

January 9, 2023

CONSIDERATIONS FOR PREPARING YOUR 2022 FORM 10-K

To Our Clients and Friends:

Each year we offer our observations on new developments and highlight select considerations for calendar-year filers as they prepare their Annual Reports on Form 10-K. This alert touches upon recent rulemaking from the U.S. Securities and Exchange Commission (“SEC”), comments letters issued by the staff of the SEC’s Division of Corporation Finance (the “Staff”), and trends among reporting companies that have emerged throughout the last year.

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I. Trends in Human Capital Disclosure

Since 2021, companies have been required to include in their Form 10-K^[1] a description of the company's human capital resources, to the extent material to an understanding of the business taken as a whole, 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).

The rule adopted by the SEC did not define "human capital" or elaborate on the expected content of the disclosures beyond the few examples provided in the rule text. This principles-based approach has resulted in significant variation among companies' disclosures. With two years of human capital disclosure now available, we recently conducted a survey of the substance and form of human capital disclosures made by the S&P 100 in their Forms 10-K for their two most recently completed fiscal years. While company disclosures continued to vary widely, we saw companies generally expanding the length of their disclosures (79% of S&P 100 companies) and covering more topics (66% of S&P 100 companies), and also noted a slight increase in the amount of quantitative information provided in some areas. For a more detailed summary of our findings from this survey, please see our recently published client alert, "Evolving Human Capital Disclosures."^[2]

Our survey looked at seven primary categories of human capital disclosure, which were broken down further into 17 different disclosure topics.

1. ***Workforce Composition and Demographics.*** Nearly all S&P 100 companies discussed workforce composition and demographics to some degree. Diversity, equity, and inclusion continued to be the most common disclosure topics, with 96% of S&P 100 companies including a qualitative discussion of their commitment to diversity, equity, and inclusion. The level of discussion ranged from generic statements expressing support of diversity in the workforce to detailed examples of actions taken to support underrepresented groups and increase representation in the workforce. Of S&P 100 companies, 61% included statistics related to gender representation and 59% included statistics related to racial representation (compared to 47% and 43% in the previous year, respectively). Most of these companies provided statistics for their workforce as a whole; however, an increased subset (37% in the most recent year, compared to 22% in the previous year) included separate statistics for different classes of employees and/or their boards of directors. We continue to see only a relatively small number of companies disclose full-time/part-time employee metrics (17% of the S&P 100) and workforce turnover rates (23% of the S&P 100).
2. ***Recruiting, Training, Succession.*** Over 90% of S&P 100 companies discussed talent attraction, retention, and development. These were mostly qualitative disclosures discussing programs and

benefits in place to recruit and maintain talent. There was no increase in the number of companies that covered succession planning.

3. **Employee Compensation.** Of companies surveyed, 85% included disclosure relating to employee compensation, generally providing a qualitative description of the compensation and benefits program offered to employees. Although 41% of companies surveyed included a discussion of pay equity practices in their 2021 Form 10-K (compared to 30% in 2021), quantitative measures of pay gaps based on gender or racial representation continued to be uncommon (12% of companies surveyed in 2022 compared to 11% in 2021).
4. **Health and Safety.** Of S&P 100 companies, 78% included disclosures relating to workplace health and safety. Disclosures primarily focused on the companies' commitment to safety in the workplace and compliance with applicable regulatory and legal requirements, but quantitative disclosures on workplace safety, such as historical and/or target incident or safety rates, were uncommon (10% of companies surveyed in 2022).
5. **Culture and Engagement.** Discussions on culture and engagement increased from the prior year, with a majority of S&P 100 companies explaining how they monitor culture and employee engagement. Some companies also included disclosures centered on practices and initiatives undertaken to build and maintain culture, including diversity-related and inclusion initiatives.
6. **COVID-19.** Companies continued to include information regarding COVID-19 and its impact on company policies and procedures or on employees generally (71% of companies surveyed in 2022, compared to 66% in 2021). We expect that some companies may slim down their disclosure related to COVID-19 impacts in their next Form 10-K.
7. **Human Capital Management Governance and Organizational Practices.** The percentage of S&P 100 companies discussing 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) increased from 41% in 2021 to 57% in 2022.

While we anticipate that human capital disclosure will continue to evolve under the existing principles-based requirements, per the SEC's recently released Fall 2022 Regulatory Flexibility Agenda, we expect the SEC to propose more prescriptive rules in the first quarter of 2023 that will significantly change the landscape. SEC chair Gary Gensler has instructed the 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."

II. Trends in Climate Change Disclosure

In March 2022, the SEC issued proposed rules on climate change disclosure requirements that, if adopted as proposed, will require disclosure of extensive and detailed climate-related information, including climate-related risks and opportunities, board oversight of climate-related risks, amount of greenhouse gas emissions, attestation of reporting on emissions, and a separate financial statement footnote on the

impact of climate change. The proposed rules generated extensive positive and negative feedback from investors, companies, politicians, and others, and we believe it is unlikely that the SEC will adopt the rules as proposed. For a summary of the proposed climate change disclosure rules, please see our prior client alert, “Summary of and Considerations Regarding the SEC’s Proposed Rules on Climate Change Disclosure.”^[3]

While there are no new SEC requirements on climate change disclosure that directly impact the 2022 Form 10-K, Form 10-K comment letters issued by the Staff over the past year underscore the Staff’s expectation of climate-related disclosures in response to existing requirements. The Staff initially issued a number of comment letters relating exclusively to climate-change disclosure issues in the fall of 2021. This was followed by the Staff publishing a sample comment letter related to climate-change disclosure issues on its website in September 2021.^[4] Based on a review of comment letters issued in 2022, a growing trend we saw was the SEC asking for more quantification around climate-related disclosures. Resolution of comments often required more than one round of responses as the Staff honed in on a company’s analysis of whether a specific disclosure item was material.

The general focus of these climate-related comments fall under four general areas:

1. ***The impact of climate legislation, regulation, and international accords.*** For example, the Staff has asked companies to disclose the risks they face as a result of climate-change legislation, regulation, or treaties to the extent such risks are reasonably likely to have a material effect on the company’s business, financial condition, and results of operations.
2. ***The indirect consequences of climate-related regulation or business trends.*** For example, the Staff has asked for additional detail on indirect consequences, such as increased demand for goods that may produce lower emissions, increased competition to develop new products, and any anticipated reputational risks resulting from operations or services that produce material emissions.
3. ***The physical effects of climate change.*** For example, the Staff has placed a particular emphasis on quantifying material weather-related damage to property, weather-related impacts on major customers and suppliers, and cost and availability of insurance.
4. ***The material expenditures for climate-related projects and increase in compliance costs.*** For example, the Staff has requested quantification of any material past and/or future capital expenditures for climate-related projects for each of the periods for which financial statements are presented.

For companies reviewing their existing climate-related disclosures in their Form 10-K, a few items to consider in light of these Staff comments include:

- Tailor climate-related disclosures to the company’s business and financial condition, rather than generic discussions on climate change. For example, the Staff may ask a company to provide specific disclosure, if material, as to the impact on the company’s business of climate change risks disclosed in the risk factor section.

- Consider whether certain climate-related matters should be disclosed not only qualitatively, but also quantitatively. For example, if climate-related capital projects have become a significant portion of overall capital expenditures spending, the comment letters indicate that quantitative disclosure may be warranted.
- As part of the disclosure controls and procedures for the 2022 Form 10-K filing, review ESG materials publicly disclosed by the company, such as the company’s sustainability report, to determine whether any of the information in them is material under federal securities laws. Based on Staff comments, the Staff may look at these additional disclosures outside a company’s SEC filings and ask what consideration was given to including these disclosures in the Form 10-K. To the extent information disclosed in sustainability reports is not material for purposes of SEC rules, as we previously advised in our prior client alert, “[Considerations for Climate Change Disclosures in SEC Reports](#),”^[5] appropriate disclaimers to that effect should accompany such disclosures.

III. Disclosure Trends and Considerations Related to Macroeconomic Issues and Current Events

An increased Staff focus on current events and macroeconomic trends kicked off in 2020 as public companies began disclosing impacts of the COVID-19 pandemic on their operations. At the time, the Staff issued CF Disclosure Guidance: Topic No. 9 (published March 25, 2020)^[6] and CF Disclosure Guidance: Topic No. 9A (published June 23, 2020),^[7] specifically regarding how companies should assess and disclose the impact of COVID-19; however, the guidance provides helpful instruction as companies evaluate the impact of other macroeconomic events, such as ongoing geopolitical conflicts, increased inflation, rising interest rates, and recessionary concerns. Below are a few general tips when drafting disclosure around current events and macroeconomic trends:

- Avoid generic disclosure of current events; be specific as to how these factors impact financial performance and operations.
- Avoid static disclosure of current events; update prior year disclosure to reflect impact during fiscal year 2022, as well as any known trends and uncertainties for 2023 and beyond.
- Confirm disclosure of current events and macroeconomic trends is consistent through the relevant parts of Form 10-K, such as the business section, risk factors, management’s discussion and analysis of financial condition and results of operations (“MD&A”), forward-looking statement disclaimer, and notes to the financial statements.

Set forth below are discussions of some of the major current events and macroeconomic trends that may impact a company’s disclosure in the upcoming Form 10-K.

A. Tailoring of COVID-19 Disclosure

The COVID-19 pandemic continues to impact public companies, though the direct and indirect impacts on a company’s operations or financial condition or on its industry may have changed significantly since the 2021 Form 10-K filing. As companies take a fresh look at their existing COVID-19 disclosure,

discussions should be tailored to highlight actual impacts realized in 2022, and risk factors may need to be slimmed down to focus on the material risks that COVID-19 still presents. For some companies or select industries, discussion of COVID-19 as a trend or risk may still be a prominent disclosure for the 2022 Form 10-K, particularly for companies and industries whose supply chains continue to be impacted.

B. Increased Discussion of Geopolitical Conflict

With the ongoing Russian invasion of Ukraine, public companies may need to discuss the conflict's direct and indirect impacts on their operations and financial condition. In May 2022, the Staff published a "Sample Comment Letter Regarding Disclosures Pertaining to Russia's Invasion of Ukraine and Related Supply Chain Issues."^[8] In the letter, the Staff emphasized that companies should provide detailed disclosure, to the extent material, regarding (i) direct or indirect exposure to Russia, Belarus, or Ukraine through operations or investments in such countries, securities trading in Russia, sanctions imposed or legal or regulatory uncertainty associated with operating in or existing in Russia or Belarus, (ii) direct or indirect reliance on goods or services sourced in Russia or Ukraine, (iii) actual or potential disruptions in the company's supply chain, or (iv) business relationships, connections to, or assets in, Russia, Belarus, or Ukraine. Similar to Staff comment letters on climate-related disclosure, comment letters received by public companies in the fall of 2022 on the Russia-Ukraine conflict have requested more specific, including quantified, information on the impacts to the company's operations and financial condition.

Companies should undertake similar disclosure analyses to determine whether direct or indirect impacts of emerging geopolitical conflicts, such as rising tensions between China and Taiwan, should be discussed in any sections of the upcoming Form 10-K.

C. Expanded Disclosure of Supply Chain Disruptions and Mitigation Efforts

In a somewhat related vein, companies experiencing supply chain difficulties should consider whether discussion of those issues in their risk factors and MD&A is sufficient. In comment letters recently issued to companies that mentioned supply chain disruptions, the Staff requested that the companies specify whether these challenges materially impacted the company's results of operations or capital resources and quantify, to the extent possible, how the company's sales, profits, and/or liquidity have been impacted. Several comment letters have also requested that companies discuss any known trends or uncertainties resulting from mitigation efforts undertaken and whether those efforts have introduced new material risks, including those related to product quality, reliability, or regulatory approval of products.

D. More Detailed Discussion of Inflation Risks and Impacts

With the rise of inflation in 2022, companies should consider whether their disclosures regarding inflation impacts and risks are adequate. Depending on the effect on a company's operations and financial condition, additional disclosure in risk factors, MD&A, or the financial statements may be necessary. In recent comment letters, the Staff has focused on how current inflationary pressures have materially impacted a company's operations and sought disclosure on any mitigation efforts implemented with respect to inflation. If inflation is identified as a significant risk, the Staff requested

companies to quantify, where possible, the extent to which revenues, expenses, profits, and capital resources were impacted by inflation.

For example, one company received the following comment: “We note your risk factor indicating that inflation can have an adverse impact on your business and on [y]our customers. Please *update this risk factor if recent inflationary pressures have materially impacted your operations*. In this regard, if applicable, *discuss how your business has been materially affected by the various types of inflationary pressures you are facing*” (emphasis added). Another company received this comment: “In various sections of your filings as well as earnings releases, you identify inflation as a significant risk you are experiencing, and indicate that there are various sources for the inflation you are experiencing. *Please revise your future filings to discuss and quantify, where possible, the extent to which your revenues, expenses, profits, and capital resources have been impacted by inflation*. Identify the drivers of inflation that most affected your options, and discuss your mitigation efforts. Provide us with your proposed disclosures in your response” (emphasis added).

E. Increased Discussion of Rising Interest Rates

In the current environment of relatively high interest rates, companies should also consider whether the recent rate increases and uncertainty regarding future rate changes are adequately discussed. In recent comment letters, the Staff has asked companies to expand their discussion of rising interest rates in the Risk Factors and MD&A sections to specifically identify the actual impact of recent rate increases on the business’s operations and how the business has been affected.

It is also critical that companies confirm that their disclosures in Item 7A (Quantitative and Qualitative Disclosures About Market Risk) are up-to-date and responsive to the requirements of Item 305 of Regulation S-K.

F. Inflation Reduction Act of 2022

In August 2022, the Inflation Reduction Act of 2022 (the “Act”) was signed into law. One of the aspects of the Act was the introduction of a 1% excise tax on certain corporate stock buybacks. More specifically, the Act would impose a nondeductible 1% excise tax on the fair market value of certain stock that is “repurchased” during the taxable year by a publicly traded U.S. corporation or acquired by certain of its subsidiaries. The taxable amount is reduced by the fair market value of certain issuances of stock throughout the year. The Act also imposes a 15% corporate minimum tax and extends and expands tax incentives for clean energy. To the extent any provisions of the Act may impact a company’s business or financial condition, additional disclosure regarding the impact of the Act may need to be added to the risk factors, MD&A or the financial statements for the 2022 Form 10-K. For more information regarding the Act, please see our prior client alert, “Update: Senate Passes Revised Version of Inflation Reduction Act of 2022; Carried Interest Changes Omitted and Tax on Corporate Stock Buybacks Added.”[9]

IV. Updated Staff Guidance on Non-GAAP Measures

In 2022, the Staff, through comment letters issued during Form 10-K reviews, continued to focus on whether non-GAAP measures disclosed in periodic reports, earnings releases, and other earnings

materials complied with Regulation G and Item 10(e) of Regulation S-K, as applicable. Issues emphasized in those comment letters include (i) whether certain performance measures should have been identified as non-GAAP measures, (ii) whether identified non-GAAP measures were presented with the most directly comparable GAAP measure at the appropriate prominence level, and (iii) the appropriateness of adjustments in non-GAAP measures. With respect to adjustments, care must be taken when deciding whether to adjust for current events, such as COVID-19 or the Russia-Ukraine conflict. Adjustments are typically only appropriate when they directly relate to a nonrecurring event and are clearly calculable and separable.

On December 13, 2022, the Staff announced an update to its Compliance and Disclosure Interpretations (“C&DI”) on Non-GAAP Financial Measures. Many of the changes memorialize positions taken by the Staff in recent comment letters or provide additional detail about those positions. A discussion of the significant changes is provided below, and a marked version of the impacted C&DIs is available in our prior post on the Gibson Dunn Securities Regulation and Corporate Governance Monitor, “SEC Updates Non-GAAP C&DIs.”^[10]

A. Question 100.01 – Misleading Adjustments

Question 100.01 was revised to emphasize that a company’s individual facts and circumstances affect whether an adjustment makes a non-GAAP measure misleading. Using the pre-update example (i.e., a non-GAAP performance measure that excludes normal, recurring, cash operating expenses may be misleading), the updated C&DI illustrates this by noting that:

- When evaluating what is a “normal, operating expense,” the Staff considers the nature and effect of the non-GAAP adjustment and how it relates to the company’s operations, revenue generating activities, business strategy, industry, and regulatory environment.
- The Staff would view an operating expense that occurs repeatedly or occasionally, including at irregular intervals, as “recurring.”

B. Question 100.04 – Individually Tailored Accounting Principles

Question 100.04, which was completely rewritten, continues to include a prohibition on individually tailored accounting principles, but has now been supplemented with the following additional examples of adjustments that would run afoul of this prohibition:

- accelerating the recognition of revenue as though it was earned when customers were billed, when GAAP requires it to be recognized ratably over time;
- presenting revenue on a net basis when GAAP requires it to be presented on a gross basis (and vice versa); and
- changing the basis of accounting for revenue or expenses to a cash basis when GAAP requires it to be accounted for on an accrual basis.

C. Question 100.05 – Improper Labels and Descriptions

New Question 100.05 memorializes the Staff’s position, often expressed through comment letters, that a non-GAAP measure can be misleading if it (or any adjustment made to the GAAP measure) is not appropriately labeled and clearly described. Three examples are provided of labels that would be misleading because they do not reflect the nature of the non-GAAP measure:

- a contribution margin that is calculated as GAAP revenue less certain expenses, labeled “net revenue”;
- a non-GAAP measure labeled the same as a GAAP line item or subtotal even though it is calculated differently than the similarly labeled GAAP measure, such as “Gross Profit” or “Sales”; and
- a non-GAAP measure labeled “pro forma” that does not meet the pro forma requirements in Article 11 of Regulation S-X.

D. Question 100.06 – Limits of Explanatory Disclosure

New Question 100.06 explains that a non-GAAP measure could be so inherently misleading that even extensive, detailed disclosure about the nature and effect of each adjustment would not prevent it from being materially misleading. No examples are provided.

E. Question 102.10 – Equal or Greater Prominence

Question 102.10, which relates to the equal or greater prominence rule, was broken into subparts and supplemented with more detailed explanations and additional examples of disclosures that the Staff believes violate Item 10(e) of Regulation S-K, including the following situations:

- *Ratios*. When a ratio is calculated using a non-GAAP financial measure and the most directly comparable GAAP ratio is not presented with equal or greater prominence.
- *Charts/tables/graphs*. When charts, tables, or graphs of non-GAAP financial measures are used and charts, tables, or graphs of the comparable GAAP measures are not presented with equal or greater prominence.
- *Reconciliations*. When a reconciliation begins with the non-GAAP financial measure or appears to constitute a non-GAAP income statement.
- *Non-GAAP Income Statements*. When a non-GAAP income statement is presented, even if it is not a *full* income statement; “most of the line items and subtotals found in a GAAP income statement” is objectionable to the Staff.

V. Cybersecurity Disclosure Considerations

Cybersecurity risks and incidents continue to remain a focus for the SEC. In March 2022, the SEC proposed amendments to its existing rules to enhance and standardize disclosures regarding cybersecurity risk management, strategy, governance, and incident reporting by public companies. The proposed amendments would require, among other things, disclosure about (i) material cybersecurity incidents, (ii) a company's policies and procedures to identify and manage cybersecurity risks, (iii) the board of directors' oversight of cybersecurity risk, (iv) the board of directors' cybersecurity expertise, and (v) management's role and expertise in assessing and managing cybersecurity risk and implementing cybersecurity policies and procedures. For more information about the proposed rules, please see our prior client alert, "SEC Proposes Rules on Cybersecurity Disclosure."^[11]

While the final rules have not yet been adopted, companies should review their existing cybersecurity risk disclosure and confirm that their disclosure controls, particularly related to incident reporting, are sufficient. In addition, when considering disclosure, companies may want to be mindful of the October 2022 updates that Institutional Shareholder Services ("ISS") made to its Governance QualityScore methodology, which added new factors on information security, including whether the company discloses its third-party information security risks and whether the company experienced a third-party information security breach.^[12] We note that comments issued by the Staff in the fall of 2022 reflect a heightened focus on cyberattacks (both in terms of potential risks and actual incidents), particularly in light of the ongoing Russia-Ukraine conflict.

VI. Reminder Regarding Past Amendments to Financial and Business Disclosure Requirements in Regulation S-K

For calendar year-end reporting companies, the 2021 Form 10-K was the first Form 10-K incorporating the SEC's amendments to certain financial and business disclosure requirements of Regulation S-K, including Item 303 for MD&A. Adopted in November 2020, these amendments generally emphasized a principles-based approach to disclosure and eliminated certain prescriptive disclosure requirements. While virtually all reporting companies took advantage of certain of these disclosure requirements in their 2021 Form 10-K, such as removing the selected financial data in Item 6, many companies did not make drastic changes to their existing disclosure and opted to retain other disclosures notwithstanding the eliminated mandates, such as the tabular disclosure of contractual obligations.

Recent comment letters show that the Staff continues to seek additional disclosures responsive to certain aspects of the Regulation S-K amendments, including the requirement to discuss underlying reasons for material changes in line items and the requirements regarding critical accounting estimates. For example, companies that cited multiple factors impacting their financial results in MD&A have been requested by the Staff to revise future disclosures to further describe material line item changes and the underlying reasons for such changes in both quantitative and qualitative terms, including the impact of offsetting factors. In addition, companies whose disclosure of critical accounting estimates did little more than repeat portions of their significant accounting policy disclosure were asked to revise future disclosures to explain why each critical accounting estimate is subject to uncertainty and, to the extent the information is material and reasonably available, how much each estimate and/or assumption has

changed over a relevant period, and the sensitivity of the reported amounts to the material methods, assumptions and estimates underlying its calculation.

For more information about the amendments to Regulation S-K, see our prior post, “Summary Chart and Comparative Blackline Reflecting Recent Amendments to MD&A Requirements Now Available.”^[13]

VII. Technical and Other Considerations

A. New Filing Requirement for “Glossy” Annual Reports

In June 2022, the SEC adopted amendments mandating that annual reports sent to shareholders pursuant to Exchange Act Rule 14a-3(c) (i.e., “glossy” annual reports) must also be submitted to the SEC in the electronic format in accordance with the EDGAR Filer Manual. The amendments supersede the Staff guidance provided in 2016 stating that the SEC would not object if companies 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.

These annual reports will be in PDF format and filed using EDGAR Form Type ARS. One technical concern with submitting “glossy” annual reports through EDGAR is file size limitations. The “glossy” annual reports are typically larger files as compared to other EDGAR filings because they tend to contain extensive graphics. In the final rule, the SEC noted 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, companies should be mindful of the file size of their glossy annual report and conduct test runs in advance to make sure that EDGAR is able to handle the file size or evaluate whether the PDF file can be compressed.

B. Clawback Check Boxes on Cover Page

As part of the final clawback rules adopted by the SEC on October 26, 2022, new checkboxes will be added to the cover pages of Forms 10-K, 20-F, and 40-F. Companies must indicate by check boxes on their annual reports whether the financial statements included in the filings reflect a correction of an error to previously issued financial statements and whether any such corrections are restatements that required a recovery analysis. The SEC’s adopting release noted that, “[p]articularly as it relates to ‘little r’ restatements which typically are not disclosed or reported as prominently as ‘Big R’ restatements, the check boxes provide greater transparency around such restatements and easier identification for investors of those that triggered a compensation recovery analysis.”

While the effective date for the SEC’s clawback rule is January 27, 2023, companies do not need to adopt a clawback policy until after the stock exchanges’ listing standards implementing the SEC rule are proposed, adopted, and become effective, which could be as late as November 28, 2023. In the meantime, it is not clear whether the SEC will require companies to include these checkboxes on the Form 10-K cover page. Each check box will constitute an inline XBRL element, so once EDGAR is set up to expect these new elements, it is possible that filings could get rejected unless the elements are included. (A similar issue cropped up last year for companies that tried to file their Form 10-K without tagging the

independent auditor name, location, and/or PCAOB ID number.) As of this writing, the official Form 10-K available through the Forms List on the SEC website^[14] has not been updated to include these new check boxes.

C. Item 201(e) Performance Graph and Pay Versus Performance

As a reminder, companies have the option of including the stock price performance graph required by Item 201(e) of Regulation S-K, which shows the company's total shareholder return (TSR), in the Rule 14a-3 annual report to security holders (distributed in connection with the proxy statement) or the Form 10-K itself (assuming a "10-K wrap" is used to comply with Rule 14a-3). Beginning in this year's proxy statements, companies will be required to provide disclosure that satisfies the new pay versus performance disclosures required by Regulation S-K Item 402(v). (For a summary of the final pay versus performance rules, please see our prior client alert, "SEC Releases Final Pay Versus Performance Rules.")^[15] These new disclosure requirements include comparisons to a peer group that may be the peer group identified in the Regulation S-K Item 201(e) performance graph. To the extent companies would like to use the Item 201(e) peer group in their pay versus performance disclosures, they will want to make sure the group identified in last year's Form 10-K or Rule 14a-3 annual report is the one that they want to use for their initial pay versus performance disclosure in the proxy statement. If a company wants to use a different peer group in the 2022 Form 10-K (and the pay versus performance disclosure) than the one in last year's performance graph, it will need to, per Regulation S-K Item 201(e)(4), "explain the reason(s) for this change and also compare the [company's] total return with that of both the newly selected index and the index used in the immediately preceding fiscal year."

[1] 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>.

[2] Available at <https://www.gibsondunn.com/evolving-human-capital-disclosures>.

[3] Available at <https://www.gibsondunn.com/summary-of-and-considerations-regarding-the-sec-proposed-rules-on-climate-change-disclosure/>.

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

[5] Available at <https://www.gibsondunn.com/considerations-for-climate-change-disclosures-in-sec-reports/>.

[6] Available at <https://www.sec.gov/corpfin/coronavirus-covid-19>.

[7] Available at <https://www.sec.gov/corpfin/covid-19-disclosure-considerations>.

[8] See Sample Letter to Companies Regarding Disclosures Pertaining to Russia’s Invasion of Ukraine and Related Supply Chain Issues (May 3, 2021), available at <https://www.sec.gov/corpfin/sample-letter-companies-pertaining-to-ukraine>.

[9] Available at <https://www.gibsondunn.com/update-senate-passes-revised-version-of-inflation-reduction-act-of-2022-carried-interest-changes-omitted-tax-on-corporate-stock-buybacks-added/>.

[10] Available at <https://www.securitiesregulationmonitor.com/Lists/Posts/Post.aspx?ID=468>.

[11] Available at <https://www.gibsondunn.com/sec-proposes-rules-on-cybersecurity-disclosure/>.

[12] Interestingly, under the current QualityScore methodology, companies that disclose an immaterial information security breach in the last three years may see an improvement in their Audit & Risk Oversight score as a result of ISS’s preference for more, rather than less, disclosure of cyber incidents, even if immaterial.

[13] Available at <https://www.securitiesregulationmonitor.com/Lists/Posts/Post.aspx?ID=432>.

[14] Available at <https://www.sec.gov/forms>.

[15] Available at <https://www.gibsondunn.com/sec-releases-final-pay-versus-performance-rules/>.



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