impacts**: Do you expect COVID-19 to materially affect the demand for your products or services?

- **Supply Chain, Distribution, and Revenues**: Do you anticipate a material adverse impact of COVID-19 on your supply chain or the methods used to distribute your products or services? Do you expect the anticipated impact of COVID-19 to materially change the relationship between costs and revenues?

- **Human Capital and Labor**: Will your operations be materially impacted by any constraints or other impacts on your human capital resources and productivity?

- **Impact of Travel Restrictions**: Are travel restrictions and border closures expected to have a material impact on your ability to operate and achieve your business goals?

CF Disclosure Guidance: Topic No. 9A
Issued June 23, 2020

- **Operational Disclosures**: What are the material operational challenges that management and the board of directors are monitoring and evaluating? How and to what extent have you altered your operations, such as implementing health and safety policies for employees, contractors, and customers, to deal with these challenges, including challenges related to employees returning to the workplace? How are the changes impacting or reasonably likely to impact your financial condition and short- and long-term liquidity?

- **Liquidity Disclosures**: How is your overall liquidity position and outlook evolving? To the extent COVID-19 is adversely impacting your revenues, consider whether such impacts are material to your sources and uses of funds, as well as the materiality of any assumptions you make about the magnitude and duration of COVID-19's impact on your revenues. Are any decreases in cash flow from operations having a material impact on your liquidity position and outlook?

- **Access to Credit Lines**: Have you accessed revolving lines of credit or raised capital in the public or private markets to address your liquidity needs? Are your disclosures regarding these actions and any unused liquidity sources providing investors with a complete discussion of your financial condition and liquidity?

- **Traditional and Non-Traditional Sources of Funding**: Have COVID-19-related impacts affected your ability to access your traditional funding sources on the same or reasonably similar terms as were available to you in recent periods? Have you provided additional collateral, guarantees, or equity to obtain funding? Have there been material changes in your cost of capital? How has a change, or a potential change, to your credit rating impacted your ability to access funding? Do your financing arrangements contain terms that limit your ability to obtain additional funding? If so, is the uncertainty of additional funding reasonably likely to result in your liquidity decreasing in a way that would result in you being unable to maintain current operations?

- **Covenant Compliance**: Are you at material risk of not meeting covenants in your credit and other agreements?

- **Liquidity and Related Metrics**: If you include metrics, such as cash burn rate or daily cash use, in your disclosures, are you providing a clear definition of the metric and explaining how management uses the metric in managing or monitoring liquidity? Are there estimates or assumptions underlying such metrics the disclosure of which is necessary for the metric not to be misleading?

- **Human and Capital Resources and Other Operational Matters**: Have you reduced your capital expenditures, and if so, how? Have you reduced or suspended share repurchase programs or dividend payments? Have you ceased any material business operations or disposed of a material asset or line of business? Have you materially reduced or increased your human capital resource expenditures? Are any of these measures temporary in nature, and if so, how long do you expect to maintain them? What factors will you consider in deciding to extend or curtail these measures? What is the short- and long-term impact of these reductions on your ability to generate revenues and meet existing and future financial obligations?

- **Details of Paying Debts**: Are you able to timely service your debt and other obligations? Have you taken advantage of available payment deferrals, forbearance periods, or other concessions? What are those concessions and how long will they last? Do you foresee any liquidity challenges once those accommodations end?

- **Customer and Counterparty Actions**: Have you altered terms with your customers, such as extended payment terms or refund periods, and if so, how have those actions materially affected your financial condition or liquidity? Did you provide concessions or modify terms of arrangements as a landlord or lender that will have a material impact? Have you modified other contractual arrangements in response to COVID-19 in such a way that the revised terms may materially impact your financial condition, liquidity, and capital resources?

- **Counterparty Financing and Other Financing Arrangements:** Are you relying on supplier finance programs, otherwise referred to as supply chain financing, structured trade payables, reverse factoring, or vendor financing, to manage your cash flow? Have these arrangements had a material impact on your balance sheet, statement of cash flows, or short- and long-term liquidity, and if so, how? What are the material terms of the arrangements? Did you or any of your subsidiaries provide guarantees related to these programs? Do you face a material risk if a party to the arrangement terminates it? What amounts payable at the end of the period relate to these arrangements, and what portion of these amounts has an intermediary already settled for you?

- **Subsequent Events**: Have you assessed the impact material events that occurred after the end of the reporting period, but before the financial statements were issued, have had or are reasonably likely to have on your liquidity and capital resources and considered whether disclosure of subsequent events in the financial statements and known trends or uncertainties in MD&A is required?

Cares Act Matters

- **Impact of Loan Terms**: How does a loan impact your financial condition, liquidity, and capital resources? What are the material terms and conditions of any assistance you received, and do you anticipate being able to comply with them? Do those terms and conditions limit your ability to seek other sources of financing or affect your cost of capital? Do you reasonably expect

restrictions, such as maintaining certain employment levels, to have a material impact on your revenues or income from continuing operations, or to cause a material change in the relationship between costs and revenues? Once any such restrictions lapse, do you expect to change your operations in a material way?

- **Tax Considerations**: Are you taking advantage of any recent tax relief, and if so, how does that relief impact your short- and long-term liquidity? Do you expect a material tax refund for prior periods?

- **Accounting Impact and Policies**: Does the assistance involve new material accounting estimates or judgments that should be disclosed or materially change a prior critical accounting estimate? What accounting estimates were made, such as the probability a loan will be forgiven, and what uncertainties are involved in applying the related accounting guidance?

Going Concern Matters

- **Substantial Doubt Considerations**: Are there conditions and events that give rise to the substantial doubt about the company's ability to continue as a going concern? For example, have you defaulted on outstanding obligations? Have you faced labor challenges or a work stoppage?

- **Management Plans**: What are your plans to address these challenges? Have you implemented any portion of those plans?