

January 26, 2022

Key Considerations for Fiscal Year 2021 Form 10-K and 20-F Filings

Disclosure Trends and Form Considerations

SUMMARY

As companies prepare to file their annual reports on Form 10-K and Form 20-F for fiscal year 2021, they should consider recent and upcoming changes to the disclosure rules of the Securities and Exchange Commission (“SEC”), SEC guidance and trending disclosure topics. This memorandum summarizes several of those disclosure considerations and highlights the key changes to SEC rules that will affect Form 10-K and 20-F filings this upcoming reporting season.¹

GENERAL DISCLOSURE TRENDS

Companies should consider a number of disclosure topics that continue to receive SEC and investor attention and evaluate whether their disclosures adequately address those matters.

COVID-19. In light of the ongoing impacts of the COVID-19 pandemic, companies should continue to carefully consider their disclosure regarding any impacts of the pandemic on their businesses. Guidance issued by the SEC staff in March and June 2020 continues to apply to most companies.² That guidance encourages companies to address the impact of the COVID-19 pandemic on their business and financial condition, including their liquidity and capital resources.³ The SEC staff also indicated that disclosures should enable an investor to understand how management and the Board of Directors are analyzing the current and expected impacts of COVID-19 and that companies should proactively revise and update disclosures as facts and circumstances change.⁴ In December 2021, Matthew Jacques, the Chief Accountant in the SEC’s Division of Enforcement, noted that the COVID-19 pandemic continues to impact financial reporting and reminded companies to continue to consider the effects of the pandemic on their

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internal controls over financial reporting (“ICFR”) and disclosure controls and procedures, including modifications resulting from the continued remote working arrangements.⁵

In December 2020, the SEC settled charges against The Cheesecake Factory Incorporated for making misleading disclosures about the impact of COVID-19 on its business operations and financial condition.⁶ As noted in the SEC’s order, The Cheesecake Factory had stated publicly that its restaurants were “operating sustainably” during the COVID-19 pandemic, and, according to the order, the company’s SEC filings were materially false and misleading because internal documents at the time showed that the company was losing approximately \$6 million in cash per week and that it projected that it had only 16 weeks of cash remaining. The SEC also reaffirmed that it is closely monitoring COVID-19-related disclosures and will recommend actions against companies that make inadequate or misleading disclosures.

In preparing their Form 10-K or 20-F filings, companies should continue to consider such matters as:

- the impact and expected future impact of the COVID-19 pandemic on their financial condition, results of operations, capital and financial resources and liquidity;
- any material operational challenges that management is monitoring and evaluating and the extent their operations have been altered to deal with any such challenges;
- any material impacts on their supply chains or distribution channels;
- any material impairments, increases in allowances for credit losses or restructuring charges and whether any material changes to their accounting judgments are anticipated;
- any challenges in implementing their business continuity plans;
- any material effects on demand for their products or services;
- any inability to access traditional funding sources on the same or reasonably similar terms as were available prior to the COVID-19 pandemic;
- any risk of not meeting covenants in any credit or other agreements;
- their ability to timely service their debt and other obligations; and
- any changes to terms with their customers, such as extended payment terms or concessions.

Environment and Climate. Environmental and climate-related disclosures have continued to receive substantial attention from the SEC. In February 2021, the then-Acting SEC Chair Allison Lee issued a public statement directing the SEC’s Division of Corporation Finance to enhance its focus on climate-related disclosures in public company filings.⁷ In March 2021, Acting SEC Chair Lee issued a further public statement instructing the SEC staff to evaluate existing disclosure rules “with an eye toward facilitating the disclosure of consistent, comparable, and reliable information on climate change”.⁸ As part of this assessment, Acting Chair Lee set forth 15 categories of questions—over 50 questions in total—on which the SEC solicited public input.⁹ Also in March 2021, the SEC announced the creation of a Climate and

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ESG Task Force within the SEC's Division of Enforcement to initially focus on identifying any material gaps or misstatements in a company's disclosure of climate risks under the SEC's existing rules.

In July 2021, the SEC Chair Gary Gensler provided some insight into the SEC's approach to crafting new climate-related risk disclosure rules. It is anticipated that the new rules, which have not yet been announced, will be a major change from the SEC's existing principles-based approach, set out in its 2010 guidance on climate risk disclosure.¹⁰ Chair Gensler's comments provided an early indication of the SEC's likely approach to certain key disclosure questions. Of particular note are the following:¹¹

- **Content:** Disclosures should be mandatory and contain sufficient detail for investors to gain consistent, comparable and decision-useful information. Chair Gensler noted that the SEC staff should consider both qualitative and quantitative disclosures. Quantitative disclosures could include metrics relating to greenhouse gases, financial impacts of climate change and progress towards climate-related goals, while qualitative disclosures could answer key questions such as how the company's leadership manages climate-related risks and opportunities and how these factors feed into the company's strategy.
- **Location of disclosure:** The SEC staff is to consider whether climate disclosure should be filed in a company's annual report alongside other information that investors use to make investment decisions. Companies that include climate-related disclosure in their annual or other reports filed with the SEC would potentially have greater liability exposure for those statements.
- **Comparability and Consistency:** While the SEC previously sought input on incorporating existing climate disclosure frameworks, notably the framework developed by the Task Force on Climate-related Financial Disclosures, Chair Gensler's remarks suggest the SEC is considering taking a more independent approach to rulemaking.

During 2021, the SEC staff increased its review of companies' compliance with the existing 2010 guidance on climate risk disclosure and issued comment letters to SEC registrants exclusively related to the climate change disclosures included in their SEC filings. In September 2021, the SEC's Division of Corporation Finance published a sample letter to companies, setting out sample comments that the SEC could issue to companies regarding their climate-related disclosure or the absence of such disclosure.¹² As stated in the sample letter, depending on the particular facts and circumstances, such disclosure may be required as part of a company's description of its business, legal proceedings, risk factors, and management's discussion and analysis of financial condition and results of operations. The sample letter also contains comments asking companies to advise "what consideration you gave to providing the same type of climate-related disclosure in your SEC filings as you provided in your [corporate social responsibility] report" and to "revise your disclosure to identify material pending or existing climate change-related legislation, regulations, and international accords and describe any material effect on your business, financial condition, and results of operations".¹³

In December 2021, the SEC's Acting Chief Accountant Paul Munter issued a statement reminding companies of the importance of presenting high quality financial information to investors and highlighting,

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among other matters, climate risk disclosures as potentially having an impact on accounting and auditing matters.¹⁴

In light of these developments, companies should evaluate carefully their climate-related disclosures, whether in SEC filings or otherwise, and how developments in this space may impact their disclosures in the future, including the extent to which their climate-related disclosures may have an impact on accounting or auditing matters. In particular, companies should ensure that all climate-related disclosures, including newly announced initiatives or commitments, whether currently mandated or voluntarily provided, are subject to robust disclosure controls and procedures and are consistent with climate disclosures that the company is making elsewhere.

Cybersecurity. The SEC continues to consider cybersecurity a key area of risk for companies. The SEC staff reviews and comments on cybersecurity-related disclosures as part of its reviews of filings by SEC registrants, including those relating to board risk oversight, disclosure controls and procedures and insider trading policies. The SEC staff monitors news reports of cyber breaches to assist in this process.

In January 2022, Chair Gensler emphasized the importance of cybersecurity policy at the SEC and foreshadowed opportunities to modernize and expand disclosure rules.¹⁵ Chair Gensler also noted that he has asked the SEC staff to make recommendations around companies' cybersecurity practices and cybersecurity risk disclosures, including whether and how to update disclosures when cybersecurity events occur, and emphasized that companies and investors would benefit if such disclosure were presented in a consistent, comparable and decision-useful manner.

Several SEC enforcement actions during 2021, summarized below, highlight the SEC's focus on the timely escalation and remediation of cybersecurity risks and incidents.

In June 2021, the SEC settled charges against a company that provides title insurance and settlement services to the real estate and mortgage industries related to a cybersecurity vulnerability that exposed sensitive customer information, such as social security (tax identification) numbers and financial information.¹⁶ The SEC's order found that the company had failed to maintain disclosure controls and procedures designed to ensure that all available, relevant information concerning the vulnerability was analyzed for disclosure in the company's reports filed with the SEC.

In August 2021, the SEC settled charges against a company that provides educational publishing and other services for misleading investors about a cybersecurity incident that involved the theft of student records and inadequate disclosure controls and procedures.¹⁷ The company had disclosed a data privacy incident as a hypothetical risk in its public filings and that it had "strict protections" in place, when the SEC indicated it had failed to patch the critical vulnerability for six months after it was notified of the incident. The order also found that the company's disclosure controls and procedures were not designed to ensure that those

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responsible for making disclosure determinations were informed of certain information about the circumstances surrounding the breach.

Also in August 2021, the SEC sanctioned eight firms in three separate actions for failures in their cybersecurity policies and procedures that resulted in email account takeovers exposing the personal information of the firms' clients and customers.¹⁸

Companies should continue to include disclosure regarding cybersecurity controls and procedures, including in the risk factors related to the potential harm of cybersecurity incidents to a company's business, and discussion in the management's discussion and analysis of financial condition and results of operations ("MD&A") where cybersecurity events or compliance costs have had or are expected to have a material effect on the company's financial condition or results of operations. Companies should also consider whether changes in their business and operations—such as entering into new lines of business or changing business processes or practices—could have a material effect on their risk exposure to cybersecurity incidents.

Given the SEC's—as well as other U.S. regulators'—heightened focus on cybersecurity, companies should review their policies and disclosure controls and procedures to assess whether they provide for the timely escalation of cybersecurity incidents and vulnerabilities by "line" cybersecurity personnel to more senior personnel and those responsible for making disclosures. Companies should also ensure that they maintain and follow appropriate policies for vulnerability and patch management, as well as cyber incident response.

LIBOR Transition. Financial regulators, industry groups and companies continue to work on transition efforts in connection with the discontinuation of the London Interbank Offered Rate ("LIBOR"). In March 2021, the Intercontinental Exchange Benchmark Administration, the administrator of LIBOR regulated and authorized by the United Kingdom's Financial Conduct Authority, announced cessation dates for the vast majority of USD LIBOR tenors.¹⁹ The one-week and two-month USD LIBOR settings ceased on December 31, 2021, while the overnight, one-month, three-month, six-month and 12-month USD LIBOR settings will cease in mid-2023.

In December 2021, the SEC staff issued its latest statement on the LIBOR transition process, which included disclosure considerations related to LIBOR transition.²⁰ The SEC staff highlighted the importance of keeping investors informed about LIBOR risk identification and mitigation and any anticipated material impact on the company. Companies were encouraged to provide qualitative disclosures and, when material, quantitative disclosures, such as the notional value of contracts referencing LIBOR and extending past December 31, 2021, or June 30, 2023, as applicable, to provide context for the status of the company's transition efforts and related risks. In addition, the SEC staff noted that since many companies include disclosures about LIBOR transition in different parts of their reports, they should consider providing cross-

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references or otherwise summarizing or tying the information together, in order to provide investors with a complete and clear view of the company's LIBOR transition status.

Non-GAAP Financial and Other Performance Measures. The SEC continues to focus on non-GAAP financial reporting, use of other performance measures and compliance with the SEC staff's interpretive guidance.²¹ The impact of the COVID-19 pandemic has reaffirmed this focus and the SEC has expressly commented on non-GAAP adjustments related to the effects of the COVID-19 pandemic.²² The SEC also issued guidance reminding companies to accurately define and disclose any metrics, to consider whether they have effective controls and procedures for such metrics, and to include such further information as may be necessary in order to make the presentation of any metric, in light of the circumstances under which it is presented, not misleading.²³

Promotion of High Quality Financial Reporting. In December 2021, Acting Chief Accountant Munter issued a statement emphasizing the SEC's continued focus on maintaining and promoting high quality financial reporting for the benefit of investors and reminding companies of the strong link between high quality reporting and the effectiveness of a company's ICFR and disclosure controls and procedures.²⁴ Acting Chief Accountant Munter noted that "responsibility for high quality financial reporting, including high quality financial statements, rests in the first instance with management", and emphasized "the importance of making well-reasoned and supported judgments" and that management should also ensure that significant judgments and estimates are disclosed "in a clear and transparent manner". The statement also emphasizes the importance of identifying and disclosing material weaknesses in ICFR before they become evident in restatements or reissuances, and encourages ongoing close attention, including audit committee participation, regarding the adequacy and basis for a company's effectiveness assessment.

Sanctions. The Treasury Department's Office of Foreign Assets Control continues to administer and enforce comprehensive sanctions with respect to Cuba, Iran, North Korea, Syria and the Crimea region of Ukraine, as well as against targeted individuals and entities involved in narcotics trafficking, terrorism and terrorist financing, transnational crime, proliferation of weapons of mass destruction, malicious cyber activities and election interference, corruption and human rights abuses. Over the course of 2021, the Biden administration authorized various new sanctions and export-control restrictions on certain Burmese military leaders and entities affiliated with the country's military. In addition, in June 2021, the Biden administration issued an executive order²⁵ amending and otherwise clarifying certain restrictions on transactions involving publicly traded securities of identified Chinese military companies previously introduced by the Trump administration.²⁶ To the extent a company has business in sanctioned countries (even if permissible without violating applicable U.S. law) or with identified entities, it should consider whether disclosure of such activities in its SEC reports may be appropriate.

Other Disclosures. Companies should also consider their disclosure focusing on other issues that are receiving increasing attention, such as exposure to government investigations and related liabilities, supply chain disruptions, tariffs and global trade uncertainties, if they have impacted the company or present material risks.

SEC RULE AMENDMENTS

Summarized below are changes to the SEC's forms and disclosure requirements that may be applicable to companies as they prepare their Form 10-K and 20-F filings for fiscal year 2021.

Compliance with Amendments to Regulation S-K Now Required. On November 19, 2020, the SEC adopted amendments²⁷ to modernize, simplify and enhance disclosure requirements in Regulation S-K under the Securities Act of 1933, as amended. Although voluntary early compliance was permitted, the new disclosure rules must be complied with beginning with the first fiscal year ending on or after August 9, 2021.

The amendments address multiple items of Regulation S-K and related rules.²⁸ Of particular note are the following:

- **Selected Financial Data (Item 301).** The disclosure of five years of selected financial data is no longer required.
- **Selected Quarterly Financial Data (Item 302(a)).** The disclosure of two years of selected quarterly financial data is no longer required. The amendments include a streamlined requirement to disclose material retrospective changes to the income statement for any of the quarters within the company's two most recent fiscal years and any subsequent interim period, together with an explanation of the reasons for the changes and summarized financial information for the income statement and earnings per share reflecting the changes.
- **Tabular disclosure of contractual obligations (Item 303(a)(5)).** A contractual obligations table is no longer required given the amended disclosure requirements for liquidity and capital resources disclosure and the overlap with information required in the financial statements.
- **MD&A (Item 303).** Among other matters, the amendments: (i) highlight that the general purpose of the MD&A disclosure is to provide both historical and prospective analysis of the company's financial condition and results of operations, with particular emphasis on the company's prospects; (ii) introduce a principles-based instruction to discuss off-balance sheet arrangements in the broader context of the MD&A; (iii) codify existing SEC guidance on critical accounting estimates disclosure and (iv) revise the interim MD&A requirement to provide flexibility by allowing companies to compare the results of operations for their most recently completed quarter to either the corresponding quarter of the prior year or to the immediately preceding quarter.

Certain corresponding amendments that apply to foreign private issuers ("FPIs") providing disclosure required by Form 20-F have also come into effect, including the elimination of the requirement to provide five years of selected financial data (Item 3.A of Form 20-F and the related instructions) and the amendments to Item 5 of Form 20-F. Certain corresponding amendments also apply to eligible Canadian

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FPIs providing disclosure required by Form 40-F that use Canadian disclosure documents to satisfy the SEC's registration and disclosure requirements.

Amendments to Confidential Treatment of Exhibits. Final rules became effective on March 31, 2021, that, among other matters, update the standard for redacting confidential information in exhibits filed with the SEC.²⁹ In particular, the final rules amend Items 601(b)(2)(ii) and 602(b)(10)(iv) of Regulation S-K and Instruction 4(a)(ii) of Instructions as to Exhibits in Form 20-F by removing the "competitive harm" standard and permitting companies to redact information that they both customarily and actually treat as private or confidential, as long as the omitted information is also not material. When redacting information, companies should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and is the type that the company treats as private or confidential. If requested by the SEC staff, companies must promptly provide an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses.

XBRL Updates. Accelerated and large accelerated U.S. GAAP filers were previously required to comply with the requirements to use Inline eXtensible Business Reporting Language ("Inline XBRL") for operating company financial statement information and fund risk/return summary information.³⁰ In accordance with the phased-in compliance period, all other filers, including FPIs that prepare financial statements in accordance with the International Financial Reporting Standards as adopted by the International Accounting Standards Board, are required to comply with the Inline XBRL amendments for fiscal periods ending on or after June 15, 2021.

Compliance with Update and Expansion of Statistical Disclosure Requirements for Banking Registrants. On September 11, 2020, the SEC adopted rules updating and expanding the statistical disclosures that bank holding companies, banks, savings and loan holding companies, and savings and loan associations provide to investors.³¹ These rules rescind Industry Guide 3, *Statistical Disclosure by Bank Holding Companies*, and codify the updated disclosure requirements in a new Subpart 1400 of Regulation S-K.³² Such registrants, including FPIs, are required to apply the updated disclosure requirements beginning with the first fiscal year ending on or after December 15, 2021.

Modernization of Disclosure for Registered Mining Companies. In 2018, the SEC adopted amendments to Regulation S-K disclosure requirements that rescind Industry Guide 7, *Description of Property by Issuers Engaged or to be Engaged in Significant Mining Operations*, and consolidate and codify the new disclosure requirements in Subpart 1300 of Regulation S-K.³³ Companies with material mining operations are required to comply with the new disclosure requirements beginning with their first fiscal year beginning on or after January 1, 2021.

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Simplified Disclosure Requirements for Issuers of Guaranteed and Collateralized Securities. On March 2, 2020, the SEC adopted final rules amending the financial disclosure requirements for guarantors, issuers of guaranteed securities and affiliates whose securities collateralize a registrant's securities.³⁴ The amended rules became effective for fiscal years ending after January 4, 2021.

The amendments revise Rules 3-10 and 3-16 of Regulation S-X, and relocate part of Rule 3-10 and all of Rule 3-16 to a new Article 13 in Regulation S-X.³⁵ The amendments also create new exhibit requirements to identify (i) each subsidiary that is a guarantor, issuer, or co-issuer of each guaranteed security that the parent company issues or guarantees and (ii) each affiliate whose security is pledged as collateral, as well as the identification of the security or securities pledged as collateral.³⁶ As companies implement the amended disclosure requirements, they should consider in particular:

- preparing the required supplemental financial and non-financial disclosure about any subsidiaries of the issuer and/or guarantors and the guarantees;
- how to present the exclusion of non-issuer and non-guarantor subsidiaries from the summarized financial information pursuant to Rule 13-01(a)(4); and
- the location of the amended disclosure—whether to provide the disclosure in the audited or unaudited interim financial statements (subject to annual audit, interim review, internal control over financial reporting requirements and XBRL tagging requirements), as the case may be, or in the MD&A.

ADDITIONAL CONSIDERATIONS FOR THE FISCAL YEAR 2021 REPORTING SEASON AND BEYOND

Companies should also consider the following items when preparing reports for the fiscal year 2021 and beyond.

Changes to Financial Disclosures Relating to Acquisitions and Dispositions. On May 21, 2020, the SEC adopted amendments to the rules requiring financial statements of businesses acquired or to be acquired and for business dispositions.³⁷ These amendments are required to be complied with for fiscal years beginning after December 31, 2020.³⁸

Among other items, the amendments modify the “significance” tests under Rules 1-02(w) (which defines a “significant subsidiary”) and 11-01 of Regulation S-X by:

- revising the “investment test” to compare the company’s investment in and advances to the acquired or disposed business to the company’s aggregate worldwide market value, if available;
- revising the “income test” by adding a new revenue component that compares the total revenue from continuing operations (after intercompany eliminations) of the acquired business to the total revenue (after intercompany eliminations) of the company in its most recent fiscal year;
- expanding the use of pro forma financial information in measuring “significance”; and

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- conforming the “significance” threshold and tests for disposed businesses to those used for acquired businesses.

Changes to Disclosures for Companies With Auditors Not Subject to PCAOB Inspection. On March 18, 2021, the SEC adopted interim final rules³⁹ and on December 2, 2021, final amendments⁴⁰ to implement the submission and disclosure requirements of the Holding Foreign Companies Accountable Act (the “HFCA Act”).⁴¹ The amended rules will apply to companies that have been identified by the SEC as having filed an annual report with an audit report issued by a registered public accounting firm that is located in a foreign jurisdiction and that the PCAOB is unable to inspect or investigate. The earliest that the SEC could identify a company would be after it files its annual report for fiscal year 2021. A company that is so identified by the SEC will be required to comply with the submission and disclosure requirements in the annual report for each year in which it was so identified. This means that, if a company is identified based on its annual report for its fiscal year ended December 31, 2021 filed in 2022, the company will be required to comply with the submission and, if applicable, the disclosure requirements in its annual report covering its fiscal year ending December 31, 2022.

Proposed New Requirements for Insider Trading Plans and Company Share Repurchases. In December 2021 and January 2022, the SEC proposed amendments⁴² that would, among other matters, (i) impose new disclosure requirements regarding insider trading plans, including insider trading policies applicable to directors, officers and employees of the company,⁴³ and (ii) enhance the disclosure requirements around company share repurchases.⁴⁴ In connection with issuer share repurchases, the amendments would include (i) a requirement to furnish a proposed new Form SR within one business day after execution of a share repurchase order, which would contain disclosure about the share repurchase in tabular format; and (ii) additional disclosure of (x) the object or rationale for each repurchase plan or program and the process or criteria used to determine the amount of repurchases and (y) any policies and procedures relating to purchases and sales of the company’s securities by its officers and directors during a repurchase program, including any restrictions on such transactions. If adopted, the proposed rules on reporting and disclosure for share repurchases would also extend to FPIs, who would be required to furnish the proposed new Form SR and subject to enhanced annual disclosure requirements for share repurchases under the proposed amendments to Item 16E of Form 20-F. FPIs would also be subject to annual disclosure of insider trading policies and procedures under a proposed new Item 16J in Form 20-F, if adopted, and such disclosure would be subject to the officer certifications required by Section 302 of the Sarbanes-Oxley Act of 2002.⁴⁵ The comment period for the proposed amendments is expected to conclude in early March 2022.

Proposed Amendments to EDGAR Filing Software and Filing Requirements. The SEC proposed amendments on November 4, 2021, to update filing requirements under its EDGAR system.⁴⁶ Among other matters the proposed amendments would (i) mandate the electronic filing or submission of most of the

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documents that are currently permitted electronic submissions under Regulation S-T, including all filings made by FPIs on Form 6-K, (ii) mandate the electronic submission in PDF format of the “glossy” annual reports provided to securityholders, and (iii) allow for the electronic submission in PDF format of certain foreign language documents. The comment period for the proposed amendments concluded on December 22, 2021. While the final rules have not yet been adopted, it is possible that these amendments will apply during the fiscal year 2021 reporting season.

Nasdaq Board Diversity Requirements. On August 6, 2021, the SEC approved the Nasdaq’s proposed rules changes relating to board diversity and disclosure.⁴⁷ The new rules will require each Nasdaq-listed company, subject to certain exceptions, to have at least two diverse board members or explain why it does not. The new standards will also require disclosure, in an aggregated form, of information on the voluntary self-identified gender, racial characteristics and LGBTQ+ status of the company’s board, with the initial disclosure of a “board matrix” by August 2022.⁴⁸ FPIs can meet the diversity objective with two female directors, or with one female director and one director who is an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the FPI’s principal executive offices, or LGBTQ+. Companies with five or fewer directors can meet the diversity objective by having at least one diverse director.

NYSE Related Party Transaction Amendment. On August 26, 2021, the SEC approved an amendment to the NYSE related party and oversight rules to reintroduce the \$120,000 threshold and conform the term “related party transactions” in Section 314.00 of the NYSE Listed Company Manual (the “NYSE Manual”) to those transactions requiring disclosure under Item 404 of Regulation S-K or Item 7.B of Form 20-F, as applicable.⁴⁹ The amendment became effective immediately.

NYSE Voting Standards. On November 19, 2021, the SEC approved the NYSE’s proposed rule changes to amend Section 312.07 of the NYSE Manual to provide that a company must calculate the votes cast in respect of a matter subject to that section in accordance with its own governing documents and any applicable state law.⁵⁰ This amendment applies to shareholder approvals required for equity compensation plans under Section 303A.08 of the NYSE Manual and in the specific situations set out in Section 312.03 of the NYSE Manual.

The topics addressed above reflect amendments and trends that have developed over the past year, as well as public statements from officials and staff at the SEC, that companies should consider as they prepare their Form 10-Ks and 20-Fs for the fiscal year 2021 reporting season. However, each company’s disclosure is unique, and therefore needs to be tailored to its particular facts and circumstances.

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ENDNOTES

- ¹ For a discussion of the changes affecting the upcoming and future U.S. proxy seasons, see our Client Memoranda: “SEC Proposes Enhanced Proxy Voting Disclosure by Investment Funds and Required Disclosure of ‘Say-on-Pay’ Votes for Institutional Investment Managers: Proposal Shows SEC’s Focus on ESG Matters; Would Also Complete the SEC’s Rulemaking Under Section 951 of the Dodd-Frank Act” (October 5, 2021), *available at* <https://www.sullcrom.com/sc-publication-sec-proposes-enhanced-proxy-voting-disclosure>; and “SEC Mandates Universal Proxy Cards in Contested Director Elections” (November 18, 2021), *available at* <https://www.sullcrom.com/sc-publication-SEC-mandates-universal-proxy-cards-in-contested-director-elections>.
- ² SEC Division of Corporation Finance, “CF Disclosure Guidance: Topic No. 9” (March 25, 2020), *available at* <https://www.sec.gov/corpfin/coronavirus-covid-19>; SEC Division of Corporation Finance, “CF Disclosure Guidance: Topic 9A” (June 23, 2020), *available at* <https://www.sec.gov/corpfin/covid-19-disclosure-considerations>.
- ³ For further information, see our Client Memoranda: “SEC Issues COVID-19 Disclosure Guidance and Extends Conditional Relief from Reporting Requirements: Staff Provides Guidance for Reporting on the Impact of the COVID-19 Crisis and Issues New Orders Extending Relief for Public Companies, Investment Funds and Investment Advisers” (March 30, 2020), *available at* <https://www.sullcrom.com/sec-issues-covid-19-disclosure-guidance-and-extends-conditional-relief>; and “SEC Issues Additional COVID-19 Disclosure Guidance: Division of Corporation Finance Provides Additional Disclosure Guidance for Reporting on the Impact of COVID-19 and the Office of the Chief Accountant Issues Statement on the Importance of High-Quality Financial Reporting in Light of COVID-19” (June 25, 2020), *available at* <https://www.sullcrom.com/sc-publication-sec-issues-additional-covid-19-disclosure-guidance>.
- ⁴ SEC Division of Corporation Finance, “Coronavirus (COVID-19)—Disclosure Considerations Regarding Operations, Liquidity, and Capital Resources” (June 23, 2020), *available at* <https://www.sec.gov/corpfin/covid-19-disclosure-considerations>.
- ⁵ Acting SEC Chief Accountant Paul Munter, “Statement on OCA’s Continued Focus on High Quality Financial Reporting in a Complex Environment” (December 6, 2021), *available at* <https://www.sec.gov/news/statement/munter-oca-2021-12-06>.
- ⁶ “SEC Charges The Cheesecake Factory For Misleading COVID-19 Disclosures” (December 4, 2020), *available at* <https://www.sec.gov/news/press-release/2020-306>.
- ⁷ Acting SEC Chair Allison H. Lee, “Statement on the Review of Climate-Related Disclosure” (February 24, 2021), *available at* <https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure>.
- ⁸ Acting SEC Chair Allison H. Lee, “Public Input Welcomed on Climate Change Disclosures” (March 15, 2021), *available at* <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>.
- ⁹ For further information, see our Client Memorandum: “SEC Focuses on Potential Updates to U.S. Climate Change Disclosure Requirements: SEC Issues Wide-Ranging Request for Public Input to Inform Potential Rulemaking on Climate Change Disclosure Requirements for U.S. Registrants” (March 19, 2021), *available at* <https://www.sullcrom.com/sc-publication-sec-updates-climate-change-disclosure-requirements>.
- ¹⁰ “Commission Guidance Regarding Disclosure Related to Climate Change”, SEC Release Nos. 33-9106; 34-61469; FR-82 (February 2, 2010), *available at* <https://www.sec.gov/rules/interp/2010/33-9106.pdf>. The 2010 SEC guidance, which remains in effect, articulates a “principles-based” disclosure framework rooted in the concept of materiality. The 2010 guidance does not mandate disclosure of any specific climate-related metrics and requires companies to disclose information about climate change’s potential or actual impacts on the company to the extent material to

ENDNOTES (CONTINUED)

- investors. Chair Gensler’s comments suggest that the new rules would likely require more specific, prescribed quantitative and qualitative information about climate risk.
- 11 For further information, see our Client Memorandum: “SEC Chair Addresses Details of Potential New U.S. Climate-Related Disclosure Rules: SEC Chair Gary Gensler Expects Staff Will Propose Mandatory Climate Risk Disclosure Rules to Commission by Year-End” (July 29, 2021), *available at* <https://www.sullcrom.com/sc-publication-sec-chair-discusses-potential-new-us-climate-disclosure-rules>.
- 12 SEC Division of Corporation Finance, “Sample Letter to Companies Regarding Climate Change Disclosures” (September 22, 2021), *available at* <https://www.sec.gov/corpfm/sample-letter-climate-change-disclosures>. These sample comments formed the basis for a number of comment letters issued during 2021.
- 13 For further information, see our Client Memorandum: “SEC Staff Highlights Review of Climate Change Disclosure: SEC Division of Corporation Finance Publishes Sample Comment Letter Regarding Compliance with Existing Climate Change Disclosure Guidance” (September 23, 2021), *available at* <https://www.sullcrom.com/sc-publication-sec-staff-highlights-ongoing-review-of-climate-change-disclosure>.
- 14 Acting SEC Chief Accountant Paul Munter, “Statement on OCA’s Continued Focus on High Quality Financial Reporting in a Complex Environment” (December 6, 2021), *available at* <https://www.sec.gov/news/statement/munter-oca-2021-12-06>.
- 15 SEC Chair Gary Gensler, “Cybersecurity and Securities Laws” (January 24, 2022), *available at* <https://www.sec.gov/news/speech/gensler-cybersecurity-and-securities-laws-20220124>.
- 16 See Press Release, “SEC Charges Issuer with Cybersecurity Disclosure Controls Failures” (June 15, 2021), *available at* <https://www.sec.gov/news/press-release/2021-102>.
- 17 See Press Release, “SEC Charges Pearson plc For Misleading Investors About Cyber Breach” (August 16, 2021), *available at* <https://www.sec.gov/news/press-release/2021-154>.
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