

# Time to Get Ready: Preparing for the 2021 US Proxy & Annual Reporting Season

Candace Jackson

Associate

+1 312 701 8754

[crjackson@mayerbrown.com](mailto:crjackson@mayerbrown.com)

Christine McDevitt

Associate

+1 704 444 3672

[cmcdevitt@mayerbrown.com](mailto:cmcdevitt@mayerbrown.com)

December 9, 2020

Anna Pinedo

Partner

+1 212 506 2275

[apinedo@mayerbrown.com](mailto:apinedo@mayerbrown.com)

Christina Thomas

Partner

+1 202 263 3344

[cmthomas@mayerbrown.com](mailto:cmthomas@mayerbrown.com)

# COVID-19 related guidance from the SEC Staff

- The SEC staff has issued guidance in various forms:
  - CF Disclosure Topic #9 – March 2020
  - Joint Statement regarding earnings releases – April 2020
  - CF Disclosure Topic #9A – June 2020
  - Statements from SEC’s Chief Accountant – April and June 2020
  - Comment letters issued to registrants

# CF Disclosure Guidance Topic #9

- Division of Corporation Finance issued CF Disclosure Guidance Topic #9 (“CF #9”) on March 25, 2020
  - Views on disclosures and securities law obligations impacted by COVID-19
- Three key topics
  - Assessing and disclosing the evolving impact of COVID-19
  - Trading prior to dissemination of material non-public information—in fact, in recent months, “good corporate hygiene” has become a focus for the SEC
  - Reporting earnings and financial results

# COVID-19: Forward-looking disclosure

- On April 8, 2020, SEC Chair Jay Clayton and the Director of the SEC's Division of Corporation Finance issued a joint statement providing guidance for the earnings release season
- Statement urged companies to provide as much information as is practicable regarding their current financial and operational status, as well as their future operational and financial planning
- Company disclosures should reflect the current state of COVID-19 affairs and outlook; historical information may be relatively less significant
- Good faith attempts to provide appropriately framed forward-looking statements would not be second-guessed by the SEC

# CF Disclosure Guidance: Topic No. 9A

- Division of Corporation Finance issued CF Disclosure Guidance Topic No. 9A (“CF #9A”) June 2020, supplementing CF #9
- CF #9A emphasizes operational adjustments in response to COVID-19 could be material to an investment or voting decision
  - Transition to telework
  - Supply chain and distribution adjustments
  - Suspension/modification of operations for health and safety
- CF #9A focuses on financing activities

# Guidance from the Chief Accountant

- In two public statements, the Chief Accountant has addressed the significance of high quality financial information
- The Chief Accountant focused on:
  - Significant judgments and estimates
  - The effects of the pandemic and work from home on disclosure controls, financial reporting and internal control over financial reporting
  - Going concern assessments
  - The importance of the audit committee's oversight role

# Proxy statement disclosures

- Compensation disclosures
  - Changes to named executive officer (NEO) compensation
    - Has the NEO agreed to forgo salary, bonus or perquisites?
    - Have any of these amounts been adjusted? Or has compensation been paid in stock?
    - Has the company repriced options?
    - Has the company changed the metrics used to evaluate performance, eligibility for bonuses, or other aspects of compensation?
  - Revising the CD&A section this year may require close consideration of historical and expected financial performance

# Proxy statement disclosures *(cont'd)*

- Corporate governance disclosures
  - Board oversight of risk during the pandemic period:
    - How has the board discharged its oversight role?
    - Additional meetings?
    - Consideration by board of reductions in force, closures or other similar measures
    - Consideration by board of workplace safety and human capital measures
    - Has the board or has the audit committee undertaken additional measures with respect to cybersecurity oversight?



# Proxy statement disclosures *(cont'd)*

- Audit committee reports
  - Consider the statements made by the Chief Accountant, as well as the PCAOB's conversations with audit committee chairs
  - How has the audit committee responded to:
    - Complexities of company staff and audit teams working from home
    - Changes to audit procedures or to the company's accounting policies
    - Challenges relating to the company's control environment
  - Has the committee vetted non-GAAP COVID-19 adjustments? Impairments? Changes to estimates or to policies requiring judgment?
- Letters to shareholders
  - The letter provides an opportunity for the company's management to address, to the extent it would like to do so, the effects on the company, its business, its workforce of the pandemic as well as other recent developments

# Form 10-K disclosures

- Principles-based disclosure may require an issuer to address the actual and potential impacts of COVID-19 in connection with the issuer's disclosures, as well as in connection with its preparation of its Form 10-K. Areas to consider include:
  - Risk factors
  - Business
  - Legal proceedings
  - Management's discussion and analysis
  - Disclosure controls and procedures
  - Internal control over financial reporting
  - Financial statements
- Consider the questions posed in CF #9, almost as a disclosure checklist, or during the disclosure committee's meeting and its review of the annual report

# Risk factors

- At the beginning of the pandemic, many companies addressed their risk factor disclosures by including a generic pandemic related risk. As time has passed, the expectation is that an issuer will include specific, tailored risks

## Sample SEC comment

We note your disclosure that the extent to which your operations may be impacted by the COVID-19 pandemic will depend largely on future developments, which are highly uncertain and cannot be accurately predicted, including new information that may emerge concerning the severity of the outbreak and actions by government authorities to contain the outbreak or treat its impact. Please amend your risk-factor disclosure to provide more detailed risks related to the COVID-19 pandemic, tailored to your specific facts and circumstances. For guidance, see CF Disclosure Guidance: Topic No. 9 (25 March 2020)

- Review and consider each of the company's risk factors, and consider whether these should be revised to address events that already have come to pass, and to address new risks that have been identified as the pandemic has become more prolonged and its effects more wide-reaching
- Particular consideration should be given to cybersecurity risks, risks related to legal proceedings and litigation, risks relating to impairment, losses, reserves, workforce changes

# Business

- While issuers may now have more flexibility with respect to the presentation in the Business section, given the pandemic's effect on the issuer's business, its workforce, actual or potential changes in its business model or its policies regarding work from home, changes in demand for its products or services, and similar matters, this year, it may make sense to present a more detailed (*rather than a summary*) discussion

# MD&A

- The SEC Staff's guidance has been particularly detailed regarding expectations for disclosure in the MD&A section that is specific to the issuer, the effects of the pandemic on the issuer's actual results of operations, the effects on liquidity (*including modifications to its debt obligations, recent financing transactions, access to credit lines, going concern issues*), and the need to provide investors with insight regarding trends and expectations for future performance

## Sample SEC comment

We note your disclosure that your overall revenues since 1 January 2020, were below expectations by approximately X% primarily due to COVID-19, and your revenues from providing services were below expectations by approximately Y%. Because investors do not know your expected revenue for this period, please revise to present the impact based on your historical financial performance. In this regard, please discuss how COVID-19 has impacted operations as compared to prior financial periods. Please refer to CF Disclosure Guidance: Topic No. 9 (25 March 2020).

## Sample SEC comment

We noted that, given the uncertainty of the impacts of COVID-19, you are monitoring your ability to comply with debt covenants in future periods and are in discussions with certain counterparties to your debt obligations. In future filings, please expand your disclosures to include the significant debt covenants and the particular subsidiaries affected.

## MD&A *(cont'd)*

- The SEC has highlighted certain areas for further consideration in MD&A:
  - Fair value and impairment
  - Debt modification
  - Revenue recognition
  - Credit losses standard
  - Leases
  - Hedging
  - Going concern

### **Sample SEC comment**

To provide investors with information to better assess the probability of future goodwill impairment charges, please disclose, if accurate, that the estimated fair values of the intangible assets you quantitatively tested for impairment substantially exceeded their carrying values. For any asset whose estimated fair value did not substantially exceed its carrying value, please disclose the percentage by which air value exceeded carrying value at the date of the most recent test.

# SEC comments – MD&A – COVID-19

- Future trends, impacts
  - Failure to disclose

## Sample SEC comments

On your first quarter earnings call, you indicate that you currently anticipate second quarter revenue to be down as much as 50% to 60% with approximately 80% of your global business having been closed since April 1, 2020. Revise your future periodic filings to disclose known trends and uncertainties related to COVID-19. For example, disclose how you expect COVID-19 to impact your future operating results and near-and-long- term financial condition and how that compares to the current period. See Item 303 of Regulation S-K, SEC Release No. 33-8350, and CF Disclosure Guidance Topic No. 9.

We note your disclosure regarding the . . . grounding and your recognition of a . . . liability for potential concessions and other considerations to customers for disruptions related to the grounding. In future filings, please provide enhanced disclosures to better clarify the nature and amounts of the various concessions you are providing. It appears your concessions may be in the form of cash, in-kind consideration and other forms of concessions. Please consider providing a tabular presentation of the concessions by type, so that investors can better understand the expected impacts to your cash flows and operating results.

# SEC comments – MD&A – COVID-19 *(cont'd)*

- Trends and uncertainties
  - Failure to disclose

## **Sample SEC comment**

- On your first quarter earnings call, you indicate that you currently anticipate second quarter revenue to be down as much as 50% to 60% with approximately 80% of your global business having been closed since April 1, 2020. Revise your future periodic filings to disclose known trends and uncertainties related to COVID-19. For example, disclose how you expect COVID-19 to impact your future operating results and near-and-long- term financial condition and how that compares to the current period. See Item 303 of Regulation S-K, SEC Release No. 33-8350, and CF Disclosure Guidance Topic No. 9.



# COVID-related non-GAAP adjustments

- Issuers may want to present financial results while giving effect to the consequences of the coronavirus
- The SEC Staff has addressed non-GAAP measures:
  - Include non-GAAP measures that have been provided to management and that are being used by the management team in order to assess the effects of the pandemic on financial results
  - “Estimated” or “provisional” items may be reflected
  - However, items should be directly related to the effects of the pandemic; these can be based on a reasonable estimate if COVID-19 charges are not yet finalized
- Sometimes referred to as **EBITDAC**
  - Earnings Before Interest, Taxes, Depreciation, Amortization, and Coronavirus

# COVID-related non-GAAP adjustments *(cont'd)*

- Originally, may have been presented as a one-time adjustment:
  - PPE, cleaning supplies, dividers, retrofitting,
  - Lease termination costs
  - Supply chain disruptions
  - Workforce issues such as severance or bonuses for working onsite
- As pandemic lasts, consider if treating COVID-19 adjustments as temporary may imply ongoing costs are lower

# SEC Enforcement Action related to

- Recently, SEC's Division of Enforcement brought its first action against an issuer relating to misleading pandemic related disclosure
- Disclosures in two Form 8-Ks that referenced that the company would be able to operate sustainably, while at the same time the company was engaging in discussions with lenders and potential investors that reflected that the company needed to raise substantial additional funding to meet its obligations

# Considerations for this year's Form 10-K

- Amendments to Regulation S-K, effective November 9, 2020
  - Business
  - Risk Factors
  - Litigation
- Recent SEC Guidance on MD&A / KPIs
- Amendments to Regulation S-K, not yet effective
  - MD&A, Selected Financial Data, Supplementary Financial Data
- Amendments to Regulation S-T, effective when published in Fed. Register

# Business (Item 101)

## Item 101(a) – General development of business

- Eliminates the five-year timeframe (three-year for SRCs), now requiring disclosure of information material to an understanding of the general development of the business
  - Four topics enumerated that disclosure may include
- In filings after initial filing, the company may provide an update only
  - Disclose all material developments
  - Incorporate by reference prior discussion with active hyperlink

# Business (Item 101)

## Item 101(c) – Description of business

- Expands principles-based approach
- New human capital disclosure
  - The company's human capital resources (e.g., number of employees), and
  - Human capital measures or objectives that the company focuses on in managing its business.
- Government regulations – not just environmental anymore
- Other disclosure items – any topic regarding the company's business that is material to an understanding of the business; no quantitative thresholds.

# Risk Factors (Item 105)

- Summary required if the risk factors section exceeds 15 pages
  - 2 pages or less
  - In the “forepart” of the annual report or prospectus
- Standard changed from “most significant” to “material” risks
- Organize logically under relevant headings
  - Subcaption describing the risk still required
- Generic risk factors are discouraged and, if presented, must be placed at the end under the caption “General Risk Factors”

# Legal Proceedings (Item 103)

- Cross reference to avoid duplicative disclosure
- Disclose environmental proceedings to which a government is a party:
  - ***Either*** use a threshold of \$300,000 (raised from \$100,000)
  - ***Or*** select a different threshold that:
    - Is reasonably designed to disclose any material proceeding;
    - Does not exceed the lesser of (i) \$1 million or (ii) 1% of the current assets of the company and its subsidiaries on a consolidated basis; and
    - Is disclosed, together with any changes, in each annual and quarterly report.



# SEC Transitional FAQs re Items 101, 103 & 105

On Nov. 5, 2020, the Staff issued three clarifying FAQs:

1. For prospectus supplements filed after November 9 for registration statements effective before November 9, issuers do not need to comply with new Items 101 and 103 or amend the Form 10-K that is incorporated by reference in the registration statement to comply with amended Items 101 and 103.

In addition, although Rule 401(a) requires a prospectus supplement conform to applicable rules on the initial file date of the supplement and Item 3 of Form S-3 expressly requires Item 105 disclosure, the Staff will not object if the prospectus supplement complies with previous Item 105 until the next update to the registration statement for Section 10(a)(3) purposes.

2. The amendments do not require Form 10-K disclosure of new Item 101 for longer than the fiscal year covered by the Form 10-K.
3. A company may (but is not required to) omit a full discussion of the general development of its business in a Form 10-K or registration statement if it:
  - Discloses all material developments since the most recent report or registration statement that includes the full discussion;
  - Includes a hyperlink to that report or registration statement; and
  - Incorporates that full discussion by reference.

The Staff anticipates that this updating method will apply mainly to registration statements.

# Recent SEC Guidance re MD&A/KPIs

- Issued in January 2020
- Addresses key performance indicators and metrics (“KPIs”)
- KPIs in MD&A should be accompanied by:
  - A clear definition of the KPI and how it is calculated;
  - A statement indicating the reasons why the KPI provides useful information to investors; and
  - A statement indicating how management uses the KPI in managing or monitoring the performance of the business.

# Recent SEC Guidance re MD&A/KPIs (*cont'd*)

The MD&A guidance contains this **non-exclusive** list of examples of KPIs to which the guidance applies:

- Operating margin;
- Same store sales;
- Sales per square foot;
- Total customers/subscribers;
- Average revenue per user;
- Daily/monthly active users/usage;
- Active customers;
- Net customer additions;
- Total impressions;
- Number of memberships;
- Traffic growth;
- Comparable customer transactions increase;
- Voluntary and/or involuntary employee turnover rate;
- Percentage breakdown of workforce (*e.g.*, active workforce covered under collective bargaining agreements);
- Total energy consumed; and
- Data security measures (*e.g.*, number of data breaches or number of account holders affected by data breaches).

# Recent SEC Guidance re MD&A/KPIs *(cont'd)*

If a company **changes** the calculation method or presentation of a KPI from one period to another, consider the need to disclose, to the extent material:

- The differences in the way the metric is calculated or presented compared to prior periods;
- The reasons for the change;
- The effects of the change on the amounts or other information being disclosed or previously reported; and
- Other differences in methodology and results that would reasonably be expected to be relevant to an understanding of the company's performance or prospects.

# Recent SEC Guidance re MD&A/KPIs *(cont'd)*

The MD&A guidance also reminds companies:

- Requirement to maintain effective disclosure controls and procedures
  - Does the company have effective controls and procedures in place to ensure consistency and accuracy of KPI disclosure?
  - Has the audit committee reviewed the KPI disclosure?
  - Does the audit committee understand the methodology, calculation, any significant changes to KPIs?

Take the same steps for KPIs in investor presentations and earnings statements

# MD&A C&DIs

In January 2020, the Staff issued 3 Compliance and Disclosure Interpretations (C&DIs) related to the SEC's May 2019 amendments to MD&A which allow companies to omit a discussion of the earliest of the three years in a filing that includes financial statements covering three year if (1) the discussion was already included in an SEC filing and (2) the MD&A identifies the location in the prior filing where the omitted discussion appears.

1. C&DI 110.02 – The statement identifying the location in a prior filing of omitted discussion is not incorporation by reference.
2. C&DI 110.03 – The discussion of the earliest of the three years may not be omitted if it is necessary to an understanding of the company's financial condition, changes in financial condition and results of operations. But it can be included through incorporation by reference.
3. C&DI 110.04 – Where a Form 10-K that omits discussion of the earliest of the three years of financial statements becomes incorporated into a registration statement that is already effective, the staff is of the view that the filing of the Form 10-K for a newly completed fiscal year establishes a new effective date for the registration statement and, as of the new effective date, the registration statement incorporates by reference only the latest Form 10-K. Thus the company's discussion of results for the earliest of the three years is not incorporated by reference in the registration statement unless, as indicated in C&DI 110.02, the information is expressly incorporated by reference.

# Amendments to Reg. S-K – Items 301, 302, 303

- Effective 30 days after publication in the Federal Register
- Compliance required for first fiscal year ending 210 days after publication in the Federal Register
- Compliance optional any time after effective date
  - But companies that comply early must provide disclosure that is responsive to an amended item **in its entirety**
- Conforming changes to Forms 20-F and Form 40-F, among others

# Amendments to Reg. S-K – Item 303

- New Item 303(a) – Objective
- New Item 303(b) – Full fiscal years – Liquidity, capital resources, results of operations, critical accounting estimates
  - Off-balance sheet arrangement paragraph eliminated; replaced with instruction to consider and disclose off-balance sheet arrangements within the broader context of MD&A
  - Tabular disclosure of contractual obligations eliminated; replaced with requirement to analyze material cash requirements from known contractual and other obligations
  - Paragraphs on safe harbor for forward-looking statements and smaller reporting companies deleted
- New Item 303(c) – Interim periods



# Amendments to Reg. S-K – Items 301, 302

- Item 301 – Selected Financial Data – eliminated
- Item 302 – Supplementary Financial Data – amended
  - Disclose material retrospective changes to the statements of comprehensive income for any quarters within the two most recent fiscal years or any subsequent interim period for which financials are included or are required to be included by Article 3 of Regulation S-X
  - Explain the reasons for such material changes and disclose summarized financial information related to the statements of comprehensive income as specified in Rule 1-02(bb)(ii) of Regulation S-X and EPS reflecting such changes

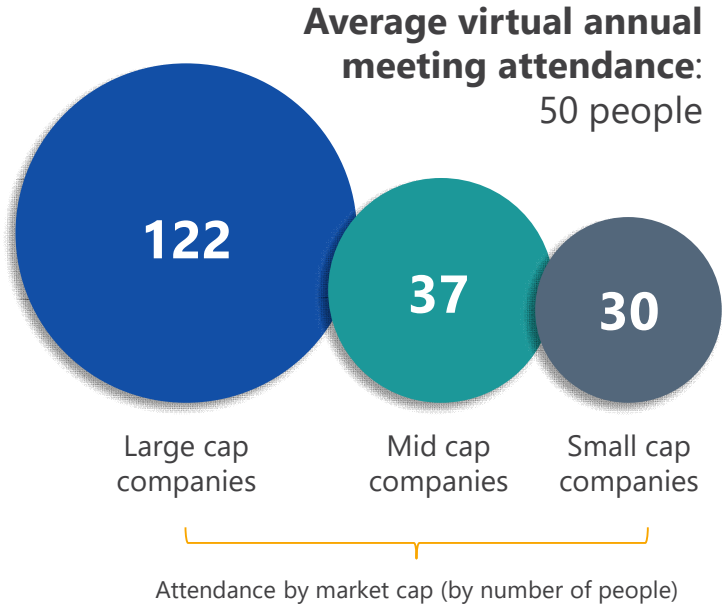
# Amendments to Reg. S-T

- The signature page to an SEC filing (the “authentication document”) can be signed manually **or electronically**
  - Must still retain this authentication document for five years
- But first, the signatory must **manually** sign a document agreeing that an electronic signature constitutes the legal equivalent of the signatory’s manual signature for any filing with electronic signature
  - Must retain this electronic signature authentication document for at least seven years after the date of the most recent electronically signed authentication document

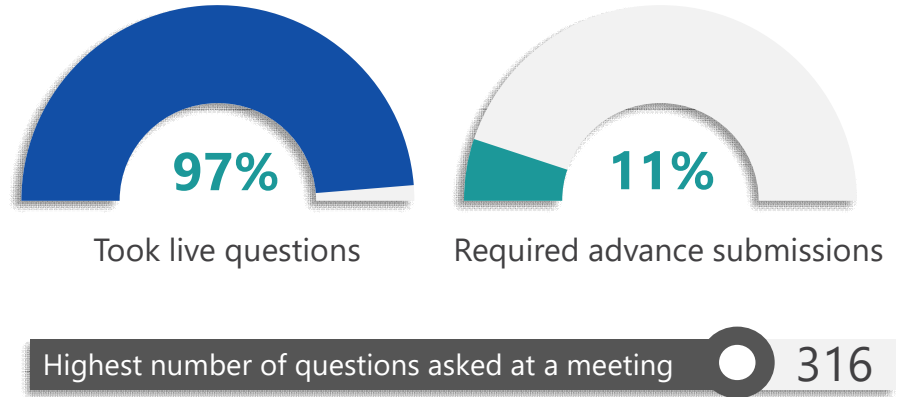
# Amendments to Reg. S-T *(cont'd)*

- Signing process for electronic signature must:
  - 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
  - Provide that the signature be attached, affixed, or otherwise logically associated with the signature page or document being signed
  - Include a timestamp to record the date and time of the signature

# Virtual Annual Meetings



**Average number of questions asked during virtual annual meetings: 5 questions**

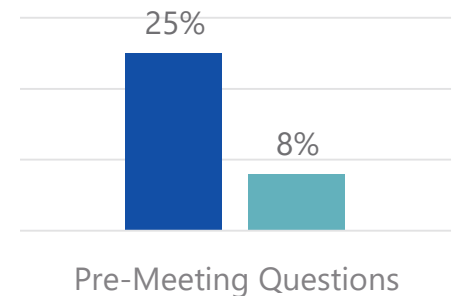
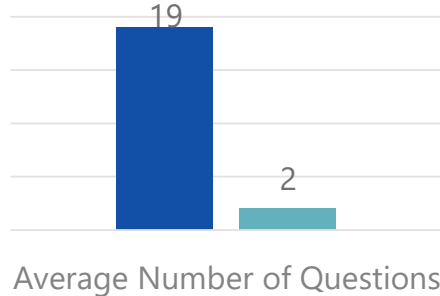
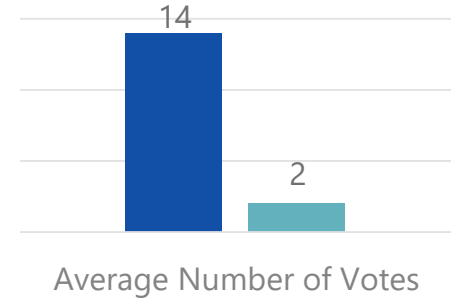
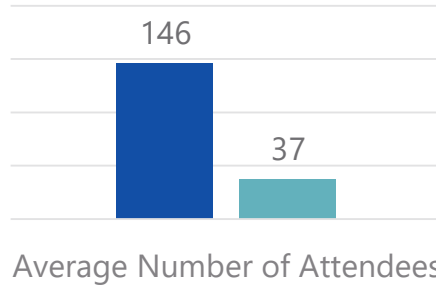
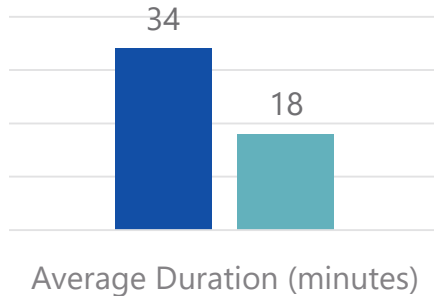


# Virtual Annual Meetings *(cont'd)*

- Meetings with shareholder proposals on the agenda saw increased shareholder participation

Meetings **with** shareholder proposal on the agenda

Meetings **without** shareholder proposal on the agenda



# Virtual Annual Meetings *(cont'd)*

- Considerations for 2021
  - **Permissibility.** Confirm whether state law permits virtual-only annual meetings or requires hybrid meetings
  - **Notice.** 2020 saw companies issuing press releases to cure defective notice where proxy statement was mailed before virtual format was adopted
  - **Logistics/Learnings from 2020.** There is lots of time to plan, so:
    - Make shareholder lists available before and during the meeting, as required by bylaws
    - Consider how to make meetings more “user friendly;” will video be utilized?
    - Allow for shareholder questions and proponent statements
  - **Timing.** Shifting to virtual-only format led to service provider issues with date availability, but providers do not expect to have these issues in 2021

# D&O Questionnaires

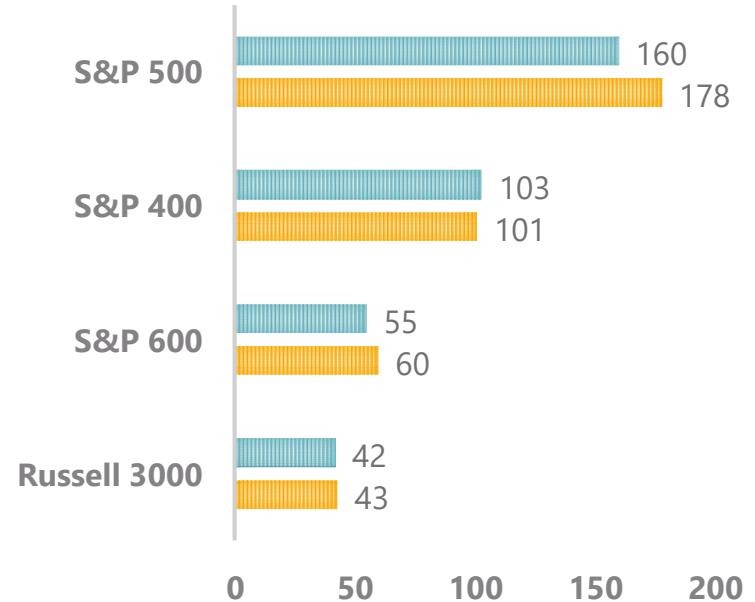
- **No relevant SEC rule/regulatory updates for 2020**
- Consider whether to collect self-identified diversity data
  - *Minimum Diversity Mandates:* **CA, WA**
  - *Diversity Reporting Requirements:* **IL, MD, NY**
  - *Legislative Action Encouraging Increased Diversity:* **CO, PA**
  - *Pending Legislation:* **HI, MA, MI, NJ, OH**
- Update dates and lookback periods
- Pre-population:
  - Most companies partially pre-populate questionnaires with biographical, compensation and board participation information
  - Benefits to requiring affirmative responses to substantive questions
- Carefully review responses and request follow-up information, if needed

# CEO Pay Ratio

## 2020 Median Pay Ratio Data

**Among all companies, median pay ratio was 76 to 1**

- S&P 500 median rose from **160** to **178**
- S&P 400 median declined from **103** to **101**
- S&P 600 median increased from **55** to **60**
- Russell 3000 (*excluding S&P 1500*) median increased from **42** to **43**





# CEO Pay Ratio *(cont'd)*

- Re-using the median employee
  - Required to identify the median employee only once every three years
    - Many companies re-identified the median employee in year two (2019)
    - 2020 disclosure (*based on 2019 compensation*) was the third year of pay ratio disclosure
    - If the median employee has been re-used since the 2018 disclosure, must be re-identified for the 2021 disclosure
  - Where the median employee is no longer employed, may substitute another employee
    - Must have substantially similar compensation as the previous median employee, using the same consistently applied compensation measure as was previously used
  - All companies should consider whether there have been any changes (*including COVID-related changes*) in the employee population or compensation program that would significantly change the pay ratio and necessitate a new median employee

# Say-on-Pay Proposals

- Shareholder support was down in 2020, compared to 2019
  - S&P 500: 79% of companies received 90%+ support in 2019 vs. 74% in 2020
  - S&P 1500: 78% of companies received 90%+ support in 2019 vs. 75% in 2020

	2017	2018	2019	2020
Average Shareholder Support*	91.8%	90.5%	90.6%	90.7%
Total Voted	1446	1411	1403	1447
Total Below 50% Support*	18	38	30	26
Total Failed	18	35***	30	25**

\*Vote calculations count abstentions as AGAINST votes  
\*\*GameStop passed with over 50% support as voting requirement did not include abstentions as AGAINST votes  
\*\*\*Customers Bancorp, PetMed Express and Jefferies Financial passed with over 50% support as voting requirement did not include abstentions as AGAINST votes

# Say-on-Pay Proposals *(cont'd)*

- Say-on-Pay proposals failed at 10 companies in the S&P 500
  - Special equity awards in consecutive years or excessive annual LTI awards
  - Accelerating grants of PSU awards
- Fewer companies in the “Red Zone” in 2020, compared to 2019
- ISS negative vote recommendations
  - Increased 1.1% among S&P 500
  - Decreased 2.1% among S&P 1500
  - Excess discretionary compensation and weak performance goals lead to CEO pay-for-performance misalignment

# COVID-19 Pay Adjustments

- Most companies implemented employee, director and executive officer reductions to cash compensation
  - Many have already restored or plan to restore salaries to their pre-COVID-19 levels
- Very few companies have taken action on their annual and long-term incentive programs
  - 78% are operating their annual incentive plan for executives on a broadly similar basis to last year
  - 25% have taken action on their annual incentive plan; 40% are planning or considering changes
  - 8% have taken action on long-term incentive programs; 16% are planning or considering doing so

# COVID-19 Pay Adjustments *(cont'd)*

Compensation committees should consider Proxy Advisor views when making changes:

- ISS
  - Disfavors changes to outstanding long-term incentive awards; *Glass Lewis shares this view*
  - Other changes will be evaluated on a case-by-case basis
  - Recommends that any changes be disclosed contemporaneously and clearly state rationales
  - Disfavors “retention” awards; *Glass Lewis shares this view*
  - ***ISS recently announced the elimination of the draft proxy research report review process***

# COVID-19 Pay Adjustments *(cont'd)*

- Glass Lewis
  - Does not favor payouts above target, where 2020 performance metrics were changed
  - Prefers actions that take a proportional approach to the impacts on shareholders and employees
  - Companies with strong governance, performance, and appropriate use of board discretion prior to the pandemic have more leeway

# Perquisites

- The SEC published new C&DI 219.05
  - Certain COVID-19 related expenses paid by issuers to enable NEOs to work from home are not considered perquisites
  - Must continue to apply SEC's long-standing perquisite test
    - Enhanced technology needed to make the NEO's home his or her primary workplace due to local stay-at-home orders is not a perquisite because it is integrally and directly related to the performance of the executive's duties under perquisite test
    - C&DI does not provide clarity on other reimbursed work-from-home expenses
    - New COVID-19-related health and transportation benefits may be a perquisite unless they are generally available to all employees
  - There may not be the same outcome from a tax perspective

# Human Capital

- Increased calls for human capital disclosure
- Recent events drawing attention to human capital management
  - COVID-19 and the treatment of workers
  - Prioritizing diversity
- Introduction of human capital to SEC disclosure requirements
- Human capital metrics
- Human capital-related shareholder proposals



# Enhanced Human Capital Disclosure

- Questions to ask when drafting human capital management disclosure
  - What are investors asking for?
  - What questions does the board ask management?
- Materiality judgment
  - Where to disclose
  - How to disclose

# Environmental, Social and Governance

- Human capital has not eclipsed other ESG issues
  - Climate change and board diversity
- Institutional investors have ESG proxy voting/engagement guidelines
- Shareholder proposals
- Multiple ESG frameworks
  - Sustainability Accounting Standards Board (SASB)
  - Task Force on Climate-Related Financial Disclosures (TCFD)

# Environmental, Social and Governance *(cont'd)*

- SEC's Investment Advisory Committee recommended ESG disclosure requirements
- SEC's Asset Management Advisory Committee working on a potential recommendation
- Potential for a standardized reporting framework
- Growing interest in ESG investments
  - ESG investment products
  - Asset management as a platform for ESG engagement

# Types of ESG Proxy Disclosures

- Environmental and sustainability
  - Climate change
  - Renewable energy
  - Green products and product sourcing
- Board diversity
- Corporate culture and values
- Political contributions and lobbying
- Social and community commitments

# Voluntary Human Capital and ESG disclosures

- Be aware of securities law ramifications
  - Goals versus commitments
- Consider adding disclosure controls/internal controls
- Begin drafting early
- Coordinate proxy statement with other disclosures
  - Form 10-K
  - Website
  - Shareholder engagement presentations
  - Press releases

# Board Diversity – California law

- New law requires publicly held corporations headquartered in California to have at least one person from an "underrepresented community" on their boards by the end of 2021 and two to three, depending on board size, by the end of 2022
  - Person self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, Alaska Native, gay, lesbian, bisexual or transgender
- California already requires publicly held corporations headquartered in California to have at least one woman on their boards and two to three, depending on board size, by the end of 2021

# Board Diversity – Nasdaq Rule Proposal

- “Comply or explain”
- Would require most Nasdaq-listed companies to have, or explain why they do not have, at least two diverse directors:
  - one who self-identifies as female, and
  - one who self-identifies as either an underrepresented minority or LGBTQ+
- Flexibility for foreign companies and SRCs
- Tiered applicability dates, if approved by the SEC

# Board Diversity – Institutional Investors

- State Street Global seeks disclosure of diversity characteristics, including racial and ethnic makeup, of the board of directors
- NYC Comptroller has sought commitments to consider both women and people of color for open board seat and CEO appointments
- Vanguard urging boards to seek greater diversity across a wide range of personal characteristics, such as gender, race, ethnicity, national origin, and age
- BlackRock may vote against the nominating/governance committee members if company has not adequately accounted for board diversity within a reasonable timeframe



# Board Diversity – ISS Position

- For Russell 3000 or S&P 1500 companies, ISS generally votes against/withholds from the chair of the nominating committee (or other directors on a case-by-case basis) if no women are on the company's board
- Mitigating factors include:
  - Only until February 1, 2021, a firm commitment to appoint **at least** one woman to the board within a year
  - The presence of a woman on the board at the preceding annual meeting and a firm commitment to appoint at least one woman to the board within a year
  - Other relevant factors, as applicable

# Shareholder Proposals – Procedural Changes

- Staff no longer automatically responds with no-action letters in response to Rule 14a-8 no-action requests
- Staff posts a chart on SEC website indicating whether or not it concurs or declines to state a view
  - Also indicates if Staff issued a letter, regulatory basis, names of parties, links to initial submissions
  - In future, Staff may make chart more interactive and sortable  
<https://www.sec.gov/divisions/corpfin/shareholder-proposals-2019-2020.pdf>

# 2020 Shareholder Proposals Receiving Majority Support

- **Governance**
  - Elimination of supermajority voting requirements
  - Elimination of classified boards of directors
  - Majority voting for the election of directors
- **Social**
  - Board and workforce diversity proposals
  - Reports on political spending/lobbying
- **Environmental**

# Possible Shareholder Proposal Topics for 2021

- Topics similar to those that received majority or significant minority support in 2020
- Topics that garnered attention as a result of COVID-19
  - Employee health and safety
  - Other human capital issues
- Topics related to social and racial justice concerns
  - Workforce diversity and equal opportunity
  - New York City Comptroller push for disclosure of annual EEO-1 report data

# Amendments to Rule 14a-8

- Amendments do not apply to 2021 shareholder meetings
- Submission threshold updated
  - Range of amount held/holding period, with aggregation prohibited
  - Transition period for \$2,000 holders
- Engagement requirement
- Resubmission thresholds updated
- One person/one proposal clarified
  - Cannot submit multiple proposals for the same meeting, whether as a shareholder or as a representative of other shareholder(s)

# Proxy Voting Advice Amendments

- SEC adopted amendments codifying its view that proxy voting advice generally constitutes a solicitation
  - Application of antifraud provisions in Rule 14a-9
- Exemption to the solicitation rules tailored to proxy voting advice businesses
  - Prominently disclose conflicts of interest
  - Establish procedures to allow all companies to access proxy advice prior to or simultaneously with the release of that advice to clients
  - Provide mechanism for clients to access any written company responses before they vote

# Proxy Voting Advice Amendments *(cont'd)*

- Proxy voting advice as solicitation is not a new rule
  - No material omissions standard for proxy voting advice applies during 2021 proxy season
- Transition period for the new conditions to the exemptions
  - Proxy advisors not required to disclose conflicts in their voting advice, provide companies with the voting advice reports by release date, or make company responses available to their clients until the 2022 proxy season
- ISS/SEC litigation on the proxy voting advice amendments has resumed

# MD&A Disclosure Amendments

- Purpose of the amendments
  - Modernize, simplify and enhance certain financial disclosure requirements
  - Enable investors to see a company “through the eyes of management”
- Considerations for this year
  - Amendments not yet applicable
  - May provide disclosure consistent with the amendments before the mandatory compliance date so long as disclosure is consistent with the entire amended item



# FREE WRITINGS + *Perspectives*

The **Free Writings & Perspectives**, or FW&Ps, blog provides news and views on securities regulation and capital formation. The blog provides up to the minute information regarding securities law developments, particularly those related to capital formation. FW&Ps also offers commentary regarding developments affecting private placements, mezzanine or “late stage” private placements, PIPE transactions, IPOs and the IPO market, new financial products and any other securities related topics that pique our and our readers’ interest. Visit [www.freewritings.law/](http://www.freewritings.law/)

Scan here  
with your  
phone to  
visit!



# Additional Resources

*Click each link below to read more:*

- [2021 Proxy and Annual Report Season: Time to Prepare](#)
- [Market Trends 2019/20 COVID-19 from a Securities Law Perspective](#)
- [SEC Staff Guidance on Disclosures and Financial Reporting in Light of COVID-19](#)
- [SEC Amends Business, Legal Proceedings and Risk Factor Disclosures](#)
- [SEC Adopts Significant Changes to MD&A and Related Disclosures](#)

## *Disclaimer*

- These materials are provided by Mayer Brown and reflect information as of the date of presentation.
- The contents are intended to provide a general guide to the subject matter only and should not be treated as a substitute for specific advice concerning individual situations.
- You may not copy or modify the materials or use them for any purpose without our express prior written permission.