

MAYER | BROWN

Georgeson

Preparing for the 2022 US Proxy and Annual Reporting Season

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Virtual Meetings

Virtual Shareholder Meetings

- Virtual shareholder meetings will likely remain part of the annual shareholder meeting landscape
- COVID-19 pandemic accelerated growth in virtual shareholder meetings



As reported in Georgeson's 2021 Annual Corporate Governance Review

- SEC Staff refused to permit exclusion of a shareholder proposal requesting virtual shareholder meetings, stating:
 - “In light of technological progress and public health guidance in light of [COVID-19], in our view the issue of shareholders’ virtual access to annual and special shareholder meetings does not relate to the Company’s ordinary business operations.”

Virtual Meeting Pointers

- Decide on type of meeting early
 - Solely virtual meeting or hybrid virtual meeting with in-person option
 - Type of virtual platform: audio-only or video
- Determine applicable corporate law requirements
 - Are virtual meetings allowed generally or by emergency authorizations?
 - Requirements for making shareholder lists available
- Review governance document requirements
- Book virtual meeting service providers
- Allow for dry runs with the current virtual platforms

Virtual Meeting Proxy Disclosures

- Details on how to access the meeting
- What documentation is needed to vote at the meeting?
- What time does the virtual meeting platform open for log in?
- Is there a telephone number, email address or chat feature to respond to technology issues?
- How are questions and answer sessions being handled?
 - May or must questions be submitted in advance or only during meeting?
 - Must proof of share ownership be submitted with questions?
 - Will Q&A session be held after formal meeting adjourned?

A low-angle, upward-looking photograph of several modern skyscrapers with glass facades. The image is overlaid with a color gradient that transitions from a deep blue on the left to a bright orange on the right. The perspective creates a sense of height and architectural scale.

NYSE Voting Change

Proposed Change to NYSE Rule for Calculating Required Vote

- Section 312.07 of the NYSE Listed Company Manual requires a majority of votes cast standard when shareholder approval is a prerequisite to the listing of any additional or new securities of a listed company
- Historically, the NYSE advised companies that abstentions had to be treated as votes cast for this rule
- The NYSE proposed an amendment specifying that a company must calculate the votes cast in accordance with its governing documents and any applicable state law for the purposes of Section 312.07



Compensation Matters

Say-on-Pay

- Say-on-Pay through September 2021*
 - Russell 3000 companies failure rate is 2.8%
 - S&P 500 companies failure rate is 4.0%
 - 76% of Russell 3000 companies received greater than 90% support
 - Average Say-on-Pay vote result 31% lower with ISS “Against” recommendation than with ISS “For” recommendation
- File with SEC any soliciting materials used to respond to an ISS negative recommendation

**Source: Semler Brossy 2021 Say On Pay & Proxy Results, September 30, 2021*

Perks

- SEC has brought enforcement proceedings where proxy statement failed to disclose perks such as personal use of:
 - Chartered aircraft, corporate aircraft and corporate credit cards
- C&DI 219.05 addressed perk analysis in COVID-19 context
 - Enhanced technology needed to make the executive's home the primary workplace generally not be a perquisite or personal benefit
 - Health-related or personal transportation benefits to address COVID-19 risks may be perquisites or personal benefits if not generally available
- Disclosure controls and internal control over financial reporting must be robust enough to identify perks

COVID-Related Pay Adjustments and Decisions

- To the extent companies have adjusted performance targets due to COVID-19, that should be explained in the CD&A
- Some companies that did not make COVID-19 adjustments discuss that decision in their CD&A
- How COVID-19 impacted targets established during 2021 may be appropriate to discuss in the CD&A
- ISS issued FAQs providing guidance on how it evaluates COVID-19 related pay decisions and the types of disclosures in this area that it views as important

Pay Ratio Disclosure

- A company needs to identify its median employee only once every three years for pay ratio purposes *if no change in its employee population or compensation arrangements that would significantly change the pay ratio disclosure*
 - Consider whether any changes resulting from the COVID-19 pandemic require the median employee to be identified this year
 - Other considerations could include acquisitions, dispositions or reorganizations
- *Explanations of ratio not needed but permitted*



Shareholder Proposals

Amendments to Rule 14a-8

Highlights of the 2020 Amendments

- **Rule 14a-8(b)** revised initial submission thresholds to provide a tiered approach based on amount of shares and duration held
 - \$2,000 in market value of company's securities entitled to vote on the proposal for at least three years
 - \$15,000 in market value of company's securities entitled to vote on the proposal for at least two years
 - \$25,000 in market value of company's securities entitled to vote on the proposal for at least one year
- For meetings to be held before January 1, 2023, shareholders may continue to use the pre-amendment threshold of the \$2,000 in market value for at least one year
- **Rule 14a-8(c)** clarified that a single person may not submit multiple proposals at the same shareholders' meeting, whether as a shareholder or as a representative of a shareholder
- **Rule 14a-8(i)(12)** raised the required level of shareholder support for resubmission at a company's future shareholders' meetings to
 - 5% for matters previously voted on once in the last five years
 - 15% for matters previously voted on twice in the last five years
 - 25% for matters previously voted three or more times in the last five years

Amendments to Rule 14a-8

Other Changes to Rule 14a-8(b)

- No aggregation of holdings to satisfy ownership thresholds
- Shareholder proponent must be available to meet with the company regarding the proposal
- Shareholder using a representative to submit a shareholder proposal must provide specified information indicating knowledge and support of the proposal

New Staff Legal Bulletin 14L: Changes Approach

- SLB 14L issued November 3, 2021
- Rescinded SLB Nos. 14I, 14J and 14K
- Ordinary course of business exclusion
 - Staff will not focus on the nexus between a policy issue and the company
 - Staff will focus on the significance of social policy that is the subject of proposal
 - Human capital management as an example
- Micromanagement
 - Proposals promoting timeframes or methods are not necessarily micromanagement
 - Climate change as an example

New Staff Legal Bulletin 14L: Changes Approach

(cont'd)

- Economic relevance
 - Rule provides for exclusion of proposals
 - involving operations involving less than 5% of total assets and less than 5% of net earnings and gross sales for its most recent fiscal year, and
 - not otherwise significantly related to the company's business
 - SLB 14L provides that proposals that raise issues of broad social or ethical concern related to the company's business may not be excluded, even if the relevant business falls below the economic thresholds
- No need for board analyses for ordinary course or economic relevance no-action requests

New Staff Legal Bulletin 14L: Procedural Guidance

- New email guidance
 - Encouraging senders to seek “read” receipts or other acknowledgements of receipt
 - Encouraging recipients to provide “read” receipts
 - Companies using email for defect notices have burden of proving timely delivery
 - Shareholders responding to defect notice by email must use appropriate email address
- Republished some procedural guidance from rescinded Staff Legal Bulletins
 - Images in shareholder proposals
 - Ownership letters
 - Some changes, primarily technical or conforming in nature

Staff Process for Reviewing 14a-8 No-Action Requests

- 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 stating whether or not it concurs or whether it declines to state a view
 - Indicates if Staff issued a letter
 - Specifies regulatory basis and names of parties
 - Contains links to initial submissions
 - Chart is searchable by column
- Few written no-action letters during 2021 proxy season

Pre-SLB 14L Trends in Shareholder Proposal No-Action Letters

- Among grounds for exclusion that had some success in the 2021 Proxy Season
 - Procedural grounds
 - Substantial implementation
 - More challenging for climate change proposals
 - Ordinary business
 - Micromanagement arguments more difficult for climate change
 - Economic relevance
- Board analyses in some, but not all, Rule 14a-8(i)(7) (ordinary business) and Rule 14a-8(i)(5) (economic relevance) no-action requests



Proxy Voting Advice

Proxy Voting Advice Amendments

- SEC amended its proxy solicitation rules, codifying guidance that voting advice produced by proxy advisors generally constitutes a solicitation under the proxy rules
 - failure to disclose material information regarding proxy voting advice could cause such advice to be misleading in violation of the proxy rules
- Amendments became effective on November 2, 2020, but proxy advisors were given until December 1, 2021, to comply with new conditions to exemptions from the proxy rules' information and filing requirements that proxy advisors typically have relied upon

Reconsideration of Proxy Voting Advice Amendments

- In June 2021, SEC Chair Gensler directed the Staff to revisit the proxy voting advice amendments and consider further regulatory action
- Corp/Fin will not recommend enforcement action based on the amendments/guidance while the SEC is considering further action
- Corp/Fin also won't recommend enforcement action based on conditions to exemptions
 - for a "reasonable period of time" after any resumption by ISS of its litigation challenging the amendments and guidance
- National Association of Manufacturers recently sued SEC for unlawful suspending a duly adopted rule

SEC Action Scheduled for November 17, 2021

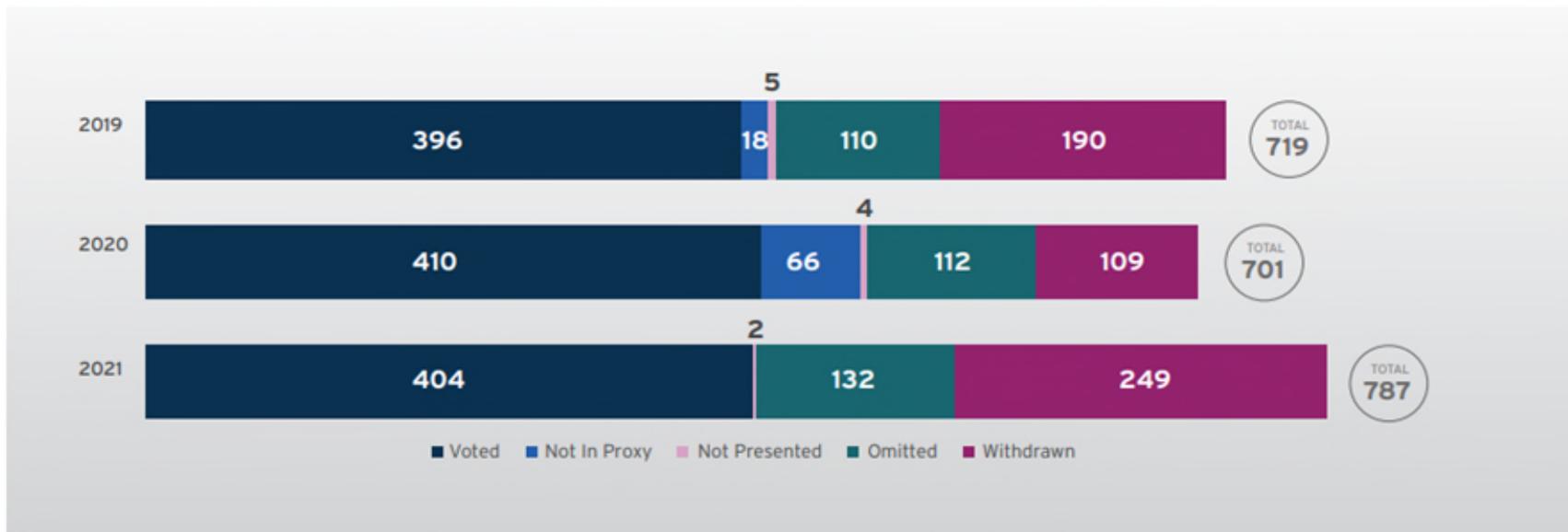
- Proxy voting advice
 - SEC to consider proposed amendments to proxy rules governing proxy voting advice
- Universal proxy
 - SEC to consider adoption of rules relating to use of universal proxy cards and related disclosures in director elections
 - Universal proxy proposal was issued in 2016
 - Comment period for universal proxy proposal was reopened in April 2021



Shareholder Proposals & Investor Expectations for 2022

128% Increase in Shareholder Proposals Withdrawn in 2021 Proxy Season

S&P 1500 SHAREHOLDER PROPOSAL ACTIVITY, 2019-2021

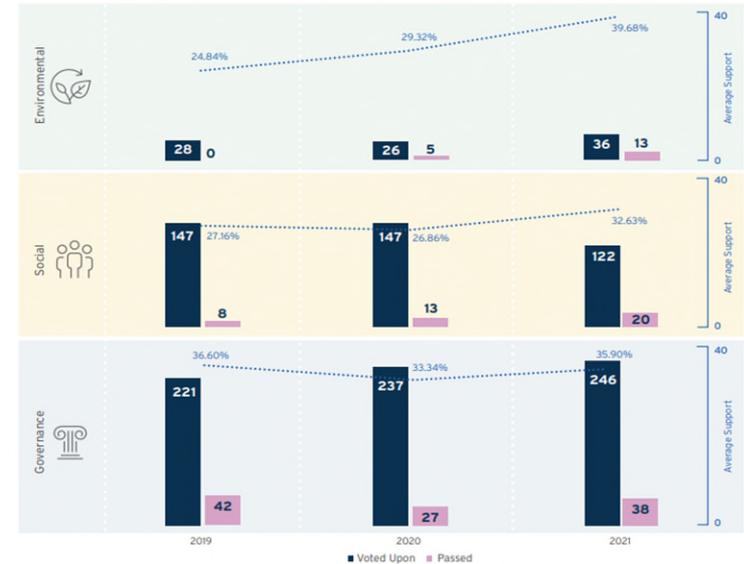


Groundbreaking ESG Shareholder Proposal Activity in the 2021 Proxy Season

S&P 1500 Shareholder Proposals Submitted and Voted, 2019-2021



S&P 1500 Shareholder Proposals Voted and Average Support, 2019-2021



A total of 787 proposals submitted, with increased average support across environmental, social and governance proposals

Top Shareholder Proponents in 2021

S&P 1500 Shareholder Proposals Submitted and Voted, 2019-2021

PROPONENT	TOTAL SUBMISSIONS	ENVIRONMENTAL 	SOCIAL 	GOVERNANCE 
Chevedden Group	252	2	24	226
As You Sow Foundation	79	38	39	2
NYC Comptroller/NYC Employees/NYC Pension	46	1	41	4
Mercy Investment Services	31	12	16	3
Comptroller of the State of New York/New York State Common Retirement Fund	28	6	17	5
National Center for Public Policy Research	20	0	13	7
Trillium Asset Management	20	3	15	2
Green Century Capital Management	19	19	0	0
Calvert Research & Management	18	1	17	0
Service Employees International Union/SEIU	14	0	14	0
Benedictine Sisters of Mount St. Scholastica	14	1	11	2
Arjuna Capital	14	2	10	2
The Sisters of St. Francis, Philadelphia	14	2	9	3

⁹ Includes John Chevedden, Kenneth Steiner, William Steiner, Myra Young and James McRitchie.

¹⁰ Includes proposals where the proponent was either a lead or co-filer, and aggregates proposals filed by pensions within each of the New York City and New York State pension systems.

Record Breaking Number of E&S Proposals Passed

S&P 1500 Social Proposals That Passed, 2021

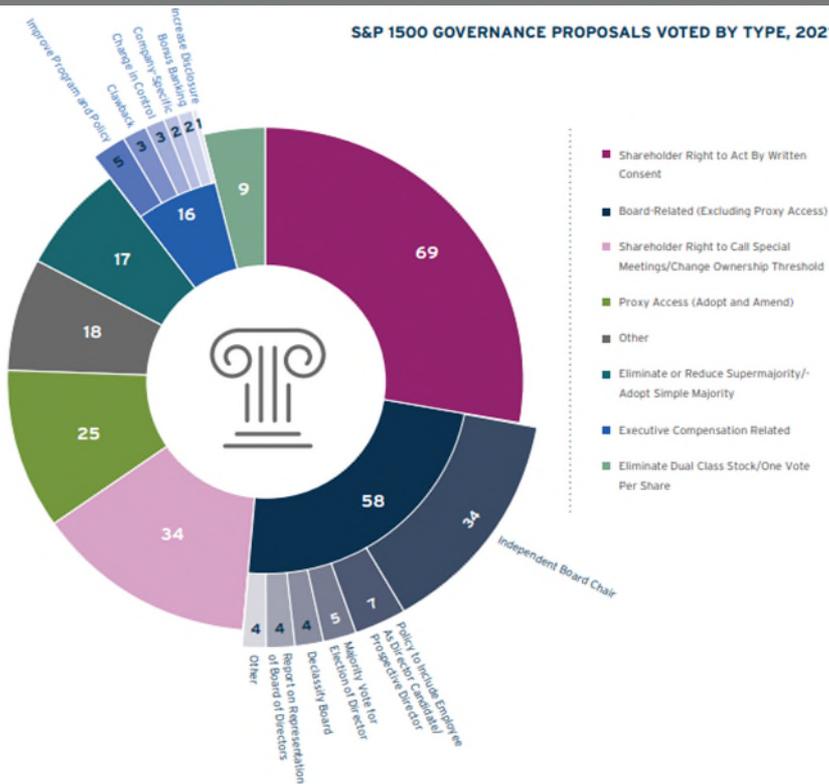


S&P 1500 Environmental Proposals Voted That Passed, 2021

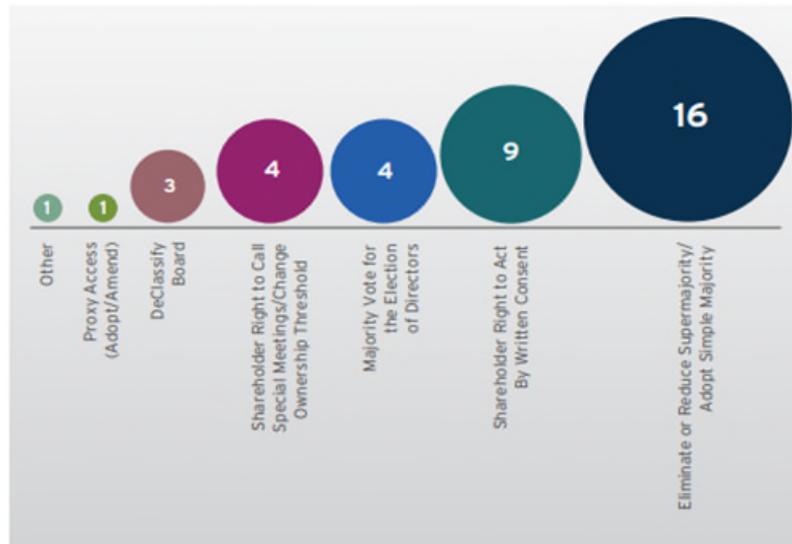


Governance Proposal Activity Consistent with Prior Years

S&P 1500 GOVERNANCE PROPOSALS VOTED BY TYPE, 2021



S&P 1500 Governance Proposals That Passed



Investors are increasing their focus on and support of E&S issues

Environmental Proposals	For Votes 2019	For Votes 2020	For Votes 2021
BlackRock	14.8%	13.3%	48.6%
Vanguard	12%	20.7%	43.2%
State Street	16%	46.7%	54.1%
Capital Group	5.3%	5%	34.5%

Diversity Proposals	For Votes 2019	For Votes 2020	For Votes 2021
BlackRock	0%	17.6%	81.3%
Vanguard	16.7%	35.3%	75%
State Street	41.7%	35.3%	56.3%
Capital Group	25%	22.2%	75%

2022 Proxy Season Outlook

- Expected Active Season That Will Build on 2021's Momentum
- Scorecards and ratings demonstrate new and evolving focus areas
- Climate Transition Reporting
- Examination of ESG risks in supply chains

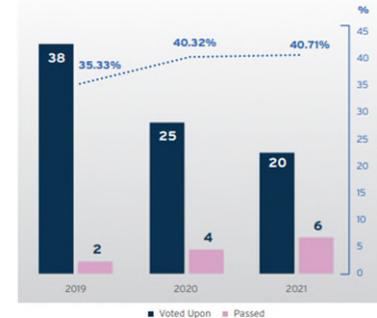
2022 Proxy Season Outlook

- Political Spending Remains High on Investor Agendas

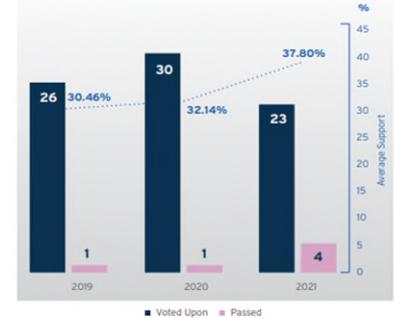
Historical Institutional Investor Voting Decisions, Political Lobbying and Contributions Proposals, 2019-2021



S&P 1500 POLITICAL CONTRIBUTIONS PROPOSALS VOTED, 2019-2021



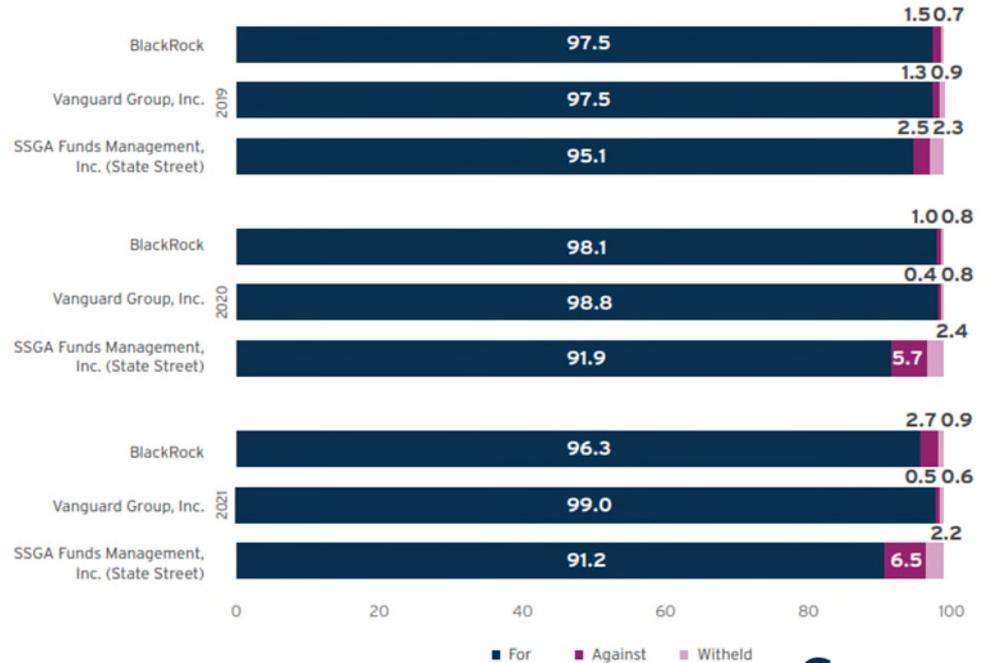
S&P 1500 POLITICAL LOBBYING PROPOSALS VOTED, 2019-2021



2022 Proxy Season Outlook

- Diversity at All Organizational Levels Continues as a Focus
- Impact to Director Elections related to Board Risk Oversight of Environmental and Social issues

S&P 500- BLACKROCK, VANGUARD, STATE STREET DIRECTOR ELECTION VOTING, 2019-2021





ESG Considerations

SEC Developments Relating to ESG Disclosures

- Division of Corporation Finance Climate Change Comment Letters
- Enforcement Climate and ESG Task Force: “The initial focus will be to identify any material gaps or misstatements in issuers’ disclosure of climate risks under existing rules.”
- Rulemaking on the Horizon
 - Disclosure relating to climate risk
 - Disclosure relating to human capital, including workforce diversity
 - Disclosure relating to corporate board diversity

Disclosure Strategy: Form 10-K vs. Proxy Statement vs. CSR Report

- Many companies limit the ESG disclosure in the Form 10-K to that which is material
 - While the recently added line item in Regulation S-K concerning human capital is qualified by a materiality standard (i.e., it was always required to be disclosed if material), many companies appear to have added disclosure this past year in response to the amended rule
 - As this was the first year many companies added disclosure, it is fairly varied and company-specific
 - Topics include: diversity and inclusion, employee development and training, workplace safety, extensive headcount data, and employee benefits
- The proxy statement is often used as an opportunity to provide more information about the company's ESG focus in the context of board diversity and the company's environmental efforts. Disclosure is usually drafted in a way that communicates the information to interested shareholders without implying that it is important to how management runs the business
- A Corporate Social Responsibility report is further opportunity to provide ESG information that is not material but may be of interest to investors and other stakeholders

Regulation S-K Item 101

- Item 101(c)(2): Discuss the information specified in paragraphs (c)(2)(i) and (ii) of this section with respect to, and **to the extent material** to an understanding of, the registrant's business taken as a whole, except that, if the information is material to a particular segment, you should additionally identify that segment.
 - (i) The **material effects** that compliance with government regulations, including environmental regulations, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries, including the estimated capital expenditures for environmental control facilities for the current fiscal year and any other material subsequent period; and
 - (ii) A description of the registrant's human capital resources, including the number of persons employed by the registrant, and any human capital **measures or objectives that the registrant focuses on in managing the business** (such as, depending on the nature of the registrant's business and workforce, measures or objectives that address the development, attraction and retention of personnel).

Nasdaq Board Diversity Standards

- New rules require Nasdaq-listed companies to have, or to explain why they do not have, at least two diverse directors, including:
 1. At least one director who self-identifies as female (regardless of designation at birth) *and*
 2. At least one director who self-identifies as either an “underrepresented minority” or as LGBTQ+
- Nasdaq-listed companies are also required to annually disclose directors’ self-identified gender, race and ethnicity (i.e., African American or Black, Alaskan Native or Native American, Asian, Hispanic or Latinx, Native Hawaiian or Pacific Islander, White, or Two or More Races or Ethnicities) and LGBTQ+ status in a standardized board diversity matrix

California Board Diversity Requirements

- Senate Bill No. 826 (2018): Requires all publicly-held corporations whose principal executive offices (according to their Form 10-K filing) are located in California to have *at least one* female director on their boards
- Assembly Bill No. 979: Requires all publicly-held corporations whose principal executive offices (according to their Form 10-K filing) are located in California to have at least one director from an “underrepresented community” on their boards
- Considerations:
 - The number increases as the board size increases
 - The California Secretary of State publishes a yearly report that tracks compliance
 - Fines imposed for violations



D&O Questionnaires; Annual Report Matters

D&O Questionnaires

- Diversity disclosure
 - Nasdaq diversity matrix
 - State-specific mandates
 - Voluntary disclosure

- Diversity question considerations
 - Anticipate additional regulation
 - Data privacy issues

Board Diversity Matrix (As of April 27, 2021)

Total Number of Directors				10
	Female	Male	Non-Binary	Did Not Disclose Gender
Part I: Gender Identity				
Directors	3	7	-	-
Part II: Demographic Background				
African American or Black	-	1	-	-
Alaskan Native or Native American	-	-	-	-
Asian	-	-	-	-
Hispanic or Latinx	-	-	-	-
Native Hawaiian or Pacific Islander	-	-	-	-
White	3	6	-	-
Two or More Races or Ethnicities	-	-	-	-
LGBTQ+	-	-	-	-
Did Not Disclose Demographic Background	-	-	-	-

D&O Questionnaires *(cont'd)*

- Related Party Transactions
 - NYSE Listed Company Manual Section 314.00 amendments (and subsequent revisions)
 - Consider supplemental or revised question to address the “prior” review requirement
 - Consider whether proxy statement requires revision to reflect any revised approval procedures
- Update all dates and lookback periods
- Carefully review responses and request follow-up information, if needed

Risk Factor Disclosure

- Regulation S-K 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”

Risk Factor Disclosure *(cont'd)*

- SEC focus on cybersecurity and data privacy disclosure and risks
 - Regulatory agenda and increasing SEC enforcement actions
- Other topics
 - Climate change
 - COVID-19
 - Labor/supply shortages
 - Intellectual property and technology
 - LIBOR transition
- Update hypothetical risks that have actually occurred

MD&A Amendments

- New Regulation S-K Item 303(a) – Objective
- New Regulation S-K 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 Regulation S-K Item 303(c) – Interim periods

Other Form 10-K Reminders

- Regulation S-K Item 301 – Selected Financial Data – eliminated
- Regulation S-K 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
- New Item 9C “Disclosure Regarding Foreign Jurisdictions that Prevent Inspections”
 - Disclosure required if issuer’s registered public accounting firm has a branch or office in a foreign jurisdiction where the PCAOB has determined it is unable to inspect or investigate completely because of a position taken by an authority in the foreign jurisdiction
 - If not applicable, still include Item 9C and indicate “not applicable”

Electronic Signatures

- 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 (the “initial electronic signature authentication document”)
 - Must retain this initial electronic signature authentication document for as long as the signatory may use an electronic signature to sign an authentication document *and* at least seven years after the date of the most recent electronically signed authentication document

Electronic Signatures *(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

Additional Resources

Mayer Brown Legal Updates:

- [SEC Staff Issues Legal Bulletin Announcing Shift in Shareholder Proposal Review Process Ahead of 2022 Proxy Season](#)
- [2022 Proxy and Annual Report Season: The Time to Get Started Is Now](#)
- [SEC Approves Nasdaq Board Diversity Rule](#)
- [SEC Revisiting Applicability of Proxy Rules to Proxy Voting Advice by Advisory Firms](#)
- [SEC Reopens Universal Proxy Comment Period](#)



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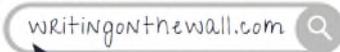
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EYE ON ESG

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