Public Company Update 2022

January 28, 2022

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Today's Agenda

- Deloitte & Touche LLP Public Company Update
- Hart-Scott-Rodino Act Update
- Corporate Governance and Disclosure Update
- ESG Update
- Executive Compensation

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Deloitte & Touche LLP Public Company Update 2022

- Joseph DiLeo, Managing Director, Deloitte & Touche LLP
- Joseph Kick, Managing Director, Deloitte & Touche LLP

- January 28, 2022

Agenda

- Highlights from the AICPA Conference
- Environmental, Social, and Governance (“ESG”)
- Accounting and Financial Reporting Update
- Non-GAAP Measures
- SEC Comment Letter Trends

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Highlights from the AICPA Conference

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Source: Dbrief - Quarterly accounting roundup: Q4 2021 update on important developments

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Environmental, Social, and Governance ("ESG")

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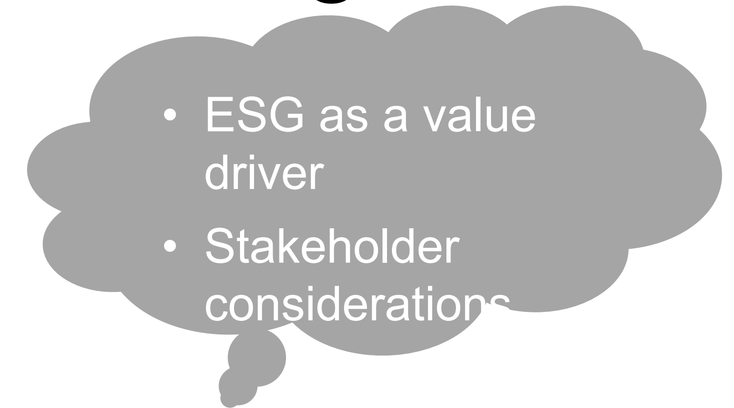
ESG with an initial focus on climate change

ESG and climate-related matters

ESG encompasses topics related to performance management and the impacts and dependencies of the business on society and the environment. Climate change represents multiple dimensions under the broader ESG umbrella.



Environment

- Greenhouse gas (GHG) emissions (carbon footprint)
- Air quality
- Energy management
- Fuel management
- Water and wastewater management
- Waste and hazardous materials management
- Ecological impacts

Social capital

- Human rights compliance
- Community relations
- Customer privacy
- Data security
- Access and affordability
- Product quality and safety
- Customer welfare
- Selling practices and product labeling

Environment | Business model and innovation | Leadership and governance | Human capital | Social capital

Human capital

- Labor practices
- Employee health and safety
- Employee engagement, diversity, equity, and inclusion

Business model and innovation

- Product design and life cycle management
- Business model resilience
- Supply chain management
- Material sourcing and efficiency
- Recycled and organic materials
- Impacts of climate change

Leadership and governance

- Business ethics
- Competitive behavior
- Management of the legal and regulatory environment
- Critical incident risk management
- Systemic risk management
- Board of directors

Included within ESG are climate-related matters that may create risks or opportunities for an entity. Climate-related matters could lead to potential impacts on an entity's financial statements from physical or transition risks or opportunities.

- **Physical risks or opportunities** related to acute events or longer-term shifts in climate patterns affecting organizations' assets, operations, supply chain, transport and logistics needs, workforce and community productivity, and safety and well-being.
- **Transition risks or opportunities** related to policy, legal, technological, market, and reputational risks or opportunities resulting from transitioning to a lower-carbon economy.

Source: Dbrief - ESG – Accounting and SEC reporting considerations, dated 11/5/21

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Accounting and reporting considerations today

“100% green by 2040”

“Net zero by 2030”

“Carbon neutral by 2050”

Financial statement implications?

Commitments, intentions, and targets

- Company statements, sustainability reports, websites, etc.
- Understand details of plan and actions taken
- Asset considerations
- Liability considerations
- Disclosure considerations

Source: Dbrief - ESG – Accounting and SEC reporting considerations, dated 11/5/21

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Asset considerations

- Impact to PP&E
  - Impairment and/or useful life considerations
  - Salvage/residual values
- Cash flow projections
  - Increased costs (to transition)
  - Changes in forecasted capital expenditures
  - Going concern
- Impairment considerations
- Realizability of deferred taxes
- Asset retirement
- Lease abandonment

Source: Dbrief - ESG – Accounting and SEC reporting considerations, dated 11/5/21

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Liability and disclosure considerations

- Liability considerations
  - Present duty that entails probable future transfer/use of assets
  - Duty obligates entity—little or no discretion to avoid future sacrifice
  - Transaction/obligating event has already occurred
- Disclosure considerations

Source: Dbrief - ESG – Accounting and SEC reporting considerations, dated 11/5/21

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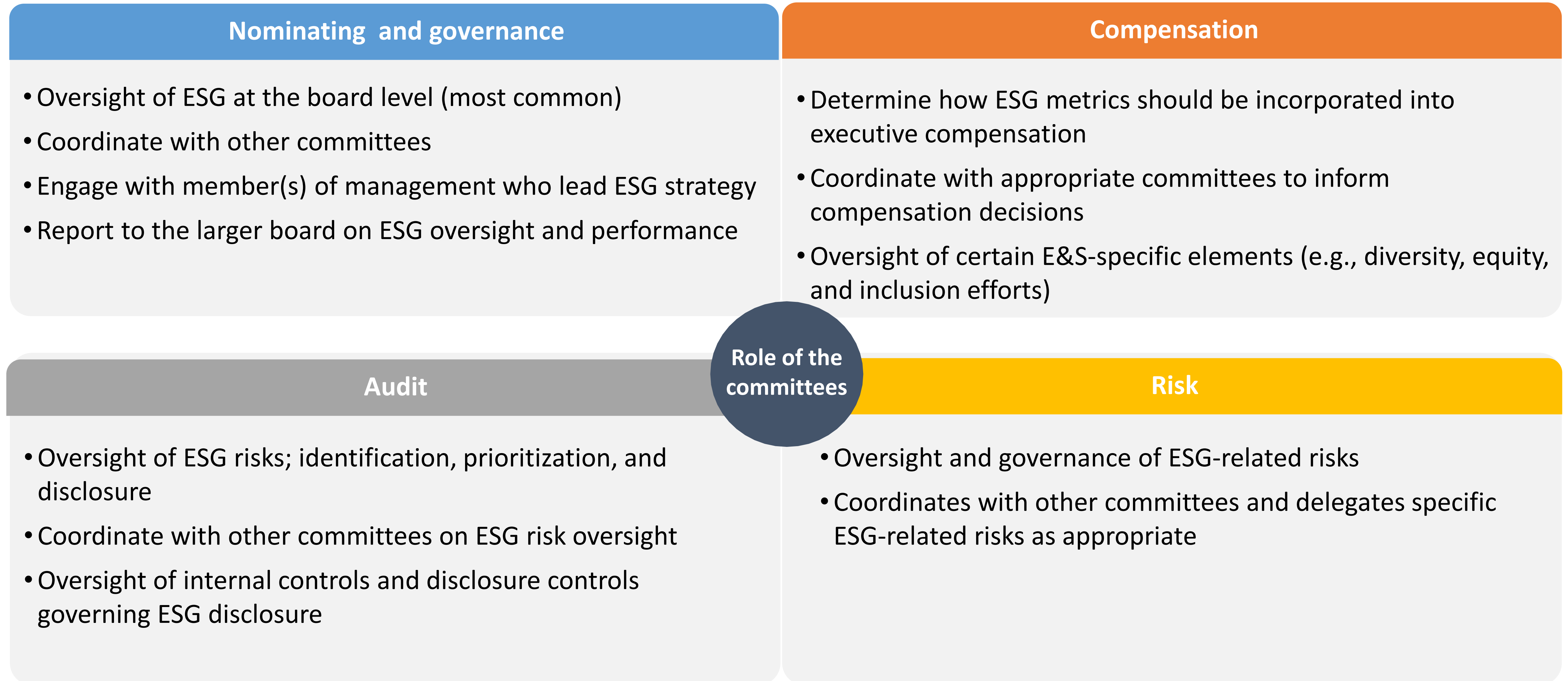
The ESG maturity

The board's evolving role in ESG oversight: Deloitte US research



Source: Dbrief - ESG – Accounting and SEC reporting considerations, dated 11/5/21

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Accounting and Financial Reporting Update

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Accounting and financial reporting update

Accounting for shares and warrants issued by a SPAC — OCA consultations

Accounting for Redeemable Shares Issued by a SPAC

- OCA **objected** to a conclusion that certain redeemable shares issued by a SPAC would not be required to be classified outside of permanent equity
- The SPAC had classified certain redeemable shares within permanent equity due to a provision in its charter that specified a minimum level of net tangible assets
- The OCA conclusion was based on the fact that each redeemable share was determined to be a separate unit of account and could not be evaluated as a combined, single unit of account because of the charter provision

Accounting for Public Warrants Issued by a SPAC

- OCA **did not object** to certain conclusions that differed from the conclusions discussed in the SEC's *Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies* when the facts and circumstances were different

Source: Dbrief - Quarterly accounting roundup: Q4 2021 update on important developments

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Accounting and financial reporting update (cont.)

Revenue recognition — Frequent areas of consultation with OCA

1. Principal-versus-agent Determination

- Evaluation of significant integration of one promised good or service with another, including an assessment of whether an entity controls the good or service from a third-party.
- The indicators of control in the principal-versus-agent analysis as outlined in ASC 606-10-55-39 are not a substitute for assessing control.

2. Identification of a customer & consideration payable to a customer

- The staff has **objected** to platform companies presenting incentive payments as marketing expense.
- Factors to consider may include whether the entity has a promise to offer incentives on the seller's behalf or whether these incentives are in-substance price concessions.

Source: Dbrief - Quarterly accounting roundup: Q4 2021 update on important developments

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Stock compensation

SAB 120 — Issued November 29, 2021

- **SAB 120 has two purposes:**

1. Conform SAB 14 to recently issued FASB standards on share base payment awards
2. Provide guidance on "spring-loaded" awards

- Entities that issue spring-loaded awards should ensure:
- The issuance of the awards are consistent with the terms of their compensation plans, governance policies and legal requirements
- The valuation of the awards appropriately adjusts for material nonpublic information

Source: Dbrief - Quarterly accounting roundup: Q4 2021 update on important developments

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Non-GAAP Measures

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Non-GAAP measures and metrics
Recent areas of focus

- **Key areas of SEC comments**
  1. Prominence
  2. Mislabeling of non-GAAP measures and any related adjustments
  3. Metrics
- The staff also reminded registrants about the importance of appropriate DCPs and ICFR over non-GAAP measures and metrics

- **Recent areas of focus**

- Recurring cash operating costs
- Adjusted revenue
- Adjusted gross profit/gross margin/contribution margin
- Prominence
- Industry specific
  - EBITDAR
  - Collaborative arrangements

Source: Dbrief - SEC hot topics: Year-end update, dated 11/18/21

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SEC Comment Letter Trends

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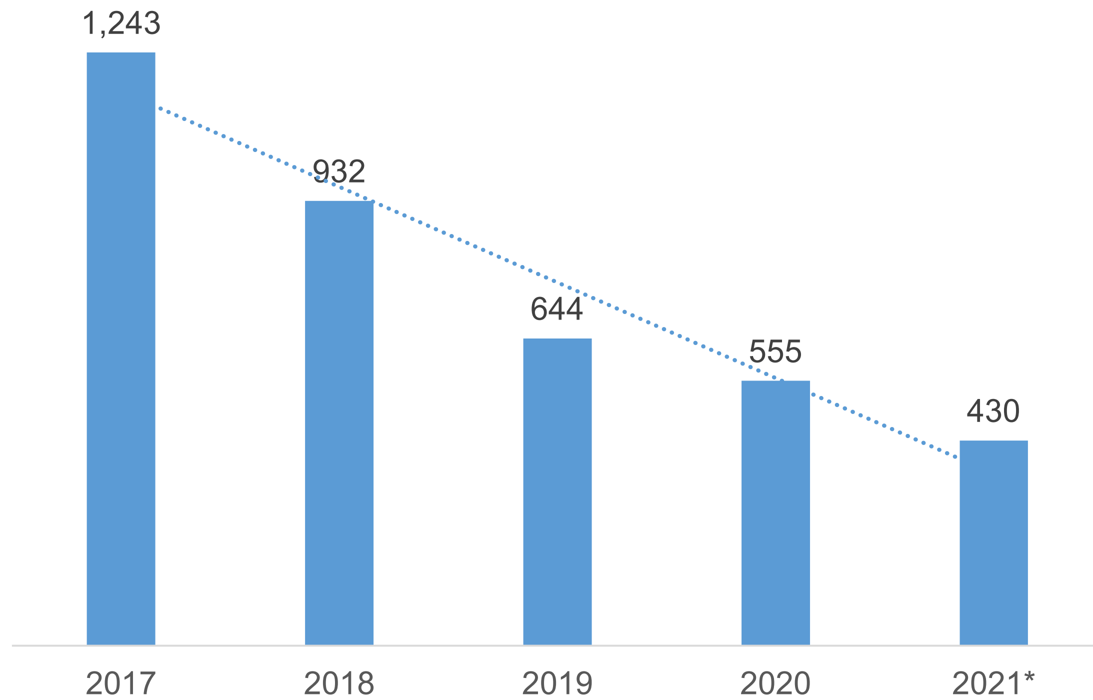
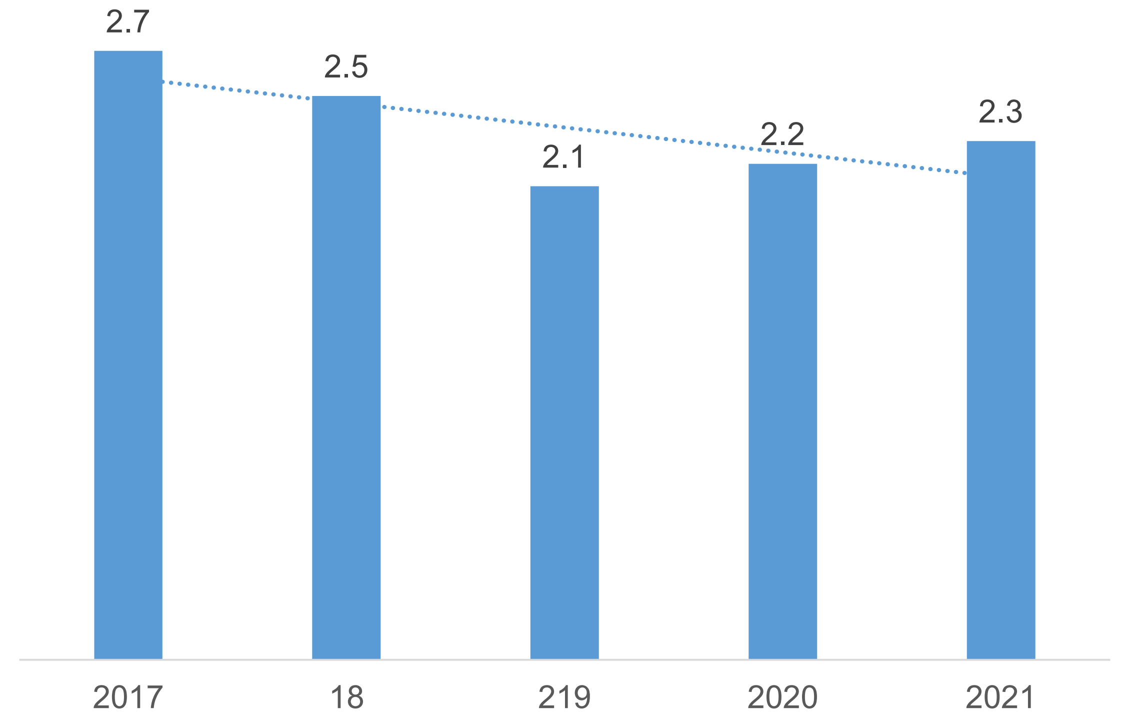
SEC comment letter trends

Reviews of Forms 10-Q and 10-K





*2021 information may be affected by reviews made public at a later date.

Source: Dbrief - SEC hot topics: Year-end update, dated 11/18/21

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SEC comment letter trends

Reviews of Forms 10-Q and 10-K

Twelve months ended July 31, 2021

Topic	Percentage of all reviews	Current Year Rank	Change in rank from prior year
MD&A	38%	1	↑ 1
Non-GAAP measures	34%	2	↓ 1
Signatures, exhibits, and agreements	20%	3	↑ 2
Segment reporting	17%	4	-
Revenue recognition	13%	5	↓ 2
Fair value	9%	6	-
Intangible assets and goodwill	8%	7 (tie)	↑ 2
Internal control over financial reporting	8%	7 (tie)	-
Inventory and cost of sales	6%	9	↑ 1
Commitments and contingencies	6%	10	↓ 2

Note: Comment Letter trend information was derived from data provided by Audit Analytics based on the percentage of all comment-letter-yielding Form 10-K and 10-Q reviews that include a comment on topic.

Source: Dbrief - SEC hot topics: Year-end update, dated 11/18/21

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Hart-Scott-Rodino Update

Valerie E. Stevens

January 28, 2022

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Hart-Scott-Rodino

- HSR Act requires parties to certain transactions to file a premerger notification and report form with the FTC and Antitrust Division of DOJ, and observe a 30 day waiting period before closing
- Today's discussion:
  - Recent announcement of revised threshold levels
  - Biden administration developments
  - Update on recent HSR enforcement actions

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Revised HSR Thresholds

- Agencies made the annual announcement of revised thresholds last week, applicable to transactions closing on or after February 23, 2022

	Prior Threshold (Before Feb 22)	New Threshold (On and after Feb 23)
Smaller Transaction Size Threshold	$92 million	$101 million
Size of Person		
Larger	$184 million	$202 million
Smaller	$18.4 million	$20.2 million
Larger Transaction Size Threshold	$368 million	$403.9 million
Failure to File Penalty	$43,792 per day	$46,517 per day

Source: Federal Trade Commission Bureau of Competition, "FTC Announces Annual Update of Size of Transaction Thresholds for Premerger Notification Filings and Interlocking Directorates," January 24, 2022, available here.

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Agency Developments

- The agencies, and particularly the FTC, are in a comparatively aggressive enforcement posture:
  - Suspension of early termination process continues
  - New warning letters at the end of the waiting period
  - Aggressive merger investigation approach
    - Substantive questions on otherwise unremarkable transactions
    - Expansion of scope of Second Request
- Last week, FTC and DOJ jointly announced a planned "revamp" of merger guidelines
  - Current guidelines were published in 2010
  - Could herald significant changes, and expand field of analysis to more than just expected price effects (i.e. labor, innovation etc.)

Source: Federal Trade Commission Bureau of Competition, "Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers," January 18, 2022, available here.

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Warning Letters

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Bureau of Competition

August 3, 2021

By Electronic Mail

Jane Doe
Law Firm XYZ
Washington, DC 20001

Re: *Company A Side/Company B Side Transaction*, FTC File No. XXX-XXXX

Dear Ms. Doe:

As you know, the Federal Trade Commission's Bureau of Competition has been conducting a nonpublic investigation to determine whether the above-referenced transaction may violate Section 7 of the Clayton Act, 15 U.S.C. § 18, or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Although the waiting period will expire imminently, the Commission's investigation remains open and ongoing.

Please be advised that if the parties consummate this transaction before the Commission has completed its investigation, they would do so at their own risk. Any inaction by the Commission before the expiration of the waiting period should not be construed as a determination regarding the lawfulness of the transaction. Indeed, no such determination could be made unless and until the Commission completes its investigation. The parties cannot stop the investigation or avoid an enforcement action by consummating. To the contrary, and in keeping with its commitment to aggressive enforcement, the Commission may challenge transactions—before or after their consummation—that threaten to reduce competition and harm consumers, workers, and honest businesses.

Accordingly, even if the parties consummate the above-referenced transaction, the Commission may still take further action as the public interest may require, which may include any and all available legal actions and seeking any and all appropriate remedies.

Sincerely,

Holly Vedova
Acting Director
Bureau of Competition

- New FTC practice since August 2021
- Infrequent, but more likely in overlap transactions
- Mere restatement of law; parties have adjusted

Source: Federal Trade Commission Bureau of Competition, "Adjusting merger review to deal with the surge in merger filings," August 3, 2021, available here.

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Recent Enforcement Activity

- FTC announced two separate enforcement actions in the past 30 days:
  - Werner – acquisition of voting securities between 2007 – 2019, including through exercise of stock options and vesting of RSUs
  - Biglari – open market acquisition of shares of Cracker Barrel Old Country Store, Inc.
- Reminder: acquisitions by individuals are subject to HSR
  - Aggregation rules can make a small acquisition of voting securities reportable, if the value of the individual's existing holdings are approaching the HSR threshold and the size of person threshold is met
- Agencies appear to be adhering to the unwritten rule that penalties are not assessed for a first strike, for now

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Polling Question #1

Are acquisitions by individuals subject to HSR?

- Yes
- No

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Questions

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2022 Corporate Governance and Disclosure Update

Craig Fischer
Hodgson Russ LLP
January 28, 2022

Amendments to MD&A and Other Financial Disclosure Requirements

- **Amendments adopted by SEC in Nov. 2020 with an effective date of Feb. 10, 2021**
  - Although early compliance was allowed on an item by item basis, compliance with all requirements is now required beginning with a company's first fiscal year ending on or after August 9, 2021
- ***Item 301 – Selected Financial Data –*** Amendments eliminate the requirement to provide the 5-year selected financial data table (formerly required by Item 6 of Form 10-K)
  - *Even though requirement eliminated, adopting release encouraged companies to "consider whether trend information for periods earlier than those presented in the financial statements may be necessary as part of MD&A's objective to 'provide material information relevant to an assessment of the financial condition and results of operations.'"*
  - *Remember to update the heading of Item 6 of your Form 10-K to state "Item 6. [Reserved]"*
- ***Item 302 – Supplementary Financial Data*** – Eliminates requirement to provide 2 yrs of tabular selected quarter financial statements, except if there are retrospective changes to the statement of comprehensive income during any of the quarters within the 2-yr period that are material (included as part of financial statements in Item 8 of Form 10-K)
  - *If provided, must also explain reasons for the material changes*
- ***Item 303 – Management's Discussion and Analysis***
  - *New Item 303(a) – A new paragraph that sets forth the principles-based disclosure objectives for the MD&A, including that the disclosure is "expected to better allow investors to view the registrant from management's perspective." Disclosure should include the following:*
    - material information relevant to an assessment of the financial condition and results of operations of the company, including an evaluation of the amounts and certainty of cash flows from operations and from outside sources;
    - the material financial and statistical data that the company believes will enhance a reader's understanding of the company's financial condition, cash flows and other changes in financial condition, and results of operations; and
    - material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition
  - This new Item 303(a) largely codifies previous SEC guidance and instructions, so may not result in any specific changes, but provides objectives to consider in preparing MD&A

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Amendments to MD&A and Other Financial Disclosure Requirements – Continued

- ***Item 303(b) – Discussion of Full Fiscal Year Results (Previously Item 303(a))***
  - Overall goal of providing investors with a more analytical discussion, rather than mechanical comparisons, to understand the reasons behind the material changes in quantitative and qualitative terms
  - Discussion to include material changes that occurred, including material changes within a line item that offset one another
  - If material to understand business, discussion to including segment information, geographic areas or product lines
- ***Item 303(b)(1) – Liquidity and Capital Resources***
  - Revisions represent a significant overhaul that is meant to clarify and modernize the disclosure requirements. Need to closely parse new requirements to ensure compliance
  - ***Capital Resources*** - Amendments require companies to disclose the company's known material cash *requirements* for known contractual and other obligations, including commitments for capital expenditures, instead of focusing only on disclosure of material *commitments for capital expenditures.*
  - ***Capital Resources*** - Continues to require disclosure of known material trends in capital resources and any "reasonably likely" material changes in cost and mix of capital resources (as opposed to only "material changes")
  - ***Liquidity*** - Discussion of trends, commitments, events or uncertainties impacting liquidity and sources (internal and external) of liquidity
  - Disclosure to cover both short-term (next 12 mths) and long-term (beyond next 12 mths)
  - *Previous Item 303(a)(5) – Tabular Disclosure of Contractual Obligations* – Requirement to provide table of known contractual obligations eliminated, portions of prior requirement now included as part of Item 303(b)(1) discussion

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Amendments to MD&A and Other Financial Disclosure Requirements – Continued

- ***Item 303(b)(2) – Results of Operations***
  - Codifies that discussion is required of all material changes (increases and decreases) from period to period, not just material increases
  - Known Trends Disclosure – Changes disclosure standard from "will cause" to "reasonably likely to cause," which is to be determined based upon management's assessment of whether a known trend is reasonably likely to come to fruition and is material
  - Eliminates requirement that companies must discuss the impact of inflation and price changes, disclosure only required if material to results
- ***Off-Balance Sheet Arrangements*** – Amendments eliminate the requirement for disclosure under a separately captioned section. Replaced with a principles-based instruction requiring a discussion of off-balance sheet arrangements that have or are reasonably likely to have a material current or future effect on a company's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements or capital resources
- ***New Item 303(b)(3) – Critical Accounting Estimates –*** New section that explicitly requires discussion of critical accounting estimates, including changes in estimates and the sensitivity of the reported amounts to the underlying estimates
  - *Critical Accounting Estimates is defined as estimates made in accordance with GAAP "that involve a significant level of estimation uncertainty and have had or are reasonably likely to have a material impact on the financial condition or results of operations of the registrant."*
- ***Item 303(c) – Interim Periods (Previously Item 303(b))***
  - Amendments permit companies to compare their most recently completed quarter to either (i) the corresponding quarter of the prior year (as previously required) or (ii) the immediately preceding quarter
  - If a company elects to discuss changes from the immediately preceding quarter, it will be required to provide summary financial information that is the subject of the discussion for that quarter or to identify the prior filing that presents this information
  - If the comparison period is changed from prior interim period to immediately preceding quarter, need to explain rationale for the change

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Considerations for Preparation of Annual Report on Form 10-K

- ***Implementation of Holding Foreign Companies Accountable Act***
  - HFCAA was passed into law in Dec. 2020 and required SEC and PCAOB to adopt implementing rules, which have been completed
  - ***Adds new Item 9(c) to Form 10-K, which adds additional disclosure obligations for "Commission-Identified Issuers"***
    - *A "Commission-Identified Issuer" is a registrant that has retained a registered public accounting firm to issue an audit report where the registered public accounting firm has a branch or office that is located in a foreign jurisdiction and the PCAOB has determined that it is unable to inspect or investigate completely because of a position taken by an authority in the foreign jurisdiction*
    - *PCAOB issued a report in Dec. d2021 that is unable to inspect or investigate completely any audit firm headquartered in mainland China and Hong Kong*
    - *Based upon newly required XBRL tagged information, SEC will provisionally identify a company as a "Commission-Identified Issuer" on the SEC's HFCAA webpage (sec.gov/hfcaa) after it files its Form 10-K in 2022; SEC process does not currently include a notice to the company, so best to check the webpage post-Form 10-K filing to ensure SEC has not made a mistake*
    - *There is a dispute process for a misidentified company, but any dispute must be submitted within 15 days after the SEC identification occurred*
    - *If a company is identified as a "Commission-Identified Issuer" for three consecutive years, HFCAA requires the SEC to issue an order prohibiting trading in that company's securities on a US stock exchange*
  - For the vast majority of companies, these disclosure requirements will not be applicable, but companies do need to remember to add the item heading and caption "Item 9C, Disclosure Regarding Foreign Jurisdictions that Prevent Inspections" to their Form 10-K and state "not applicable" beneath
  - ***Adds additional Inline XBRL tagging requirements beginning with Form 10-Ks filed for fiscal years ending on or after December 15, 2021***
    - *Requires tagging in XBRL of (i) the name of the auditor(s) who has provided opinion(s) related to the financial statements presented in the company's Form 10-K, (ii) the location where the auditor's report has been issued, and (iii) the PCAOB ID Number(s) of the audit firm(s) or branch(es) providing the opinion(s)*
    - *Obligation to tag this information in XBRL is buried in the EDGAR Filer Manual, so difficult to find*
    - *SEC adopting release provides that the location of this information is up to the company, but the EDGAR Filer Manual states that the information should be tagged "where they normally appear, adjacent to the auditors' opinion"* ***Suggest discussing approach with your auditor.***

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Considerations for Preparation of Annual Report on Form 10-K – Continued

- ***Risk Factor Updates***
  - Consider need for risk factor updates regarding (i) COVID-19, including vaccine mandates, (ii) supply chain disruptions, (iii) labor shortages, (iv) inflation impacts, (v) cybersecurity risks, (vi) LIBOR transition, (viii) environmental risks/climate change and (viii) Ukrainian operations
  - *A reminder to avoid using a hypothetical risk description in a risk factor when the risks have actually presented themselves*
  - *Also a reminder that if your risk factor sections is more than 15 pages, summary risk factor disclosure will be required (a series of concise, bulleted or numbered statements that is no more than two pages summarizing the principal risk factors)*
- ***SEC Staff Statement on LIBOR Transition***
  - Issued on Dec 7, 2021 by the SEC Staff as a reminder to public companies and other market participants as to their disclosure obligations related to LIBOR Transition
  - *Guidance urged public companies to provide detailed and specific disclosure about their progress toward LIBOR risk identification and mitigation and the anticipated impact on the company, if material, including:*
    - *quantitative disclosures to provide context for the status of the company's transition efforts;*
    - *for companies with material risks related to outstanding debt with inadequate fallback provisions, how much debt will be outstanding after the relevant cessation date and the steps the company is taking to address these risks; and*
    - *to the extent that a company has or is taking steps to identify and assess LIBOR exposure and mitigate material risks or potential impacts of the transition, insight into what the company has done, what steps remain, and the timeline for further efforts*
- ***Director and Officer Questionnaire Updates***
  - For Nasdaq-listed companies that are subject to the board diversity requirements or companies that otherwise plan to voluntarily disclose the diversity information related to their directors, be sure to add in a question to elicit information on your directors' diversity characteristics and obtain their consent to disclose this information in the company's SEC filings
  - Given SEC's focus on perk disclosure, suggest to review questions regarding perks and other personal benefits in questionnaire to ensure eliciting necessary and sufficient information
- ***Material Agreement Exhibit Redacting*** – In March 2021, SEC changed the standard to redact confidential information from material agreements by removing the "competitive harm" standard and permitting redactions if the information is not material and is the type of information that the company both customarily and actually treats as confidential

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Annual Meeting and Proxy Statement Preparation Consideration

- **Virtual Meetings for New York Corporations**
  - On Nov 8, 2021, Gov. Hochul signed legislation to permanently amend provisions to the NYBCL (§602 of the NYBCL) to allow companies to hold fully virtual shareholder meetings, unless this action is prohibited by a company's organizational documents (companies should check to confirm)
  - Previously, the NYBCL only allowed for hybrid meetings (having a virtual and an in person component). During COVID-19, fully virtual meetings were allowed on a temporary basis through an executive order from then-Gov Cuomo and subsequently through a temporary law that had a sunset provision of December 31, 2021.
- **SEC Staff Guidance on Shareholder Meetings during COVID-19**
  - On Jan 19, 2022, the SEC Staff reaffirmed its existing prior guidance related to shareholder meetings in light of COVID-19 originally put out in April 2020
  - Staff guidance permits change in meeting date, time or location without remailing proxy materials if (i) the company issues a press release announcing the change, (ii) the press release is filed with the SEC as additional proxy soliciting material and (iii) reasonable steps are taken to inform other intermediaries in the proxy process of the change
- **Universal Proxy Cards**
  - In Nov 2021, SEC adopted final rules to enable the use of a universal proxy card in the case of public solicitations involving contested elections of directors. This new rule is effective Aug 31, 2022
  - Rules require that all nominees for director appear on the same proxy card, giving shareholders the ability to "mix and match" their votes for nominees from each of the company's and a dissident shareholder's slate
  - Use of a universal proxy card is subject to certain procedural requirements, including a 60-day prior notice to the company of the names of all nominees for which proxies will be solicited. ***Companies will be required to disclose this deadline for the following year's meeting in each annual meeting proxy statement, including the notice deadline for the 2023 meeting in the 2022 proxy statement***

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Nasdaq Board Diversity Rules

- Nasdaq Listing Rules 5605(f) and 5606 were approved by the SEC in August 2021; Originally proposed in December 2020
  - In response to the initial proposal, over 200 comment letter were received and Nasdaq reported that almost 85% of the substantive comments received were supportive
- Appointment of Diverse Directors
  - Rule uses a "Comply or Explain" approach
    - *Listing rule requires Nasdaq-listed companies to have at least two members of the board who are diverse or to explain why they do not have two members who are diverse - including at least one who self-identifies as Female, and at least one who self-identifies as (i) Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities or (ii) LGBTQ+*
      - Foreign issuers and smaller reporting companies permitted to satisfy the diversity objectives with two directors who self-identify as Female
    - If diversity requirement is not met, company must explain the reasons why it does not have required diverse directors in its proxy statement or on its website where it publishes its board diversity matrix. Nasdaq will not assess the substance or merits of the company's explanation, but has stated that it will verify that the company has provided one.
  - Compliance phase-in period based upon Nasdaq listing tier
    - Nasdaq Global and Nasdaq Global Select Markets - at least one diverse director by August 7, 2023, and at least two diverse directors no later than August 6, 2025
    - Nasdaq Capital Market - at least one diverse director no later than August 7, 2023, and at least two diverse directors no later than August 6, 2025
    - Companies with boards consisting of five or fewer directors (regardless of listing tier) must have one diverse director by August 7, 2023
- Board Diversity Matrix Disclosure Requirement
  - *Disclosure requirement is effective beginning with filings in 2022.*
  - If proxy is filed before August 8, 2022 and does not include the matrix, a company will have until August 8, 2022 to publicly disclose the matrix – disclosure can be made on website or in an amended SEC filing. For future years, if matrix is not included in proxy, a company may publish the board diversity matrix on its website on the date that the company files its proxy statement and submit a link to the disclosure to Nasdaq
  - Companies required to disclose board diversity annually, using a standard form board diversity matrix (see next slide)
    - Matrix does not include specific names of directors, rather includes the total number of directors and number of directors who self-identify based on certain characteristics - 1) gender identity (male, female, or non-binary), 2) race and ethnicity (Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities), and 3) LGBTQ+
  - For 2022, companies required to disclose diversity statistics for current year only; after 2022, companies will be required to disclose diversity statistics for current year and the immediately preceding year
- Lawsuit brought in Fifth Circuit challenging the Nasdaq rule on constitutional grounds; 17 states have filed amicus briefs in support of the suit

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Board Diversity Policies - Continued

- *Update on Gender Diversity Policies of Proxy Advisory Firms*
  - ***ISS*** – For meetings to be held through Jan 31, 2023, for companies in the Russell 3000 or S&P 1500, ISS will generally recommend voting against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) at companies where there are no women on the company's board, unless the proxy statement included disclosure of a "firm commitment" to appoint at least one woman to the company's board within a year. Beginning on Feb 1, 2023, this policy will apply to companies outside of Russell 3000 and S&P 1500.
  - ***Glass Lewis*** – Beginning Jan 1, 2022, GL will generally recommend against the nominating chair if the board has fewer than two gender diverse directors, or the entire nominating committee of a board with no gender diverse directors. For companies outside of the Russell 3000 index, and all boards with six or fewer total directors, one gender diverse director will be required. ***Starting in 2023, GL will move to a percentage-based approach (30% of board for Russell 3000 companies)***
- *Update on Racial/Ethnic Diversity Policies of Proxy Advisory Firms*
  - ***ISS*** – Effective for meetings on or after February 1, 2022, for companies in the Russell 3000 or S&P 1500, ISS will generally recommend voting against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) where the board has no apparent racially or ethnically diverse members, exception if board included racially diverse member at preceding meeting and firm commitment made to appoint a racially diverse member within one year
  - ***Glass Lewis*** - In 2022, GL may recommend voting against the chair of a company's nominating committee if the company has "particularly poor disclosure" concerning director diversity and skills. In addition, starting in 2023, GL will generally recommend voting against the chairs of nominating committees at companies that do not provide any disclosure regarding individual or aggregate director racial/ethnic diversity data.
  - *Many of the larger institutional investors (such as Blackrock, State Street, Vanguard, etc.) have their own policies and standards as well*

Nasdaq Board Diversity Matrix Format

Board Disclosure Format

Board Diversity Matrix (As of [DATE])				
Total Number of Directors	#			
	Female	**Male**	**Non-Binary**	**Did Not Disclose Gender**
Part I: Gender Identity				
Directors	#	#	#	#
Part II: Demographic Background				
African American or Black	#	#	#	#
Alaskan Native or Native American	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+	#			
Did Not Disclose Demographic Background	#			

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Proxy Advisory Firms on Multi-Class Share Structures

- Both ISS and Glass Lewis have announced voting policy changes with respect to companies with multi-class capital structures with unequal voting rights
- ***ISS Policy Change***
  - ISS will begin recommending against directors at all U.S. companies with multi-class structures with unequal voting rights, unless reasonable sunset provisions are implemented (a sunset period of no more than 7 years is considered to be reasonable)
  - The recommendation may apply to directors individually, committee members or the entire board
  - Policy change is effective for the 2023 proxy season
- ***Glass Lewis Policy Change***
  - GL will issue adverse voting recommendations for the chair of the nominating and governance committee at all companies with multi-class structures with unequal voting rights, unless such structures are subject to a reasonable sunset (a sunset period of no more than seven years).
  - Policy change is effective for the 2022 proxy season

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Proposed Changes by SEC related to Rule 10b5-1 Plans

- In December 2021, SEC proposed several amendments and new disclosure requirements (currently in the public comment period) intended to address perceived abusive practices engaged in by directors, officers and companies that trade in a company stock under Rule 10b5-1 plans
- Summary of Proposed Rule Changes
  - *Amendments to Rule 10b5-1 would add several new conditions that would need to be met to use the insider trading liability defense provided by Rule 10b5-1 trading plans*
    - **Cooling Off Period** - Required minimum cooling-off period between plan adoption or modification date and when trading commences; proposal requires 120 days for directors and officers and 30 days for companies
    - **Certifications** - As part of adopting or modifying a plan, a director or officer would be required to provide the company with a written certification that such director or officer was not aware of any material nonpublic information about the company or securities and that the plan is being adopted in good faith. Company would need to retain certification for 10 yrs, but not required to be filed with SEC
    - **Multiple Plans Prohibited** - Would prohibit the ability to have more than one Rule 10b5-1 plan for trading in the same class of securities in existence at once. Prohibition would not apply to transactions directly with the company, such as employee stock ownership plan or dividend reinvestment plans
    - **Single-Trade Plans** - Only one single-trade plan could be used in any 12-month period
    - **Enhanced Good Faith Requirement** – Would add ongoing condition that a plan must be operated in good faith (in addition to current requirement that plan entered into in good faith)
  - *Rules would add the following new disclosure requirements for companies:*
    - **Insider Trading Policies and Procedures –** Companies would be required to annually disclosure the company's insider trading policies and procedures or explain why these types of policies do not exist
    - **Rule 10b5-1 Plans and Trading Arrangements** – Companies would need to provide quarterly disclosure on the adoption, modification and termination of Rule 10b5-1 plans by the company as well as by its directors and officers
    - **Equity Grant Timing Disclosure** – Companies would be required to disclose policies and practices on timing of awards with option-like features in relation to disclosure of MNPI. Companies would need to discuss (i) how award timing is decided, (ii) how MNPI is considered when determining award timing and terms and (iii) whether disclosure is timed to impact the value of awards
    - **New Option-Related Table** – Companies required to disclose in a new table any options, SARs or similar instruments granted to NEOs within 14 calendar days before or after the filing of a 10-Q or 10-K, a company share repurchase or the filing or furnishing of a current report on Form 8-K that contains material nonpublic information

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Proposed SEC Rules on Share Repurchase Disclosure

- Concurrently with SEC's proposed amendments to Rule 10b5-1 Plan rules, SEC also proposed share repurchase disclosure rules that would be significantly different then the current disclosure framework applicable to companies
- Summary of Proposed Rule
  - Proposal would require companies to report repurchases of equity securities made by or on behalf the company or any affiliated purchase **before the end of the first business day after the repurchase is executed**.
    - *Disclosure would be effected through a new Form SR in which a company would disclose:*
      - the repurchase date and the class of securities purchased;
      - the total number of shares purchased, whether or not made pursuant to publicly announced plans or programs;
      - the average price paid per share;
      - the aggregate total number of shares purchased on the open market;
      - the aggregate total number of shares purchased in reliance on the safe harbor in Exchange Act Rule 10b-18; and
      - the aggregate total number of shares purchased pursuant to a Rule 10b5-1 plan
    - ***Form SR would be furnished, not filed, with the SEC***
  - Proposal would also require enhanced periodic disclosure regarding share repurchases and the structure of the company's repurchase program
    - As part of the periodic disclosure, the Company would be required to disclose:
      - the objective or rationale for the company's program and the process or criteria it uses to determine the amount of repurchases;
      - any policies and procedures relating to purchases and sales of the company's securities by its directors and officers during a repurchase program;
      - whether the company made its repurchases pursuant to a Rule 10b5-1 plan, and if so, the date that the plan was adopted or terminated; and
      - whether the company made its repurchases in reliance on the nonexclusive safe harbor under Rule 10b-18
- **Section 16 Reporting Changes:**
  - A mandatory checkbox would be added to Forms 4 and 5, where filers would have to indicate whether a reported transaction was made under a Rule 10b5-1 plan
  - Bona fide gifts of equity securities would no longer be reported on Form 5, but instead would have to be reported on Form 4 and filed before the end of the second business day following the date of the gift

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SEC Potpourri

- ***Clawback Rules*** – In Oct 2021, the SEC reopened the comment period for clawback rules (to implement the requirement specified in the Dodd Frank Act).
  - If enacted, the rules would instruct securities exchanges to establish listing standards that require issuers to adopt, disclose and comply with a specific compensation clawback policy as a condition to listing.
  - This clawback policy would enable issuers to recover from current and former executive officers erroneously awarded incentive-based compensation received during the three fiscal years preceding the date of an accounting restatement required to correct a material error in the issuer's financial statements.
- ***Courtesy Copies* –** Effective Jan 21, 2022, SEC Staff no longer wants to receive paper courtesy copies of filings, unless specifically requested by the Staff.
- ***Filing Fee Modernization***
  - In Oct 2021, the SEC adopted amendments to the rules governing the payment of filing fees for companies engaged in transactions.
  - The amendments made significant changes to how companies disclose, file and pay filing fees, including:
    - The amended rule requires registrants to present the filing fee table in tabular form, using Inline XBRL, and requires additional information to be presented in the table;
    - Registrants must file the fee table as a separate exhibit to the registration statement or post-effective amendment; and
    - Registrants will be able to pay filing fees via Automated Clearing House, credit and/or debit cards, but payment by check or money order no longer will be accepted.
  - The amendments take effect in Jan 2022, but there is a lengthy transition period of 30 months for LAFs and 42 months for AF and all other filers until compliance is required.

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Polling Question #2

In October 2021, the SEC reopened the comment period for clawback rules ?

- Yes
- No

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ESG UPDATE

John J. Zak

January 28, 2022

What is ESG?

E = Environmental	S = Social	G = Governance
Climate change	Diversity and inclusion	Board diversity/independence
Sustainability	Workplace safety	Executive compensation
Water use	Compensation/benefits	Political engagement
Recycling	Equal pay/internal pay equity	Shareholder/stakeholder engagement
Food waste	Labor rights	Audit oversight
Carbon footprint	Racial and economic justice	Disclosure/reporting
Plastics	Human capital management	Ethics
Animal welfare	Ethical sourcing/supply chain	Enterprise risk management
	LGBTQ+ rights	

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What is the Current "State of Play" on ESG Disclosure?

- Institutional investors/investment advisors continue to push for greater disclosure and change. (blackrock.com/corporate/investor-relations/larry-fink-ceo-letter)
- Proxy advisors continue to tie voting recommendations to company practices that address ESG matters. (iss.governance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf)
- Securities and market regulators are applying existing disclosure requirements with more rigor and promising new, more specific disclosure requirements.
- Current ESG disclosure practices differ substantially based primarily on company size.
  - Risks of Climate Change Discussed in Annual Report (2021)
    - Revenues under 100 MM, 92% of Russell 3000 do not disclose
    - Revenues 100 – 999 MM, 75% of Russell 3000 do not disclose
  - Total GHG Emissions – Disclosure Rate (2021)
    - Revenues under 100 MM, 99.7% of Russell 3000 do not disclose
    - Revenues 100 – 999 MM, 92% of Russell 3000 do not disclose
    - Revenues 1 – 4.9 B, 70% of Russell 3000 do not disclose

Source: Sustainability Disclosure Practices (2022) (www.conferenceboard.org)

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Specifically, Where is the SEC on ESG Disclosures?

- Currently, SEC has promulgated disclosure requirements for:
  - Human capital resources (Item 101(c) of Reg. S-K)
  - CEO pay ratio
  - Conflict minerals/resource extraction/mine safety
  - Board diversity policies
  - Impact of governmental regulations on business (including environmental regulations)
- SEC working on additional human capital disclosure requirements per Chair Gensler's request (Aug. 2021). Could include metrics on workforce turnover, skills training, compensation, benefits, diversity and health and safety.
- SEC approved Nasdaq's comply or explain board diversity proposal. (Aug. 2021)
- SEC issued SLB 14L which reversed prior staff interpretations governing the inclusion of shareholder proposals on ESG issues in proxy statements. (Nov. 2021)
- Per Chair Gensler's Fall 2021 regulatory agenda, SEC is also working on rule amendments to enhance disclosures regarding cybersecurity risk and related governance and to enhance disclosures about the diversity of board members.
- On climate change, SEC issued disclosure guidance in 2010. No mandated disclosure. Climate change-related information may be required under existing S-K disclosure items, if material.

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Specifically, Where is the SEC on ESG Disclosures? (cont'd)

- Biden Administration – Jan. 2021
  - Acting Chair Lee issues directive to staff to review SEC filings for climate-related disclosures. (Feb. 2021)
  - Acting Chair Lee creates "Climate and ESG Task Force" in SEC Division of Enforcement, hires Senior Policy Advisor for Climate and ESG. (March 2021)
  - Chair Gensler authorizes preparation of new climate-related disclosure rule by end of year. (July 2021)
  - SEC staff publishes sample comment letter on climate change disclosures (Sept. 2021) (www.sec.gov/corpfin/sample-letter-climate-change-disclosures), and issues comment letters exclusively on climate disclosure issues to filers in carbon intensive and non-carbon intensive industries.

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Specifically, Where is the SEC on ESG Disclosures? (Cont'd)

- Based on the foregoing, for this reporting season public companies should think about the following topics for disclosure, if material:
  - Whether specific climate-related disclosures should be included in Business, Legal Proceedings, Risk Factors, MD&A, forward-looking statement disclaimer sections of the 10-K
  - Should climate-related disclosures provided in stand-alone ESG, sustainability, corporate responsibility or other reports be incorporated into or, at minimum, referred to in SEC filings
  - Level of capex for climate-related initiatives
  - Physical effects of climate change on properties/operations
  - Impacts of weather on insurance cost/availability
  - Compliance costs/transition risks related to impacts of climate change
  - Carbon credits or offsets (costs, availability, etc.)
  - Any litigation risks related to climate change
  - Board oversight of climate change issues (for proxy)
- Compare your ESG disclosures with those of relevant peers and against internal disclosures reported up to senior management or board of directors.
- <u>Reminder</u>: Adjust any disclosure controls and procedures to include the consideration and review of climate/ESG related information, including human capital disclosures.

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What Should We Expect from the SEC Climate Change Rule When Promulgated?

- With any luck, an overarching materiality standard using the traditional reasonable investor formulation.
- Some form of scaled disclosure based on company size.
- Qualitative and quantitative reporting of GHG emissions
  - Direct emissions from sources owned or controlled by the company (Scope 1)
  - Indirect emissions associated with third party generation of energy consumed by the company (Scope 2)
  - All other indirect emissions across the company's value chain (Scope 3)
- Identification of disclosure framework
  - What is scope of disclosure and what is the method for quantifying GHG emissions?
  - Based on existing reporting standards or bespoke
    - Sustainability Accounting Standards Board (SASB)
    - Task Force on Climate Related Financial Disclosures (TCFD)
    - Global Reporting Initiative (GRI)
  - Requirement to provide specific information supporting climate pledges or commitments
  - Need for external assurance on climate-change reporting

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Polling Question #3

Does your company report regularly to the Board of Directors regarding ESG/sustainability issues?

- Yes
- No

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2022 Public Company Update Executive Compensation

Ryan Murphy

Tax Updates

- 162(m)
  - TCJA previously amended 162(m) to provide that a covered employee includes (i) any individual serving as CEO or CFO at any time during the tax year, (ii) the three other most highly compensated executive officers for the tax year, and (iii) any individual who was a covered employee in a preceding tax year beginning after December 31, 2016.
  - American Rescue Plan Act of 2021 further amended 162(m).
  - ARPA provides that covered employees will also include the five highest compensated employees other than those described in (i) and (ii) above.
  - The once a covered employee, always a covered employee rule under TCJA does not apply to ARPA covered employees.
  - Effective date is for tax years starting after December 31, 2026.

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Tax Updates

- Tax Withholding
  - Special FICA tax timing rule for deferred compensation under Code Section 3121(v)(2).
  - In a 2015 district court case (*Davidson v. Henkel Corp.*), the company failed to withhold FICA taxes in accordance with the special timing rule, the effect of which was that the former employee paid higher FICA taxes. The underlying agreement included the following language:

    > For each Plan Year in which a Deferral is being withheld or a Match is credited to a Participant's Account, the company shall ratably withhold from that portion of the Participant's compensation that is not being deferred the Participant's share of all applicable Federal, state or local taxes. If necessary, the Committee may reduce a Participant's Deferral in order to comply with this Section.

  - Based on the plan language, the *Henkel* court held that the company could be liable for the failure to properly withholding in accordance with the special timing rule.

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Tax Updates

- Tax Withholding Cont'd
  - Recently a complaint was filed by the former CEO of CV Sciences Inc.
  - The CEO had received shares of company stock in settlement of equity awards that had been granted to him.
  - The Company did not withhold taxes in connection with the settlement of the award.
  - Because of the federal securities laws, the CEO was unable to immediately sell the stock. During this period, the value of stock significantly declined.
  - The CEO's employment agreement included a provision that the company "shall withhold from any payroll or other amounts payable to [the CEO] pursuant to this Agreement [all taxes] and other contributions as are required pursuant to any law or other government regulation or ruling."
  - The CEO alleged that the company's failure to withhold taxes in connection with the settlement of the awards was in breach of the employment agreement and damaged him.
  - Take Away: Recommend reviewing tax withholding language in agreements/plans. Would caution against using mandatory language.

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Tax Updates

- ISOs/ESPPs
  - Reminder that if ISOs were exercised under a stock incentive plan or shares were purchased under an ESPP during 2021, Form 3921 (ISO exercises) and Form 3922 (ESPP purchases) must be furnished to employees by January 31, 2022.

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Polling Question #4

The *Henkel* court held that the company could be liable for the failure to properly withhold in accordance with the special timing rule.

- Yes
- No

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SEC Updates

- Spring-Loaded Equity Grants
  - In November, the SEC staff released Staff Accounting Bulletin 120, addressing “spring-loaded” equity grants in circumstances where a company grants awards just prior to the release of positive non-public information.
  - The SAB indicates that using market prices on the grant date to establish the fair value of an equity award are generally reasonable when estimating the grant-date fair value of a routine annual grant that is not designed to be spring-loaded.
  - However, the SAB indicates that, when equity grants are made shortly before the release of material non-public information that is expected to result in a material increase in the company’s share price, the company should consider whether adjustments are appropriate in determining the fair value of the equity award.
  - If an adjustment is appropriate, the SAB also indicates that disclosure to the financial statements should be provided as to how fair value was determined for a spring-loaded grant (e.g., process for determining when an adjustment is appropriate, how the adjustment was determined, and any significant assumptions used in the adjustment).

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SEC Updates

- Spring-Loaded Equity Grants Cont'd

  Example. Company D is a public company that entered into a material contract with a customer after market close. Subsequent to entering into the contract but before the market opens the next trading day, Company D awards share options to its executives. The share option award is non-routine, and the award is approved by the Board of Directors in contemplation of the material contract. Company D expects the share price to increase significantly once the announcement of the contract is made the next day. Company D's accounting policy is to consistently use the closing share price on the day of the grant as the current share price in estimating the grant-date fair value of share options.

  Response. In estimating the grant-date fair value of share options in this fact pattern, absent an adjustment to the closing share price to reflect the impact of Company D's new material contract with a customer, the staff believes the closing share price would not be a reasonable and supportable estimate and, without an adjustment the valuation of the award would not meet the fair value measurement objective of FASB ASC Topic 718 because the closing share price would not reflect a price that is unbiased for marketplace participants at the time of the grant.

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SEC Updates

- Clawbacks
  - In October, the SEC reopened the comment period on proposed Rule 10D-1 relating to clawback rules under Dodd-Frank. Comment period closed in November.
  - National securities exchanges would be required to establish listing standards requiring issuers to adopt a recovery policy under which recovery is required from current and former executive officers (i.e. Section 16 officers) who received incentive-based compensation during the 3 fiscal years preceding the date on which the issuer is required to prepare an accounting restatement.
  - Recovery to be on a no-fault basis and required, except where it would be impractical to do so (e.g., cost of recovery exceeds the amount to be recovered).
  - Clawback policy to be a required exhibit to the issuer's annual report.
  - Disclosure regarding actions taken to enforce clawback policy (e.g., amount of excess incentive-based compensation and excess amounts outstanding).

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SEC Updates

- Perk Enforcement Actions
  - Background. Item 402(c)(2)(ix)(A) requires disclosure of perquisites and personal benefits that total at least $10,000. Perks also factor in determination of NEOs under Item 402(a).
  - In 2006, SEC issued Release 33-8732A that generally provided that an item is not a perk or personal benefit where it is integral and directly related to the performance of the executive's duties (i.e., is the item needed) or, alternatively, it is generally available on a non-discriminatory basis to all employees.
  - Three enforcement actions in 2020.
  - Three more enforcement actions in 2021.
  - Have tended to target more egregious examples (e.g., use of corporate aircraft).
  - In these actions, the SEC has been critical of the lack of internal policies/controls governing the relevant perquisite such as tracking whether a flight was integrally related to the officer's job duties, failures to disclose perquisites as part of the annual D&O questionnaire process, and failures to properly train those responsible for executive compensation disclosures.

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Pay Ratio

- Generally will be an off-cycle year.
- Need to consider whether any changes in employee populations or compensation arrangements affect ability to use the same median employee as last year.
- If non-U.S. employees were excluded under the 5% de minimis exclusion, consider whether headcount changes may impact the availability of the 5% de minimis exception.

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2021 Say on Pay Recap

- Approximately 97.2% of Russell 3000 companies received at least majority support on their say-on-pay vote. 93% received at least 70% support.
- Among those failing their vote, the most common reasons for failure were problematic pay practices, misalignment between pay and performance, use of special awards, shareholder outreach and disclosure, rigor of performance goals, COVID-related actions, and non-performance based equity.

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Proxy Advisor Updates

- ISS
  - Equity Scorecard
    - For meetings on or after February 1, 2022, new value-adjusted burn rate will be used in addition to multiplier-based adjusted burn rate. VABR to be informational for 2022 meetings, but is expected to replace existing burn rate factors for meetings on or after February 1, 2023.

      MABR = (# of appreciation awards granted + (# of full value awards x Multiplier)) ÷ (Weighted average common shares * stock price)

      VABR = ((# of options x option's value using Black-Scholes Model) + (# of full value awards * stock price)) ÷ (Weighted average common shares * stock price)
    - Clawback policy must authorize no-fault recovery on financial restatements.
  - COVID
    - Return to pre-pandemic approach. Mid-year changes to metrics, performance targets, or performance period will generally be viewed negatively.
    - If changes are made, companies are encouraged to provide disclosure explaining why the changes were necessary and were not reflective of management performance.
    - Regarding rigor of performance goals, lower performance goals in response to pandemic should be accompanied by disclosure, especially in regard to the effect on payout opportunities.
    - If company grants one-time awards, should clearly disclose the rationale for the award and why it furthers investors' interests. Vesting conditions should be strongly performance-based and vesting periods should be long-term.

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Proxy Advisor Updates

- ISS Cont'd
  - Shareholder Value Transfer (SVT)
    - In reviewing a proposed equity plan, ISS generally takes into account shares remaining available for future awards under any existing plan.
    - If a company does not want ISS to take these shares into account, it should include disclosure in its proxy regarding the total number of shares remaining available for future awards, separately identify the total number of full value awards and appreciation awards outstanding (including the weighted avg. exercise price and remaining term), and commit to make no further grants under the existing plan.
    - Alternatively, the new plan can include a provision that the share reserve will be reduced by shares granted under existing plans between the new plan's adoption and its approval by shareholders.

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Proxy Advisor Updates

- Glass Lewis
  - ESG
    - If ESG performance goal is introduced into incentive plans, disclosure should be provided relating to how the goal aligns with the company's strategy, the rationale for the particular ESG metric, the target-setting process, and the corresponding payout opportunities. Particularly where qualitative measures are used, disclosure should be provided as to how achievement will be assessed.
  - One-Time Awards
    - Like ISS, wary of one-time awards. If one-time award is provided, disclosure should be provided as to why the award was necessary and why existing awards do not provide sufficient motivation. Similar to ISS, Glass Lewis expects awards to be tied to future service and performance.

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