Form 10-K Compliance Guide

Public Company Tool Kit

January 2022

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Introduction

This document is a guide to aide in the preparation or review of an annual report on Form 10-K ("10-K") for the fiscal year-ended December 31, 2021. It is organized based on four key areas: (1) trending disclosure topics; (2) changes in SEC rules and disclosure requirements; (3) technical compliance matters; and (4) business updates. In addition, there is a note at the end of this document on late 10-K filings.

Trending Disclosure Topics

COVID-19 disclosure updates

It is extremely important that the COVID-19 disclosure in the 10-K speaks as of the date of filing of the 10-K and is not simply a repetition of text written last year. Even disclosure that was revised for the previous quarter may no longer be accurate.

- Disclosure topics for potential inclusion that may not be in previous disclosures include discussion of changes in state and local governmental responses (for example, California), vaccinations rates, the impact of the Omicron variant, the company's current responses to the pandemic, and continuing and potential future impacts of the pandemic on the company's operations such as supply chain, distribution constraints, and potential shutdowns. Other disclosures, such as general social and economic discussion should also be reviewed carefully and updated appropriately.

- Consider whether the impact of the pandemic should be discussed in forward-looking statement disclaimers, Business (Item 1), Risk Factors (Item 1A) and Management's Discussion and Analysis ("MD&A," Item 7). In addition, most public companies have COVID-19 disclosure in the footnotes to the financial statements; ensure such language is accurate and consistent with other disclosures elsewhere in the 10-K.

    - Business: the impact of the pandemic on company personnel may require discussion under the Human Capital section.

    - Risk Factors: these should accurately and fully describe the risks the company faces from COVID-19, including risks that have already had an impact on the company, rather than describing such risks as merely hypothetical.

    - MD&A: key impacts of the pandemic on the company should be identified, assessed and described. These impacts may include, but are not limited to, information on liquidity, operational adjustments, health and safety of employees, any material changes in the company's debts, loans and credit, any material changes to equity investments, impairment of assets, rent concessions, and government assistance related to COVID-19. Also carefully consider whether any significant known trend or uncertainty that management is closely monitoring and/or has discussed with the board may be appropriate for MD&A disclosure. Refer to "CF Disclosure Guidance Topic 9: Coronavirus (COVID-19)" and "CF Disclosure Guidance Topic 9A: Coronavirus (COVID-19) - Disclosure Considerations Regarding Operations, Liquidity, and Capital Resources" for additional guidance.

Environmental, Social, and Governance ("ESG") disclosures

More companies are providing voluntary ESG disclosures in their 10-Ks in addition to the mandatory human capital disclosures discussed immediately below. The ESG disclosures are often taken from ESG, sustainability, and corporate social responsibility reports that often tend to be driven more by investor and stakeholder considerations than liability and disclosure provisions of the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act"), and the fact that 10-K disclosure is incorporated by reference into the prospectus provided as part of a Form S-3 (and in certain instances a Form S-1) "shelf" registration statement. As such, it is important to make sure that the statements in the 10-K disclosure regarding ESG are appropriate for an SEC filing; language often needs to be toned down or eliminated so that it is more aspirational in nature.

The disclosure in the 10-K should be factual, backed up by objective diligence and documentation, and relevant to the company and its business (as opposed, for example, to sweeping statements about the company's role in reversing global climate change). The SEC undertook several ESG initiatives in 2021, including forming an Enforcement Task Force on Climate and ESG Issues, and in 2020 the SEC brought an enforcement action relating to ESG disclosures. See In the Matter of Fiat Chrysler Automobiles N.V., Release No. 34-90031.

ESG has three prongs:

- the environmental prong, which covers topics such as climate change, greenhouse gas emissions, air and water pollution, energy consumption, water usage, waste and recycling, and environmental justice;
- the social prong, which includes workplace and product safety, employee diversity, equity and inclusion, nondiscrimination and fair pay, collective bargaining, human rights, charitable contributions and community programs, and supply chain management; and
- the governance prong, which encompasses issues such as regulatory compliance, corporate purpose and stakeholder interests, board diversity, director independence, anti-takeover or shareholder-friendly provisions in a company's governing documents, executive compensation, and political contributions and lobbying.

The "E" prong of ESG has received an increased level of attention from the SEC with respect to climate change. On September 22, 2021, the Staff of the Division of Corporation Finance (the "Staff") published a sample comment letter on climate change disclosures. A brief statement that precedes the sample comment letter reiterates the view expressed in the SEC's 2010 interpretive guidance that a variety of existing SEC disclosure rules may require companies to disclose the current and potential future material impacts of climate change. The sample comment letter highlights the importance of conducting a thorough review of company disclosures about climate change and related issues in the 10-K and in materials such as corporate social responsibility reports that companies prepare and post to their websites.

Human Capital

Business Section.

Item 101(c)(2)(ii) of Regulation S-K requires a description of the company's human capital resources, including any human capital measures or objectives that the company focuses on in managing the business, to the extent such disclosure is material to an understanding of the company's business taken as a whole. The amended rule provides non-exclusive examples of such human capital measures and objectives (i.e., "measures or objectives that address the attraction, development, and retention of personnel"), which may be material, depending on the nature of the company's business and workforce. However, each company's disclosure must be tailored to its unique business, workforce, and facts and circumstances. In addition, the amendments retain a requirement from the prior rule to provide the total number of persons employed by the company. We understand based on our review of SEC comment letters that the Staff is checking to see if this disclosure appears in required filings. A company has to make sure it has human capital disclosure contained in "Item 1. Business."

- We recommend including a subheading in the description of business section titled "Human Capital," "Human Capital Resources," or something similar. Previous disclosure that referred to employees or included "Employees" as a subheading should be reviewed and changed to "Human Capital" as appropriate.
- In preparing a company's human capital disclosure:
    - Consider the company's current existing disclosure relating to human capital—including those in the risk factors of the 10-K and any sustainability, corporate social responsibility, or similar ESG reports—in order to assess what information is available and verifiable.
    - Consider which human capital measures or objectives the board and senior management focus on in managing the business.
    - Consider the company's goals in providing this disclosure in its 10-K and understand the potential internal and external ramifications related to making such disclosure, including expectations of investors on a going forward basis.

Risk Factors.

Consider any appropriate updates to risk factor disclosure. This could include risks related to the ability to attract and retain skilled employees, changes in laws or regulations regarding employees outside of the US, employee health and safety issues, increases in labor costs and increased employee turnover.

Cybersecurity and related disclosures

Cyber-related matters continue to be a visible priority for the SEC, and this focus applies to companies of nearly every type that are subject to SEC regulation. For operating companies, compliance with SEC rules in this area involves not only public disclosures but also internal matters such as the company's disclosure controls and procedures and its internal control over financial reporting.

SEC focus on adequate cybersecurity disclosure goes back to at least 2011, when the Staff published *CF Disclosure Guidance Topic No. 2 – Cybersecurity*. The SEC commissioners approved *Commission Statement and Guidance on Public Company Cybersecurity Disclosures*, which provides interpretive guidance on several cybersecurity-related disclosure topics, in 2018. The interpretive guidance included the following potential negative impacts from cyber-related events as examples that may require disclosure, if material:

- remediation costs, such as liability for stolen assets or information, repairs of system damage, and incentives to customers or business partners in an effort to maintain relationships after an attack;
- increased cybersecurity protection costs, which may include the costs of making organizational changes, deploying additional personnel and protection technologies, training employees, and engaging third party experts and consultants;
- lost revenues resulting from the unauthorized use of proprietary information or the failure to retain or attract customers following an attack;
- litigation and legal risks, including regulatory actions by state and federal governmental authorities and non-U.S. authorities;
- increased insurance premiums;
- reputational damage that adversely affects customer or investor confidence; and
- damage to the company's competitiveness, stock price, and long-term shareholder value.

Although the SEC has not published formal guidance since 2018, cybersecurity has been a topic of frequent focus at all levels of the SEC. Further, the Fall 2021 SEC regulatory agenda indicates an intent to propose amendments to SEC rules that would "enhance issuer disclosures regarding cybersecurity risk governance." The SEC regulatory agenda does not provide any information about the potential scope of this rulemaking. Lastly, the SEC continues to bring enforcement actions relating to cybersecurity disclosures. See In the Matter of Pearson plc, Exchange Act Release No. 92676 (August 16, 2021) and In the Matter of First American Financial Corporation, Exchange Act Release No. 92176 (June 14, 2021).

SEC Rule Changes

The SEC has adopted a series of amendments affecting many parts of 10-K (and other) reports and registration statements in recent years. This section highlights the most significant recent SEC amendments and includes links to the relevant Goodwin client alerts.

Amendments to Business, Risk Factors and Legal Proceedings (Items 1, 1A and 3 of 10-K; Regulation S-K Items 101, 103 and 105)

These amendments became effective on November 9, 2020 so fiscal year-end companies should have addressed them in the 2021 Form 10-K filing for 2020; however, updated disclosure may be necessary. Due to the nature of the amendments governing the Risk Factors section, it is important to confirm that the Risk

Factors disclosure is in compliance with these amendments, as discussed below. For more information about these amendments, see this Goodwin client alert: SEC Adopts Third Round of Disclosure Modernization.

Amendments to MD&A and related financial disclosure requirements (Items 6, 7, and 8 of 10-K, Regulation S-K Items 301, 302 and 303)

Amendments to MD&A and related financial requirements became effective on August 9, 2021 for all companies with a fiscal year-end after that date and, therefore, apply to companies with a December 31, 2021 fiscal year-end. The changes were described in the Goodwin client alert SEC Amends MD&A and Other Financial Disclosure Rules and a separate client alert on effective date and transitional considerations.

Item 9C of 10-K

The Interim Final Rules adopted by the SEC in connection with the Holding Foreign Companies Accountable Act, which became effective May 5, 2021, added a new 10-K item number and may require disclosure changes in the future. This year's 10-K is required to include Item 9C; however, for 10-Ks filed this year, the disclosure under this Item should say "Not Applicable." This disclosure is not required unless the company has been "identified by the Commission" (*i.e.*, designated a "Covered Issuer" by the SEC). Since the SEC has not yet made any such designation, this disclosure will not be required in this year's 10-K. Disclosure is only required for a company that has retained a PCAOB registered public accounting firm to issue an audit report and where that registered public accounting firm has a branch or office that: (1) is located in a foreign jurisdiction; and (2) the PCAOB has determined that it is unable to inspect or investigate completely a registered public accounting firm because of a position taken by an authority in a foreign jurisdiction.

Inline XBRL Tagging

Large accelerated and accelerated filers were required to comply with the Inline XBRL requirements, including cover page tagging, during 2020. All other domestic filers were required to comply with this requirement beginning with Form 10-Q reports for fiscal periods ending on or after June 15, 2021. Additional information is contained in the following Goodwin client alerts: Disclosure Simplification, Round Two: A Deep Dive Into The SEC's New Amendments (cover page tagging); SEC Adopts Mandatory Inline XBRL (Inline XBRL); see also Inline XBRL Interpretations Issued by SEC Staff (Inline XBRL SEC Staff C&DIs).

Earlier Regulation S-K Amendments

These were summarized in Disclosure Simplification, Round Two: A Deep Dive Into The SEC's New Amendments. The amendments became effective on May 2, 2019 with a three year phase-in period for Inline XBRL tagging of cover page data. As noted immediately above, this requirement became effective for all filers that were not already subject to this requirement, beginning with Form 10-Q reports for fiscal periods ending on or after June 15, 2021.

Financial Disclosures about Guarantors and Issuers of Guaranteed Securities

On March 2, 2020, the SEC issued a final rule that amended the disclosure requirements related to certain registered securities under SEC Regulation S-X, Rules 3-10, and 3-16, which previously required separate financial statements for:

- Subsidiary issuers and guarantors of registered debt securities unless certain exceptions are met.
- Affiliates that collateralize registered securities offerings if the affiliates' securities are a substantial portion of the collateral.

The final rules apply to Form 10-Ks filed for fiscal years ending after January 4, 2021. The final rules are based on the premise that the primary source of information that investors in guaranteed debt or collateralized securities rely on is the consolidated financial statements of the parent company. The rules provide that alternative financial disclosures or narrative disclosures may be provided in lieu of separate financial statements of the guarantors or affiliates. If your company has these types of securities, please see the SEC Fact Sheet and SEC Small Entity Compliance Guide for more information on these rules.

Technical Compliance Matters

10-K cover page

There have been several changes to the 10-K cover page in recent years; therefore, it is important to obtain the current 10-K cover page, which is on the SEC website. Confirm that your 10-K cover page complies with the 10-K currently posted on the SEC website.

As described in this Goodwin alert, the most recent change to the 10-K cover page added the following check box:

"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. ☐"

Compare the Item numbers and headings in the draft 10-K to the version posted on the SEC website

The purpose here is to make sure each 10-K Item is listed and that any required disclosure is included under each Item. If the Item does not apply to your company, the 10-K should indicate "Not Applicable" under the Item. See Exchange Act Rule 12b-13.

Cover page Inline XBRL tagging

As noted in the previous section, the Inline XBRL tagging requirements for the cover page and body of Forms 10-K, 10-Q and 8-K are now fully phased-in and apply to all SEC-registered companies. For non-accelerated filers, the 10-K for the fiscal year-ended December 31, 2021 will be the first 10-K that is subject to mandatory

Inline XBRL tagging. The company should confirm that the 10-K will comply with these requirements when filed, including the requirement to add an Exhibit 104 to the Exhibit Index.

Confirm filer status

Assess the following:

- Check the company's public float (stock price multiplied by number of shares held by non-affiliates – affiliate status presumed for officers, directors, and certain large shareholders) as of June 30, 2021, to determine whether company is a non-accelerated filer, accelerated filer, or large accelerated filer (definitions are contained in Exchange Act Rule 12b-2). The determination of a company's filer status is crucial for determining the deadline for filing periodic reports for the fiscal year, among other requirements. Note that in March 2020, the SEC revised the definition of "accelerated filer" and "large accelerated filer" contained in Rule 12b-2 of the Exchange Act.

- Check whether the company is an emerging growth company ("EGC") or smaller reporting company ("SRC"). For EGC status, it is helpful to refer to whether the company claimed such status in its third quarter Form 10-Q. While all companies will be either a non-accelerated, accelerated, or large accelerated filer, if they are also an EGC and/or SRC, the 10-K cover page must include checks in multiple boxes to indicate filer status. If a company is an EGC or SRC, it can choose to rely on scaled (meaning reduced) disclosure requirements, which can affect both substantive disclosure requirements and the periods covered by these disclosure requirements.

Check for use of incorporation by reference

General Instruction G(3) of 10-K permits a company to omit from the 10-K some or all of the information called for by Part III of 10-K, and instead incorporate this information by reference to the company's definitive (not preliminary) proxy statement, so long as the company files the definitive proxy statement within 120 days of fiscal year-end. If Part III information is incorporated by reference, then Items 10, 11, 12, 13, and 14 of 10-K should refer to disclosures in the proxy statement and likely would not contain any substantive disclosure responsive to these items.

If the company intends to rely on forward incorporation by reference from its definitive proxy statement, be reminded that, within 120 days after the end of its fiscal year, the company must file either (1) its definitive proxy statement or (2) a Form 10-K/A amendment that includes the Part III information not filed as part of the 10-K. Failure to do so will have potentially very serious consequences under the Securities Act, including loss of Form S-3 eligibility.

Item 1 of 10-K (Business)

Amendments that became effective November 9, 2020 should already have been reflected in last year's 10-K, but the company should confirm that the draft 10-K complies with the following technical requirements:

- New business strategy disclosure – the 10-K should include disclosure about transactions and events that affect or may affect the company's business operations, including any material changes to a previously disclosed business strategy.

- Expanded government regulations disclosure – the 10-K must include disclosure about compliance with all material government regulations, rather than only the impact of compliance with environmental regulations, as previously required.

- Five/three year lookback – although Regulation S-K no longer includes the previous timeframe for disclosure of the general development of the company's business (generally five years, or three years for smaller reporting companies), the requirements for the 10-K include a one-year lookback that requires a discussion of developments since the beginning of the fiscal year covered by the annual report.

- Hyperlinks to previously filed disclosure are now permitted – this allows 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. If the 10-K adopts this disclosure approach and includes only an update in the 10-K, the 10-K needs to expressly incorporate the disclosure 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.

Item 1A. of 10-K (Risk Factors)

Key principles to keep in mind when preparing or reviewing Risk Factors include:

- assessing whether any disclosure may be out of date and require updating or revision, focusing particularly on any risks that are related to or affected by COVID-19 related issues, human capital resources, cybersecurity and privacy matters, intellectual property and technology risks, the LIBOR transition, regulatory matters, including changes in previously-disclosed political risks following President Biden taking office, and environmental matters (see Annex A for further details); and

- confirming that, as revised, the Risk Factors disclosure continues to comply with SEC rules governing presentation of this section, including the following:

    - if the Risk Factors section exceeds 15 pages, include a summary that does not exceed two pages, in bulleted or numbered form, prior to the Risk Factors section;

    - each individual risk factor must have a sub-caption;

    - each group of risk factors must have a heading, such as "Risks Related to the Business"; and

    - general risk factors that could apply to any company, such as risks related to compliance with the Sarbanes-Oxley Act or general business, economic or financial market conditions, must be located at the end of the Risk Factors section under the required heading "General Risk Factors."

If a material event that has occurred that implicates a risk factor, such as a cybersecurity breach, the disclosure should reflect that the event has occurred, such as "For example, on [ ], we experienced a cybersecurity breach . . ." You should also confirm that there is appropriate disclosure included elsewhere in

the 10-K (for example, in MD&A) that describes the event and its material impacts. In other words, hypothetical risk factor disclosure is legally insufficient if the hypothetical risk has actually occurred. The SEC has brought various enforcement actions against companies that had only hypothetical risk disclosure when an event relating to the risk has actually occurred. See Securities and Exchange Commission v. Mylan N.V., No. 19-civ-2904 (D.D.C. filed September 27, 2019), Litigation Release No. 24621 (September 27, 2019).

Item 2 of 10-K (Properties)

Item 102 of Regulation S-K requires disclosure of the location and general character of the company's principal physical properties only to the extent that such disclosure is material. There are additional rules on property disclosures for companies in the mining, real estate, and oil and gas industries; outside of those businesses, extensive property disclosure is typically not necessary.

Item 3 of 10-K (Legal Proceedings)

Item 103 of Regulation S-K was amended effective November 9, 2020, and 10-K reports filed in 2021 by companies with calendar fiscal year-ends should have reflected these amendments. The principal changes included:

- Cross-Reference/Hyperlink to Other Disclosure. The amendments permit companies to satisfy the required disclosure about legal proceedings without unnecessary duplication by cross-referencing or 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). If the Legal Proceedings disclosure in the 10-K includes cross-references to disclosure in the financial statement footnotes, confirm the cross-referenced disclosure satisfies the requirements of Item 3 because the requirements of Item 3 and Regulation S-K Item 103 are different from the disclosure standards that apply to financial statement footnote disclosure. If Item 3 includes cross-references, you should also consider whether additional cautionary disclosure about legal proceedings and/or disclosure of additional litigation may be appropriate.

- Increased Dollar Threshold. The amendments increased the dollar threshold for disclosure about proceedings involving environmental sanctions from $100,000 to $300,000. Alternatively, the company can use a different dollar threshold, which must be disclosed, that does not exceed the lesser of $1,000,000 or 1% of the company's consolidated current assets and has been determined by the company to be reasonably designed to result in disclosure of any material proceedings. If the company has applied a different dollar threshold, you should confirm that the disclosure satisfies applicable requirements, including confirming that the threshold does not exceed the required amount.

Item 4 of 10-K (Mine Safety Disclosures)

Item 4 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 of 10-K (Market for Registrant's Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities)

The disclosure required by Item 201(d) (securities authorized for issuance under equity compensation plans) should not be included in Item 5 of 10-K, instead it should be included in Item 12 of 10-K. For most companies, this means that this disclosure will be included in the proxy statement. See Regulation S-K CDI Question 106.01.

The performance graph is only required to be provided in the Annual Report to Shareholders (the "Glossy Annual Report") under Rule 14a-3 of the Exchange Act. If the Performance Graph is not included in the 10-K, it must be included in the Glossy Annual Report that is posted on the company's website. Inclusion of the Performance Graph in the proxy statement is permitted, but doing so does not satisfy the requirement to include the Performance Graph in the Glossy Annual Report.

Item 6 of 10-K (Selected Financial Data)

The disclosure that was previously required by Item 301 of Regulation S-K is no longer required. Thus, Item 6 should say "Not Applicable."

However, in its adopting release, the SEC encouraged companies to "consider whether trend information for periods earlier than those presented in the financial statements may be necessary as part of MD&A's objective to 'provide material information relevant to an assessment of the financial condition and results of operations'." In addition, the SEC noted that it encourages companies to consider whether a "tabular presentation of relevant financial or other information, as part of an introductory section or overview…may help a reader's understanding of MD&A." Therefore, to the extent a company wants to provide selected financial data on a voluntary basis to show five year trend information for certain business reasons or otherwise, it should be included in Item 7, MD&A. We recommend that companies that wish to do so consult with their independent auditors to confirm that doing so would not have any material impact on comfort letters delivered in connection with public offerings.

Item 7 of 10-K (Management's Discussion and Analysis)

In contrast to the financial statements included in the 10-K, most of the other disclosure in the 10-K must satisfy SEC disclosure requirements as of the filing date. This is especially true of MD&A, and you should make sure the MD&A speaks as of the date of filing.

A number of changes to Item 303 of Regulation S-K became effective on November 9, 2020 and are mandatory for 10-Ks filed by December 31, 2021 year-end companies. Key items are summarized below:

- Contractual Obligations table. The contractual obligations table in Item 303(a)(5) was eliminated. A more flexible principles-based approach to this disclosure has been integrated into the liquidity and capital resources requirements in Item 303(b)(1) – in lieu of the prescriptive table – to specifically require disclosure of material cash requirements from known contractual and other obligations, including specifying the type of obligation and the relevant time period for the related cash requirements. 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.

- Off-Balance Sheet Arrangements. The separately-captioned section for this disclosure was also eliminated. The amended rules integrate broader and more flexible principles-based disclosure about off-balance sheet arrangements into other MD&A sections. Like the contractual obligations table disclosure, these disclosure requirements have changed since last year and should be updated to reflect the new requirements.

- Critical Accounting Estimates. The most recent amendments made two important changes in this disclosure:

  First, based on dissatisfaction with the disclosure companies were providing, an instruction explicitly states that this disclosure should supplement but should not duplicate the description of accounting policies and related disclosure in the financial statement footnotes. Under Regulation S-K Item 303 as amended, this disclosure should include qualitative and quantitative information necessary to understand the uncertainty of each estimate and the impact the estimate has had or is reasonably likely to have on the company's financial condition or results of operations, to the extent material and reasonably available to the company. This should include (1) why each critical accounting estimate is subject to uncertainty; (2) how much each estimate or assumption has changed over the relevant period, to the extent material and reasonably available; and (3) the sensitivity of the reported amount to the methods, assumptions and estimates that underly the company's calculation, to the extent material and reasonably available.

  Second, although most companies have included disclosure under this heading for many years, this disclosure was provided in response to SEC guidance and SEC Staff interpretations rather than any requirement in Regulation S-K. Item 303 now expressly requires this disclosure.

- Known trends and uncertainties. These amendments clarify the prior disclosure standard for known trends and uncertainties. The amendments replace the prior test with disclosure based on whether a 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." This is not disclosure of forward-looking information: it is disclosure of material information currently known by the company's management that may have a material impact on the company in the future. Although the distinctions between the earlier test and the test as clarified by the SEC may in some cases be subtle, companies should be aware that the Division of Enforcement has a decades-long history of successful actions against companies for failing to disclose the material impacts of known trends and uncertainties.

- Financial Statements Discussion. Note that for companies providing three years of financial statements, the MD&A needs to cover three years, but the third year can be omitted if the company refers to an earlier filing containing such information. To satisfy the conditions for omitting this discussion, (1) the omitted discussion must not be material to an understanding of the company's financial condition, changes in financial condition, and results of operations, (2) the company must have included the omitted discussion in a prior EDGAR filing and (3) the company must clearly identify the location in the prior filing where the omitted discussion may be found.

- Qualitative Discussions. To the extent numbers have changed materially from year to year, ensure there's qualitative discussion of these changes in addition to the quantitative/numeric changes. MD&A should discuss why changes have occurred and, where relevant, any factors that would affect comparability of current amounts to prior amounts or potential future amounts.

Non-GAAP Financial Measures

Carefully draft and review Non-GAAP Financial Measures, including adjustments related to the COVID-19 pandemic, for compliance with Item 10(e) of Regulation S-K. The SEC continues to focus on non-GAAP financial measures, so it is important to pay careful attention to the use and disclosure of such measures. Recent SEC guidance has emphasized the following:

- Ensure that when a non-GAAP measure is used, the comparable GAAP measure is disclosed with equal or greater prominence, and a reconciliation of the two measures is provided.

- Maintain consistent treatment of items between periods, or otherwise provide adequate disclosure about the reason for any change in treatment. For example, if there is a COVID-19 adjustment for an item during the current reporting period, and that adjustment was not made during the prior period, the company should provide sufficient disclosure regarding the change, including (i) the differences in the way the metric is calculated, (ii) the reasons for such changes, and (iii) the effects of any such changes on the amounts or other information being disclosed.

- To the extent a company presents a non-GAAP financial measure or performance metric to adjust for or explain the impact of COVID-19, it should highlight why management finds the measure or metric useful and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations.

Moreover, the Staff has reminded companies that it is not appropriate for a company to present non-GAAP financial measures or metrics for the sole purpose of presenting a more favorable view of the company. For example, the Staff believes the acceptable purpose of non-GAAP financial measures with respect to COVID-19 is to share with investors "how management and the Board are analyzing the current and potential impact of COVID-19 on the company's financial condition and operating results."

Key Performance Indicators ("KPIs")

In accordance with 2020 SEC guidance, you should keep in mind that KPIs are often included in MD&A given that MD&A is intended to provide a snapshot of a company's performance through the eyes of management.

This may result in disclosure of material financial and non-financial metrics—KPIs—used by management to manage or evaluate the performance of the business.

Certain KPIs (e.g., those containing purely operational metrics) may not meet the definition of a non-GAAP financial measure and thus may not be subject to Item 10(e) of Regulation S-K. Nevertheless, companies need to consider what additional information may be necessary to provide adequate context for an investor to understand the KPI metric presented. In this regard, the SEC generally expects the following disclosures to accompany any KPI metric:

- a clear definition of the metric and how it is calculated,
- a statement indicating the reasons why the metric provides useful information to investors, and
- a statement indicating how management uses the metric in managing or monitoring the performance of the business.

Item 8 of 10-K (Supplementary Financial Information)

The supplementary financial information table required by Item 302 of Regulation S-K has been amended and Item 302 now requires this disclosure only if there has been one or more retrospective changes in comprehensive income for any quarter in the last two fiscal years 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.

Note that supplementary financial information, if required to be disclosed, is typically disclosed in the notes to the financial statements rather than under Item 8 of 10-K.

For IPO companies, this requirement no longer applies until the company has filed its first 10-K annual report after its IPO. This change eliminated the requirement that an IPO company seeking to make a follow-on offering before it has filed its first 10-K must prepare quarterly disclosure reviewed by its auditors.

Item 9C. of 10-K (Disclosure Regarding Foreign Jurisdictions that Prevent Inspections)

All 10-K reports are required to include this item, the caption, and disclosure indicating “Not Applicable.” In some cases, additional disclosure may be required, but not for 10-Ks for the fiscal-year-ended December 31, 2021. See “SEC Rule Changes – Item 9C. of 10-K” above for more information.

Exhibit Index

- Certifications: confirm that the Sarbanes-Oxley Section 302 certifications contain the exact language found in Item 601(b)(31) of Regulation S-K.
- Incorporation by reference: exhibits can generally be incorporated by reference, but in nearly all cases a hyperlink directly to the incorporated exhibit must be provided. Certain exhibits filed as "forms of" that omit interest, dividend or conversion rates, redemption or conversion prices, purchase or offering prices, underwriters' or dealers' commissions, names, addresses or participation of underwriters or similar matters, such as supplemental indentures, cannot be incorporated by reference. See Instruction 1 to Item 601(a) of Regulation S-K. Note that the Instruction would also apply to "forms of" underwriting agreements, but underwriting agreements are not required to be filed as exhibits or incorporated by reference in a 10-K.
- Schedules of Exhibits:
    - *In General, May Omit Schedules from All Exhibits:* Under Item 601(a)(5) of Regulation S-K, schedules and similar attachments can be omitted from exhibits (unless they contain information material to voting or investment decisions and such information is not disclosed elsewhere in the exhibit or the 10-K).
    - *Provide List of Omitted Schedules, If Required*: Amended Item 601(a)(5) requires companies that omit schedules to provide a list briefly identifying the contents of all omitted schedules, but this list is not required if the filed exhibit already includes this list or otherwise conveys the subject matter of the omitted schedules.
    - *Remove Undertaking to Provide Omitted Schedules from Exhibit List.* Under the SEC's prior rule on exhibit schedules, companies were only permitted to omit schedules from plans of acquisitions under Item 601(b)(2) if they filed a list briefly identifying the contents of all omitted schedules together with an agreement to furnish to the SEC a copy of the omitted schedules upon request. However, under the amended rule, this "agreement "is no longer specifically required and therefore disclosure regarding such an agreement (often provided in a footnote to the exhibit list) should be removed. Nevertheless, note that the new rule still states that, "upon request," a company "must provide a copy of any omitted schedule to the Commission or its staff."
- Material Contracts No Longer Required If Fully Performed: For companies that are not "newly reporting registrants," Item 601(b)(10) now requires material contracts to be filed only if they are to be performed in whole or in part at or after the filing of the report. Accordingly, you should review the exhibit index to check if any material contracts have been fully performed and can therefore be removed from the exhibit index as a result of this rule change. The previous rule had required material contracts that were fully performed before the filing date but that were entered into within two years of the date of filing of the 10-K to be included in the Exhibit Index.

- Remove Personally Identifiable Information: Item 601(a)(6) of Regulation S-K explicitly allows a company to omit personally identifiable information from exhibits, such as bank account numbers, social security numbers, home addresses and similar information.

- Consider Recent Changes for Confidential Treatment Request Orders:

  - *Consider Confidential Treatment Requests for New Exhibits.* As a reminder, pursuant to amendments adopted in 2019, companies are permitted to omit confidential information from material contracts without having to submit a formal confidential treatment request ("CTR"), so long as the redacted information: (i) is not material; and (ii) would likely cause competitive harm to the company if publicly disclosed. For information on the procedures for exhibit redactions, as well as information on Staff reviews of redacted exhibits, see April 2019 Staff guidance. As an alternative, companies can still use the traditional CTR process. See Staff guidance updated in March 2021. Also see prior Staff guidance on extensions.

  - *Check for Expiring Confidential Treatment Request Orders.* Check whether the company has any expiring confidential treatment orders on material agreements. Depending on the time period when the order was originally issued, there are different requirements to request a renewal of the order, as explained in SEC Staff guidance updated in March 2021.

- Consider, if Applicable, the New Registered Debt Exhibit: Effective January 4, 2021, companies with registered debt securities that are guaranteed by related entities are required to file an Exhibit 22 under new Regulation S-K Item 601(b)(22) listing (i) each affiliate whose securities are pledged as collateral for the company's debt securities; and (ii) the securities pledged.

Signature Requirements

Form 10-K requires signatures by the Principal Executive Officer, Principal Financial Officer, Principal Accounting Officer or Controller, and a majority of the Board of Directors (although typically all directors sign the 10-K). If an officer occupies more than one of the offices requiring signature, then the signature block must indicate each capacity in which such officer is signing. Note that amendments to a 10-K require only signature by an "authorized officer."

Moreover, in November 2020, the SEC modernized its rules relating to signatures to permit electronic signatures provided certain requirements are met. For more information on electronic signatures, see the SEC Release adopting revisions to Regulation S-T.

Subsequent event footnote to financial statements

If any material event has occurred after the balance sheet date, the financial statements contained in the 10-K may need a subsequent event footnote. Note that unlike financial statements in the 10-K, which speak as of year-end, the financial statement footnotes may include a subsequent event footnote that speaks as of the date of filing.

Business Updates

Required discussion of material changes to business, including to a previously disclosed business strategy.

It is probable that there have been developments in the company's business over the past year that need to get disclosed throughout the 10-K, in addition to updates for other material changes required in MD&A. These business updates will most often need to be reflected in the "Description of Business," "Risk Factors," and "MD&A" sections of the 10-K.

Companies are now specifically required under Item 101(c) to disclose "material changes to a registrant's previously disclosed business strategy." This is particularly relevant for a company that recently went public and provided a lengthy discussion of its business strategy in the business section of its IPO registration statement and subsequently has had a change in strategy.

At a minimum, the 10-K should incorporate any business updates reflected in the third quarter Form 10-Q, the earnings release for the fourth quarter/year-end, any other Form 8-Ks filed since the date of filing of the third quarter Form 10-Q, and any press releases issued since the date of filing of the last 10-K. If the company filed a registration statement or prospectus supplement after the filing of the third quarter Form 10-Q, any updated description of the business, recent developments section, or updated cautionary note on forward-looking statements in the registration statement or prospectus supplement should be reflected in the 10-K, as appropriate. Ultimately, the 10-K speaks as of the date of filing, so it needs to reflect the current state of the business on the date the 10-K is filed.

Consider Streamlining Disclosure that May No Longer be Required

The SEC has emphasized a principles-based approach, with a focus on disclosure of information that is material to a company's business. Information that was eliminated under recent amendments to Item 101 of Regulation S-K that is not otherwise material for a company may be removed. For example, to the extent not material to a company, it may remove from its Form 10-K Business section: "the year in which the registrant was organized and its form of organization" and "the dollar amount of backlog orders." However, companies must provide disclosure on Business section topics (even those eliminated from Item 101(c)'s previous prescriptive disclosure list) if material to an understanding of the business.

Confirm Business Section Includes a Discussion of Compliance with Material Government (Not Just Environmental) Regulations

Item 101(c) of Regulation S-K specifically requires, to the extent material to an understanding of the business taken as a whole, disclosure of the material effects on capital expenditures, earnings and competitive position of compliance with government regulations generally, including but not limited to, environmental regulations. Companies are also required to include the estimated capital expenditures for environmental control facilities for the current fiscal year and any other subsequent period that is material. You should ensure that regulatory disclosure in the 10-K adequately addresses all areas of government regulations generally that are responsive to this principles-based materiality standard.

Review company press releases

Review company press releases issued since the filing of the last 10-K to determine if any material developments need to be disclosed in the 10-K. There may have been business developments that occurred throughout the year that need to be disclosed in the 10-K so it is prudent to review all press release issued since the filing of the last 10-K.

Review fourth quarter/year-end earnings release and earnings script

The purpose here is to make sure any material matters referenced in the earnings release, earnings script, or earnings presentation materials are reflected in the 10-K. See, e.g., In the Matter of Shared Medical Systems Corporation, Release No. 34-33632 (May 9, 1995) (disclosure of trend in earnings release of material slowdown in sales that was not disclosed in the 10-K violates disclosure requirements of Item 303 of Regulation S-K).

Review Form 8-K filings

Review 8-Ks filed in the fourth quarter of fiscal 2021 and first quarter of fiscal 2022 and confirm that:

- Any exhibits that need to be filed or incorporated by reference in the 10-K (required if Form 8-K filed in fourth quarter 2021, optional if Form 8-K filed in first quarter 2022, but may be better to just incorporate exhibit by reference in 10-K for completeness); and
- Any material developments reported on a Form 8-K are included in the 10-K, to the extent applicable. Note that the company can include Form 8-K disclosures for events that occurred within four business days of filing the 10-K rather than Form 8-K, but not Form 8-K Item 4.01 or 4.02 disclosures, which must be filed on Form 8-K.

Forward-looking statement disclaimers

SEC rules do not require this section, and it has no prescribed location in a 10-K. However, companies nearly always provide this disclosure, which sometimes appears towards the front of the 10-K and in other cases may appear immediately before or after MD&A. If this disclosure is included, ensure that it satisfies the requirements of the Private Securities Litigation Reform Act of 1995. These requirements can be found in Section 21E of the Exchange Act and Section 27A of the Securities Act.

Regardless of where the disclosure is placed, it should speak as of the date of filing the 10-K. The cautionary disclaimer provides greater protection if it is specifically tailored to the 10-K and the company is able to show that the language was dynamic over time. You should also look at the cautionary note in the most recent Form 10-Q to see if any updates were made that need to be carried forward.

Date as of which the 10-K speaks vs. end of fiscal year

In contrast to the financial statements included in the 10-K, most of the other disclosure in the 10-K must satisfy SEC disclosure requirements as of the filing date. Although true for other SEC filings, this requires particular attention for 10-K filings because the due date is 60-90 days after the end of the fiscal year.

Late Filings

Form 12b-25 for late 10-K filings

A Form 12b-25 can be filed if the company is unable to file the 10-K by its due date. A properly and timely filed Form 12b-25 will provide up to 15 additional calendar days from the original due date for the company to file its 10-K on a timely basis.

In preparing and reviewing a Form 12b-25 filing, one should be mindful of (1) the requirements of Form 12b-25 and Rule 12b-25 to ensure compliance with applicable requirements, (2) confirming that the filing contains all required disclosure, including the required disclosure of any significant anticipated changes from the prior year period, and (3) how the extended deadline works with the federal holiday rule.

In April 2021, the SEC Division of Enforcement charged eight companies with failure to comply with the disclosure requirements of Form 12b-25. The Division of Enforcement focused on the companies' failure to comply with the requirement to disclose the reason(s) for not filing the report by the applicable due date and any significant changes in the company's results of operations that the company anticipates reporting in the filing, compared to the prior year period. Therefore, one should not assume that the SEC Staff will not review Form 12b-25 filings and should not assume that a review would be conducted by the Division of Corporation Finance rather than the Division of Enforcement.

Annex A

Risk Factors: What to Include

Although each company will need to assess its own material risks and tailor risk factors to its unique circumstances, below is a list highlighting certain areas of SEC focus and key trends that you should consider when preparing or assessing risk factors disclosure. Note that recent SEC enforcement actions indicate the SEC is focused on misrepresentations or omissions in connection with risk factors. In particular, in recent SEC enforcement actions, the SEC has alleged that statements in a company's risk factors were materially misleading because a company stated that an event only "may" or "could" occur, but the event was no longer hypothetical at the time of the disclosure. Recent judicial decisions have also confirmed that stating that a risk may occur when the event has actually happened is legally insufficient. Accordingly, risk factor disclosure should clarify whether a potential material risk has in fact occurred to some degree (whether or not the degree of occurrence is material on its own).

- COVID-19: Ensure the risk factor disclosure related to COVID-19 is appropriately robust and specific. It is important to focus the discussion on the actual, specific risks the company faces, as the SEC has repeatedly commented on risk factor disclosures that only touch on general economic or societal impacts of COVID-19 and do not go far enough in describing company-specific COVID-19-related risks. Ensure that the risk factors accurately and fully describe the risks the company faces, including risks that have already had an impact on the company, rather than describing these risks as merely hypothetical.

  Furthermore, COVID-19 is no longer a novel consideration from a disclosure perspective, therefore, it is important that the risk factors disclose company-specific risks rather than merely disclosing that the risks related to the pandemic remain uncertain. If applicable, you should also carefully consider whether any significant COVID-19 related known trend or uncertainty that management is closely monitoring and/or discussed with the board is appropriate for MD&A disclosure.

- Human Capital Resources: In light of the rule changes requiring human capital management disclosure, as well as heightened focus on this issue by investors, you should assess what—if any—material risks the company faces with respect to human capital resources and consider any appropriate updates to risk factor disclosure. This could include risks related to the ability to attract and retain skilled employees, changes in laws or regulations regarding employees outside of the U.S., employee health and safety issues, increases in labor costs, and increased employee turnover.

- Cybersecurity and Privacy: As cybersecurity and ransomware incidents and data misuse continue to proliferate, the Staff has been focusing on, and providing comments regarding, cybersecurity and privacy disclosures. As part of this focus, the Staff monitors press reports and may raise questions directly with affected companies about the sufficiency of cybersecurity or privacy disclosures in SEC reports on that basis. SEC guidance issued in 2018, as well as high-profile enforcement actions for inadequate or misleading disclosures, emphasize that cybersecurity and complying with personal data rights pose economic, operational and reputational risks that can impact any company. With respect to disclosure issues, recent enforcement actions and judicial decisions caution against framing risk factor disclosures in hypothetical terms without addressing actual material incidents experienced by the company.

Material cybersecurity and data privacy risks must be disclosed and, to the extent the company has already experienced actual material cybersecurity or data misuse incidents, such occurrences and their impact on the company must be described. In addition, other specific disclosure with respect to cyber and data risks associated with suppliers, acquisition targets and other third parties may be warranted.

Meanwhile, the impact on corporate operations of an ever-expanding and complex array of personal data privacy laws throughout the world often requires additional risk disclosures. Most notable in this regard is compliance with the European Union's General Data Protection Regulation (the "GDPR"), which became effective in 2018 and remains a material issue for many companies regardless of whether they have a physical presence in Europe. Compliance with the GDPR can require changes to a company's business practices on whether and how to collect and use certain types of personal data, affect a company's ability to transfer personal data internationally, impact decisions to expand into certain regions or lines of business, and subject companies to sizable financial penalties, all of which could materially adversely affect profitability and outlook. Similarly, in light of the California Consumer Privacy Act, which became effective on January 1, 2020, companies should identify and disclose any material risks of this law to their business model, especially with respect to restrictions on the broadly defined "sale" of personal data. Companies should also consider what non-boilerplate disclosures, if any, are necessary, as well as the business impact of compliance, with these and other emerging data privacy laws and regulations.

- IP and Technology Risks: In December 2019, the SEC Staff released guidance specifically calling on companies to assess risks related to the potential theft or compromise of their technology, data or intellectual property in connection with their international operations and disclose them where material. Beyond direct intrusions, the guidance notes that companies may also face theft or compromise of these assets via indirect routes. For example, a company's products may be reverse engineered by joint venture parties, including those affiliated with state actors. The guidance encourages companies to consider a range of questions when assessing these risks, including whether they are operating in foreign jurisdictions where the ability to enforce rights over intellectual property is limited as a statutory or practical matter, and whether they have controls and procedures in place to adequately protect technology and intellectual property. The Staff also emphasized that disclosure of material risks should be specifically tailored, and that where a company's technology, data or intellectual property is being (or previously was) materially compromised, hypothetical disclosure of potential risks is not sufficient to satisfy a company's reporting obligations. Furthermore, companies should continue to consider this evolving area of risk and evaluate its materiality on an ongoing basis.

- LIBOR: In light of the discontinuation of LIBOR after 2021, the SEC staff issued guidance in July 2019 stating that: (i) companies should consider disclosing their efforts to date to identify and mitigate associated risks and assess their impacts, as well as consider disclosing any significant matters yet to be addressed; (ii) if a material exposure to LIBOR has been identified but the company cannot yet reasonably estimate the expected impact, companies should consider disclosing that fact; and (iii) disclosures that allow investors to see this issue through the eyes of management are likely to be the most useful for investors (such as information used by management and the board in assessing and monitoring how transitioning from LIBOR may impact the company). The SEC staff expressly indicated that it is actively monitoring the extent to which risks related to the discontinuation of LIBOR are being addressed, and noted that companies should assess whether disclosure may be appropriate in their risk

factor section as well as in MD&A, the business section, the financial statements and/or the discussion of board risk oversight responsibilities. In addition, in December 2021, the SEC Staff issued a statement on the LIBOR transition providing key considerations for market participants, including publicly-traded companies, and encouraging such companies to refer to the July 2019 statement as they prepare their disclosures to investors.

- Regulatory: Changes and potential changes in law, regulation, policy and/or political leadership, including the regulatory agenda of the Biden administration, may necessitate modifications to risk factor disclosure for certain companies. Some examples include: current and potential changes to immigration policies, minimum wage, tariffs, taxes, environmental policies, health care and other political developments in the U.S.

- Environmental: Environmental issues such as climate change have been receiving increased attention, and companies should consider whether they present material risks for their businesses. Risk factor disclosure related to environmental issues should be tailored to the specific circumstances of a company and can address a number of topics, including applicable environmental regulations and the impact of climate change on a company's business, such as risks of increased costs or reduced demand for products, carbon asset risk, risks due to severe weather events, such as forest fires on the west coast and hurricanes in the southwest, and management of greenhouse gas emissions, among other environmental issues. Environmental risk factors should also address risks to companies from anticipated changes to regulations affecting their businesses. The Biden administration supports implementing laws and policies that will take a more aggressive approach towards regulating impacts to the environment. In addition, the Staff issued a letter on September 22, 2021 providing sample comments to companies regarding climate change disclosures, including risk factor disclosures.