

Form 10-K Compliance Checklist

Public Company Tool Kit

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GOODWIN

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Form 10-K Compliance Checklist

This document is a checklist to assist in the preparation or review of an annual report on Form 10-K for the fiscal year ended December 31, 2021. This checklist is supplemented by a separate Form 10-K Compliance Guide that contains more detailed information about most of the items in this checklist.

Set forth below are key areas to consider in the preparation or review of a Form 10-K: (1) trending disclosure topics; (2) changes in SEC rules and disclosure requirements; (3) technical compliance matters; and (4) business updates.

Trending Disclosure Topics

- COVID-19 – For any COVID-19 disclosures, ensure they speak as of the date of filing of the 10-K and are not simply legacy discussions from 2021. Disclosure topics for potential inclusion are: (i) discussion of changes in state and local governmental responses; (ii) vaccinations rates; (iii) impact of the Omicron variant; and (iv) the company’s current responses to COVID-19, as well as continuing and potential future impacts such as supply chain/distribution constraints and potential shutdowns.
- Environmental, Social & Governance (ESG) Matters - ESG disclosures are often taken from ESG and sustainability reports that tend to be driven more by marketing considerations. As such, it is very important to make sure that the ESG disclosures in the 10-K are appropriate for an SEC filing, which may require toning down or eliminating certain phrases/sentences or revising certain phrases/sentences so they are more aspirational in nature. The SEC has been particularly focused on climate change and on September 22, 2021, the Staff of the Division of Corporation Finance published a [sample comment letter](#) on climate change disclosures that you may want to consider in preparing or reviewing the 10-K.
- Human Capital Disclosure – Ensure that the Business section of the 10-K includes disclosure regarding human capital resources as required by Item 101(c)(2)(ii) of Regulation S-K. SEC comment letters indicate that the SEC Staff is checking to see if this disclosure appears in required filings. It is recommended that you include a subheading in the Business section titled “Human Capital,” “Human Capital Resources,” or something similar. Previous disclosure that referred to employees or including “Employees” as a subheading should be reviewed and changed to “Human Capital” as appropriate.
- Cybersecurity – In general, the 10-K should include cybersecurity disclosures, whether as a risk factor or otherwise. If there is cybersecurity disclosure, make sure that if any cyber breaches or incidents have actually occurred at the company, that you consider whether the actual occurrence of such breaches or incidents needs to be disclosed in the risk factors section or elsewhere, rather than just articulated as hypothetical risks, as there have been several recent SEC enforcement actions on this issue.

SEC Rule Changes

- Item 6 of 10-K (Selected Financial Data) - The disclosure previously required by Item 301 of Regulation S-K has been eliminated. Item 6 has been retitled “Reserved” and disclosure under this Item should now provide as follows: “Not Applicable.” If a company chooses to voluntarily disclose five-year trend information, such disclosure should be included in MD&A.

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- Item 7 of 10-K (MD&A) – The contractual obligations table has been eliminated. A more flexible principles-based approach to this disclosure has been integrated into the liquidity and capital resources requirements to specifically require disclosure of material cash requirements from known contractual and other obligations. Tabular disclosure can still be used to comply with the new disclosure requirements, but companies have flexibility as to what information to provide in the table. Similarly, there is no longer a requirement to have a separately captioned section for off-balance sheet arrangements. The amended rules integrate broader and more flexible principles-based disclosure about off-balance sheet arrangements into other MD&A sections. Lastly, the 10-K must include disclosure regarding critical accounting estimates. Contrary to common past practice, this disclosure cannot merely repeat the disclosure in the accounting policies section of the financial statement footnotes.
- Item 9C of 10-K (Disclosure Regarding Foreign Jurisdictions that Prevent Inspections) – The 10-K should include Item 9C. For this year, disclosure under this Item should say “Not Applicable”.
- Exhibit Index - Exhibit 104 (Cover Page Interactive Data File) needs to be listed in the Exhibit Index. Inline XBRL now applies to all publicly-traded companies so Exhibit 104 is required in all 10-K, 10-Q and 8-K reports.
- Financial Disclosures about Guarantors and Issuers of Guaranteed Securities – If the company has these types of securities, please see the [SEC Fact Sheet](#) and [SEC Small Entity Compliance Guide](#) for more information on the relevant rules.

Technical Compliance Matters

- 10-K Cover Page – Ensure your cover page is consistent with the current [10-K form](#) from the SEC website.
- Filer status – Confirm non-accelerated/accelerated/large accelerated filer status, emerging growth company and/or smaller reporting company status. Calculate the company’s public float by multiplying the stock price on June 30, 2021 times the number of shares outstanding on that date (or closest date publicly available), but do not include shares held by officers, directors, and other affiliates in calculation of public float. Note that depending on filing status, you may need to check multiple boxes, such as non-accelerated filer, emerging growth company, and smaller reporting company.
- Incorporation by reference – The 10-K cover page should indicate whether the company is incorporating Part III information by reference from its definitive proxy statement (e.g., Items 10, 11, 12, 13, and 14 of Form 10-K).
- 10-K Items – Review the current SEC 10-K form against the items listed in the draft 10-K (Items 1 to 16). All Items need to be included, even if disclosure under an Item says “Not Applicable” or “None.”
- Business (Item 1) – Confirm that this section includes human capital disclosure (discussed above), all material regulatory impacts from government regulations (not just environmental regulations), proper links to prior disclosure if the company has adopted an update-only format, and business strategy disclosure if there has been a change in strategy.

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- Risk Factors (Item 1A) – Ensure that any updates to risk factors made in prior quarter Form 10-Qs are pulled forward into the 10-K. Comply with the relatively new summary, captioning, and organizational risk factor requirements. Check the page length; if greater than 15 pages, you need to include a risk factor summary.
- Properties (Item 2) – This section now requires property disclosures only to the extent material (note there are special property disclosures rules for mining, oil and gas, and real estate companies).
- Legal Proceedings (Item 3) – Use of cross-references is explicitly permitted. If this section includes no disclosure other than cross-references to legal proceedings disclosure in the notes to the financial statements, make sure such disclosure complies with Item 103 of Regulation S-K given differences in requirements for litigation disclosures in financial statements and Item 103.
- Mine Safety Disclosures (Item 4) – This section only applies to companies with mining operations. Disclosure for most companies is “Not Applicable.”
- Executive Officer Disclosure – Companies are permitted to provide the information required by Item 401 of Regulation S-K about their executive officers in the 10-K (anywhere in Part I of 10-K) or in the proxy statement. If disclosure is provided in the 10-K, the section caption needs to be “Information about our Executive Officers”.
- Item 5 – The equity compensation plan disclosure required by Item 201(d) should not be included in Item 5 of the 10-K. It should instead be included in Item 12 of 10-K (although it may be incorporated by reference from the proxy statement).
- The performance graph required by Item 201(e) is only required in the Annual Report to Shareholders required by Rule 14a-3 of the Exchange Act, but many companies include it in the 10-K if they use the 10-K to meet the Rule 14a-3 requirements by delivering a 10-K “wrap” in lieu of a separate Annual Report to Shareholders. If such disclosure is not in the 10-K, make sure the “Glossy Annual Report” includes the performance graph.
- Item 6 – Selected financial data disclosure is no longer required as of August 9, 2021 (see discussion above).
- Item 7 (MD&A) – Amended effective August 9, 2021 (see discussion above). Additionally, to the extent numbers materially changed from year to year, ensure there’s qualitative discussion explaining the reasons for these changes in addition to providing the quantitative/numeric changes.
- Non-GAAP Financial Measures – review any Non-GAAP Financial Measures and confirm compliance with Item 10(e) of Regulation S-K, including reconciliations to the most directly comparable GAAP measure.
- Key Performance Indicators (KPIs) – make sure the disclosure provides a clear definition of the KPI, how the measure is calculated, and a statement indicating the reasons why the metric provides useful information to investors and how management uses the metric in managing or monitoring the performance of the business.

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- Item 8 – (Supplementary Financial Information) – Note that unless there has been a retrospective change to comprehensive income for any quarter in the last two years, then the disclosure previously required by Item 302 of Regulation S-K is no longer required. Potentially disclosable changes include, 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.
- Item 8 – (Financial Statements) – Attorneys should review the financial statements for items such as COVID-19 disclosure, description of an acquisition or divestiture, and any disclosure in the subsequent event footnote. In doing so, they should ensure that the information in the financial statement notes is consistent with the other disclosures throughout the document.
- Item 9 – If the company is disclosing any disagreements with accountants and there was 8-K disclosure of such a disagreement, such disclosure must be repeated in the 10-K pursuant to Instruction 1 to Item 304(b) of Regulation S-K.
- Item 9A. (Controls and Procedures) – If any material weaknesses are to be disclosed, make sure material weakness and remediation efforts are properly described. If you include a risk factor on disclosure controls and procedures and/or internal control over financial reporting, the risk factor should provide disclosure of the material weakness.
- Item 9B. (Other Information) – Disclosure is required under this Item if the company failed to report information in the fourth quarter that was required to be reported by Form 8-K. If there is an 8-K event within four business days of the filing of the 10-K, then a company can use Item 9B. to provide this disclosure (other than for Form 8-Ks filed under Items 4.01 and 4.02). Otherwise, disclosure under this Item should say “None.”
- Item 9C. – No substantive disclosure needed in this year’s 10-K (see discussion above). Disclosure should say “Not Applicable”.
- Items 10 to 14 – If these Items will be included through incorporation by reference from the proxy statement, make sure all items are listed and covered (or will be covered). If disclosure of these items is included in the 10-K, then need to review for compliance with Regulation S-K.
- Item 15 (Exhibits and Financial Statement Schedules) – Confirm the exhibit index reflects correct additions and deletions and that incorporation by reference requirements have been satisfied. Confirm that hyperlinks to filings incorporated by reference are accurate. Check 8-K and 10-Q filings during the year for exhibit filings to ensure those are included. Exhibits filed with an 8-K in the fourth quarter of 2021 need to be incorporated by reference in the 10-K (assuming that 10-K requires such exhibit). Any exhibit that the company did not file with an 8-K in fourth quarter in reliance on its ability to file it with the 10-K must be filed with the 10-K.
- Item 15 (Exhibits and Financial Statement Schedules) – Confirm Exhibit 104 (Cover Page Interactive Data File) is listed in the Exhibit Index. Inline XBRL now applies to all publicly-traded companies so Exhibit 104 is required in all 10-K filings.
- Item 16 – It is unlikely that disclosure will be included, in which case the 10-K should indicate “None.”

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- Signatures - Confirm that majority of directors and each of the principal executive officer (CEO), principal financial officer (CFO), and principal accounting officer or controller will be signing the 10-K.
- Confirm the Sarbanes-Oxley Section 302 certifications contain the exact language found in Item 601(b)(31) of Regulation S-K.

Business Updates

- Ensure that the 10-K reflects key updates to the company's business.
- Review company press releases issued in 2021 and first quarter 2022 for disclosure updates that may need to be included in the 10-K.
- Review fourth quarter/year-end earnings release and earnings call script for disclosure updates that may need to be made in 10-K.
- Review 8-K filings made in fourth quarter 2021 and first quarter 2022 for disclosure updates that may be needed in the 10-K.
- Consider whether the forward-looking statement disclaimer should be updated for potential additions and deletions of factors that may impact the business. Also, any forward-looking statements included in the 10-K should be specifically disclaimed in this section.
- As you draft or review the 10-K, note that the 10-K (other than financial statements) needs to speak as of the date of filing, not the end of the fiscal year. You should make sure that any material developments you are aware of are included in the 10-K, potentially including Item 1 (Business), Item 1A (Risk Factors) and Item 7 (MD&A), and in any subsequent event footnote in the financial statements.
- Ensure that MD&A includes all known trends and uncertainties that are likely to come to fruition and that are reasonably likely to have a material effect on liquidity, capital resources, or results of operations.

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