

Updating Considerations for 2021 Form 10-K Reports

Goodwin 2020-2021 Year-End Tool Kit

Updating Considerations for 2021 Form 10-K Reports

1. Cover Page of Form 10-K

Form 10-K – Cover Page

The following text and checkbox was added to the cover page of Form 10-K as part of the amendments to the definitions of “accelerated filer” and “large accelerated filer”:

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.

Practice point: Annex A shows the amended Form 10-K cover page with the new checkbox and text boxed in red.

Effective date: April 27, 2020

For additional information: [Goodwin Alert](#) – [SEC Release No. 34-88365](#)

2. Amendments to Business, Legal Proceedings and Risk Factors

Form 10-K Item 1 – Business

Like many of the amended disclosure requirements adopted by the U.S. Securities and Exchange Commission (SEC) in recent years, many of the amendments that will newly affect Form 10-K annual reports in 2021 shift from prescriptive disclosure based on lists of disclosure topics that are required if material to the company, these amendments reflect a principles-based approach that supplements a general disclosure requirement that is supported with non-exclusive examples of disclosure topics for companies to consider.

Practice point: the continuing shift from prescriptive disclosure may require a fresh, thoughtful review of both the amended disclosure requirements and the company’s current disclosures.

General Development of Business. Item 101(a) of Regulation S-K Item 101(a) has been amended as follows:

- **Replace List of Specific Disclosure Topics with Examples.** The amendments focus on disclosure of information that is material to an understanding of the company’s business, and replaces the previously required lengthy and detailed list of disclosure topics with a more concise and general list of potential disclosure topics. The amendments clarify that disclosure is required only to the extent material to an understanding of the general development of the company’s business.
- **New Business Strategy Disclosure.** The amendments add a new disclosure topic about transactions and events that affect or may affect the company’s business operations, including changes to a previously disclosed business strategy.

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- **Eliminate Five/Three Year Lookback.** The amendments eliminate the previously-required timeframe for disclosure of the general development of the company's business (generally five years, or three years for smaller reporting companies).

***Practice point:** Form 10-K continues to require a one-year lookback that discusses developments since the beginning of the fiscal year covered by the annual report.*

- **Permit Hyperlinks to Previously Filed Disclosure.** The amendments permit a company to provide only an update of the general development of its business, focusing on material developments during the reporting period, in filings other than IPO registration statements. A similar amendment to Item 101(h), which applies to Item 101 business disclosure by smaller reporting companies, provides a similar option for smaller reporting companies that use the scaled reporting provision.

***Practice point:** if the company includes only an update in the annual report, the amendments require the company to incorporate by reference and include a single active hyperlink to a single report or registration statement filed by the company that, together with the update, would present a full discussion of the general development of the company's business.*

Business Description. Item 101(c) of Regulation S-K has been amended as follows:

- **Expanded Governmental Regulation Disclosure.** The amendments require disclosure about compliance with all material government regulations, expanding the previous disclosure requirement that applied only to the impact of compliance with environmental requirements.
- **Human Capital Disclosure.** The amendments added a new requirement to disclose certain information about the company's human capital resources, including any human capital measures or objectives that the company focuses on in managing its business, such as measures or objectives that address the attraction, development, and retention of personnel, to the extent relevant and material. The amendments do not define "human capital" or require disclosure of any specific metrics.

***Practice point:** Consistent with the principles-based nature of these amendments, companies have considerable flexibility to tailor human capital disclosure to the company's specific circumstances and practices. When considering what disclosure would be appropriate, a company should consider the existing context of its prior Form 10-K and proxy statement disclosures, as well as its corporate governance and business conduct policies and its workforce-related policies and practices. A [survey](#) of early Form 10-K reports by FW Cook found significant differences in the length and topical coverage of human capital disclosures. The most frequent topics discussed included headcount information (60%), diversity and inclusion (54%), employee development and training (50%); competitive pay and benefits (36%) and safety (36%).*

Form 10-K Item 3 – Legal Proceedings

Legal Proceedings. Item 103 of Regulation S-K has been amended as follows:

- **Cross-Reference/Hyperlink to Other Disclosure.** The amendments permit companies to satisfy the required disclosure about legal proceedings without unnecessary duplication by cross-referencing hyperlinking to the legal proceedings disclosure that is included elsewhere in the same filing (for example, in the financial statement footnotes, MD&A or risk factors).
- **Increased Dollar Threshold.** The amendments increased the dollar threshold for disclosure about environmental sanctions from \$100,000 to \$300,000. Alternatively, the company can use a different dollar threshold, which must be disclosed, that is not greater than lesser of \$1,000,000 or 1% of the company's

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consolidate current assets and has been determined by the company to be reasonably designed to result in disclosure of any material proceedings.

Practice points:

Cross-references to disclosure in the financial statement footnotes should be reviewed carefully, because the Item 3 disclosure requirements about a company's legal proceedings disclosure may differ from the disclosure standards that apply to financial statement footnote disclosure.

Rather than providing a simple cross-reference or hyperlink, consider whether additional cautionary disclosure about legal proceedings and/or disclosure of additional litigation may be appropriate.

Form 10-K Item 1A – Risk Factors

Risk Factors. Item 105 of Regulation S-K has been amended as follows:

- **Material Risks.** The amendments change the risk factor disclosure standard from the “most significant” risk factors to “material” risk factors.
- **Organizational Requirements.** The amendments require companies to group by topic with descriptive headings, rather than presenting risk factors in order of significance or probability, as many companies have done. The amendments also discourage generic risk factors, and require that any generic risk factors be placed at the end of the Risk Factors section under required caption “General Risk Factors.”
- **Risk Factor Summary.** If the risk factors section exceeds 15 pages, the company must include a summary of the principal risk factors that is not longer than 2 pages. The summary must follow the cover page of the Form 10-K report, before Item 1, Business.

Practice point: *Companies should confirm before filing a Form 10-K report that the risk factors section does not exceed 15 pages, since there may be significant pagination differences between the software used to prepare drafts of the report and the final report as prepared for filing by a financial printer or the company's EDGAR filing software.*

Effective date: November 9, 2020

For additional information: Goodwin [redline showing amendments](#) – [Goodwin alert](#) – [SEC Release No. 33-10825](#)

3. Amendments to MD&A and Other Financial Disclosure Rules

In November 2020, the SEC adopted amendments to Regulation S-K Item 301 (Selected Financial Data), Item 302 (Supplementary Financial Information) and Item 303 (Management's Discussion and Analysis of Financial Condition and Results of Operations). The effective date for these amendments is February 10, 2021. Companies are permitted to voluntarily comply with one or more of the amended disclosure items starting on the effective date, provided that the company complies with all of the requirements of the amended disclosure item. Companies must comply with the amended disclosure requirements in their first Form 10-K annual report for a year ending on or after August 9, 2021. For calendar year-end companies, this will be the Form 10-K annual report for the year ended December 31, 2021, due in February or March 2022 (depending on whether the company is a large accelerated filer, an accelerated filer or a non-accelerated filer).

These amendments are referred to below as the “2021 amendments” to distinguish them from the amendments discussed above.

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Form 10-K Item 6 – Selected Financial Data

Selected Financial Data. Item 301 of Regulation S-K has been amended as follows:

- **Selected Financial Data.** This section has been eliminated entirely.
- **Form 10-K Change.** The 2021 Amendments amended Item 6 of Form 10-K to read as follows:
Item 6. Reserved.

Form 10-K Item 7 – MD&A

Management’s Discussion and Analysis. Item 303 of Regulation S-K has been amended as follows:

Although the 2021 amendments modified the MD&A disclosure requirements in Item 303 extensively, they are not likely to result in significant changes in most companies’ disclosure, although the form and organization will change.

- **Contractual Obligations Table.** The 2021 amendments eliminated the contractual obligations table, and a more flexible principles-based approach to this disclosure has been integrated into the liquidity and capital resources disclosure.
- **Off-Balance Sheet Arrangements.** This disclosure is no longer a separately-captioned section. The 2021 amendments integrate broader and more flexible principles-based disclosure about off-balance sheet arrangements into other MD&A sections.
- **Critical Accounting Estimates.** The 2021 amendments expressly require critical accounting estimates disclosure, which had previously been required only by SEC interpretations. The 2021 amendments require meaningful disclosure of the nature and potential impacts of a company’s critical accounting estimates, and specifically state that this disclosure should not simply copy the accounting principles disclosure in the financial statement footnotes.
- **Known Trends and Uncertainties.** The 2021 amendments clarify the prior disclosure standard for known trends and uncertainties. The 2021 amendments replace the prior test with disclosure based on whether known trend/uncertainty is *likely* to come to fruition and, if so, whether it is *reasonably likely* to have a material effect on the company, based on an objective analysis by management. The adopting release states that this change “should not result in voluminous disclosures or unnecessarily speculative information.”
- **Quarterly Discussion (Form 10-Q).** The 2021 amendments permit companies to present quarterly discussions of material changes can be based on comparisons with either the prior year quarter or the sequentially prior quarter. If the company changes the format for this comparison, the change must be disclosed and both comparisons included in the Form 10-Q report for the first quarter for which the change occurs.

Form 10-K Item 8 – Financial Statements and Supplementary Data

Supplementary Financial Information. Item 302 of Regulation S-K has been amended as follows:

- **Quarterly Financial Information Table.** The 2021 amendments require tabular disclosure of selected quarterly financial information for the preceding two year period and any subsequent quarterly periods only when there have been one or more retrospective changes for any quarter in the last two fiscal years

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or any subsequent interim period that are material, individually or in the aggregate. The adopting release included a non-exhaustive list of examples of retrospective changes that could require disclosure, if material:

- correction of an error;
- disposition of a business accounted for as discontinued operations;
- reorganization of entities under common control; and
- a change in accounting principles.

As amended, Item 302 will require companies to explain any material changes and provide summarized financial information for each affected quarter and the fourth quarter in the relevant fiscal year. For IPO companies, this requirement will not apply until the company has filed its first Form 10-K annual report after its IPO, which will eliminate the requirement that an IPO company seeking to make a follow-on offering before it has filed its first Form 10-K must prepare quarterly disclosure reviewed by its auditors.

Effective date: February 10, 2020; compliance required in first Form 10-K for the fiscal year ending on or after August 9, 2021

For additional information: Goodwin [redline showing amendments](#) – [Goodwin alert](#) – [SEC Release No. 33-10890](#)

4. SEC COVID-19 Guidance

SEC Guidance on COVID-19 Disclosure. The SEC and the staff of the Division of Corporation Finance issued a variety of statements providing interpretive guidance on disclosure issues related to the COVID-19 pandemic. Companies should consider the applicability of the guidance to their Form 10-K reports. Among the SEC interpretive guidance includes the following, among others:

- [SEC press release](#), which [discusses](#) disclosure considerations for public companies, including insider trading, selective disclosure and forward-looking statements;
- [Disclosure Topic No. 9, Coronavirus \(COVID-19\)](#), which [discusses](#) the following topics:
 - assessment and disclosure of the evolving impacts of COVID-19;
 - disclosure of material non-public information in the context of securities issuances and repurchases, and trading by company insiders; and
 - presentation of non-GAAP financial measures and other key metrics in earnings releases and other materials, including important accommodations for company disclosures that are not filed with the SEC;
- statements by the [Chair and the Directors of the Division of Corporation Finance](#) and the [Division of Enforcement](#) of the SEC [discussing](#) COVID-19 disclosure challenges;
- [Disclosure Topic No. 9A, Coronavirus \(COVID-19\) — Disclosure Considerations Regarding Operations, Liquidity, and Capital Resources](#), which supplements Disclosure Topic No. 9 (above) and [discusses](#) the following topics:

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- operational changes, including supply chain and distribution adjustments;
- liquidity and capital resources impacts; and
- uncertainties about a company's ability to continue as a going concern.

For additional information see the Goodwin alerts linked in the description of each of the interpretive statements above.

5. Electronic Signatures

New Rules for Electronic Signatures. In November 2020, the SEC [adopted amendments](#) to Regulation S-T that permit electronic filers to use an electronic signature to sign many SEC registration statements, reports and other filings (including Section 16 filings). The amendments became effective in December 2020. Prior to these amendments, SEC rules required "conformed" (typed) signatures in electronic filings, and required companies to obtain and retain manually signed signature pages to authenticate the electronic signature. The amendments impose several requirements on the use of electronic signatures; failure to comply with these requirements could result in a company filing documents that were not properly executed, with potentially serious consequences.

- **What Companies Should Do Now.** Companies that file documents electronically using the SEC's EDGAR system and wish to use electronic signatures should do the following:
 - obtain a manually signed attestation and agreement from each director and officer who will sign SEC filings – a sample attestation, which must be obtained prior to any use of that person's electronic signature, is included below;
 - review any electronic signature methods currently in use or under consideration for future use to ensure that the electronic platform and the company's manner of use will comply with SEC rules; and
 - confirm that the company's document retention policies will retain (1) copies of the signature attestation referred to above for seven years after the signatory's last electronic signature on a company filing and (2) copies of electronic signatures for five years, which is the same period required currently for manual signatures.
- **Requirements for Use of Electronic Signatures.** The amendments require that the method used for electronic signature must meet the following conditions:
 - require the signatory to present a physical, logical or digital credential that authenticates the signatory's individual identity;
 - reasonably provide for non-repudiation of the signature—meaning that there are precautions against the signer falsely denying having signed;
 - provide that the signature be attached, affixed, or otherwise logically associated with the signature page or document being signed; and
 - include a timestamp to record the date and time of the signature.

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- **Obtain Signatory's Manually-Executed Attestation Before Filing.** As described above, prior to the first use of a signatory's electronic signature on an SEC filing, the electronic filer (usually the company) must obtain an attestation from the signatory that confirms that the signatory's electronic signature is the legal equivalent of a manual signature. The filer must retain this attestation for seven years after the last use of the signatory's electronic signature on an SEC filing. An attestation in the following form should satisfy this requirement:
- **Sample Attestation for Electronic Signatories**

By manually signing this document, the undersigned hereby attests and agrees that that when my electronic signature, which may include but not be limited to use of DocuSign, AdobeSign or an equivalent system, is used to sign any registration statement, report or other document filed or furnished ("filing") by [insert company name] ("Company") with the Securities and Exchange Commission ("SEC"), the use of my electronic signature constitutes the legal equivalent of my manual signature for purposes of authenticating my signature on any filing for which my signature is provided. I understand that SEC rules require the Company (1) to obtain this document before using an electronic version of my signature and (2) to retain this document for as long I may use an electronic signature on a filing to satisfy the requirements of SEC rules and for a minimum period of seven years after the date of the most recent filing for which my electronic signature was used.

Manual signature: _____

Name:

Date:

If the company intends to rely on access to an email address as an authenticating digital credential, the following paragraph may be added:

I understand that maintaining secure access to the email address that will be used in connection with my electronic signatures, [insert signatory's email address], is important and agree that (1) I will maintain the confidentiality of access to that email and (2) I will promptly notify the Company if I believe or have reason to believe that access to that email address has been compromised or breached.

Practice point: Failure to comply with the new electronic requirements is a potentially very serious issue. A filing that isn't properly signed may result in concerns about the company's internal controls over financial reporting. In addition, the SEC staff could potentially take the position that the report or document had not actually been "filed," with potentially serious results.

Effective date: December 4, 2020

For additional information: [SEC Release No. 33-10889](#)

Annex A

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Table with 2 columns: Label (OMB Number, Expires, Estimated average burden, hours per response) and Value (3235-0063, October 31, 2022,2,326.62)

Updated for Form 10-K annual reports filed during 2021
See Goodwin client alert SEC Amends MD&A and Other Financial Disclosure Rules (March 25, 2020)

(Mark One)

FORM 10-K

[] ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended _____

or

[] TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from _____ to _____

Commission file number _____

(Exact name of registrant as specified in its charter)

State or other jurisdiction of incorporation or organization

(I.R.S. Employer Identification No.)

(Address of principal executive offices)

(Zip Code)

Registrant's telephone number, including area code _____

Securities registered pursuant to Section 12(b) of the Act:

Table with 3 columns: Title of each class, Trading Symbol(s), Name of each exchange on which registered

Securities registered pursuant to section 12(g) of the Act:

(Title of class)

(Title of class)

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act.
[] Yes [] No

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act.
[] Yes [] No

Note - Checking the box above will not relieve any registrant required to file reports pursuant to Section 13 or 15(d) of the Exchange Act from their obligations under those Sections.

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes No

Indicate by check mark whether the registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulation S-T (§ 232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit such files).

Yes No

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company, or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company," and "emerging growth company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer

Accelerated filer

Non-accelerated filer

Smaller reporting company

Emerging growth company

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act.

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.

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act). Yes No

State the aggregate market value of the voting and non-voting common equity held by non-affiliates computed by reference to the price at which the common equity was last sold, or the average bid and asked price of such common equity, as of the last business day of the registrant's most recently completed second fiscal quarter.

Note.—If a determination as to whether a particular person or entity is an affiliate cannot be made without involving unreasonable effort and expense, the aggregate market value of the common stock held by non-affiliates may be calculated on the basis of assumptions reasonable under the circumstances, provided that the assumptions are set forth in this Form.

APPLICABLE ONLY TO REGISTRANTS INVOLVED IN BANKRUPTCY

PROCEEDINGS DURING THE PRECEDING FIVE YEARS:

Indicate by check mark whether the registrant has filed all documents and reports required to be filed by Section 12, 13 or 15(d) of the Securities Exchange Act of 1934 subsequent to the distribution of securities under a plan confirmed by a court. Yes No

(APPLICABLE ONLY TO CORPORATE REGISTRANTS)

Indicate the number of shares outstanding of each of the registrant's classes of common stock, as of the latest practicable date.

DOCUMENTS INCORPORATED BY REFERENCE

List hereunder the following documents if incorporated by reference and the Part of the Form 10-K (e.g., Part I, Part II, etc.) into which the document is incorporated: (1) Any annual report to security holders; (2) Any proxy or information statement; and (3) Any prospectus filed pursuant to Rule 424(b) or (c) under the Securities Act of 1933. The listed documents should be clearly described for identification purposes (e.g., annual report to security holders for fiscal year ended December 24, 1980).