

Snell & Wilmer

Committed to being your perfect fit.®

THIRTEENTH ANNUAL PROXY SEASON UPDATE

Presented by:

Jeffrey Beck

Jon Cohen

Anne Meyer

Joshua Schneiderman

Jeffrey Scudder

Kevin Zen

January 7, 2021

Topics to be Discussed

- SEC Update (Kevin Zen)
- Annual Reporting Considerations (Jeffrey Beck)
- Executive Compensation Update (Anne Meyer)
- ESG Trends and Developments (Joshua Schneiderman)
- Virtual Annual Meeting Considerations (Jeff Scudder)
- Governance and Regulatory Trends and Forecast (Jon Cohen)

Regulation S-K Modernization Update

- During 2020, the SEC continued with its disclosure simplification project by issuing two adopting releases to streamline and modernize certain Regulation S-K disclosure requirements
- Movement away from prescriptive disclosure requirements towards a more “principles-based” approach
- **Item 100 Amendments** - Item 101: Description of Business; Item 103: Legal Proceedings; Item 105: Risk Factors
 - o Effective November 9, 2020—compliance required for upcoming 10-K
- **Item 300 Amendments** - Item 301: Selected Financial Data; Item 302: Supplementary Financial Information; Item 303: MD&A
 - o Effective 30 days after publication in the Federal Registrar—compliance required for first fiscal year ending on or after the date that is 210 days after publication of the amended rules in the Federal Registrar

Item 101: Description of Business

General development of the business (Item 101(a))

- ***Non-exclusive list of topics***
 - o Non-exclusive list of four topics—include disclosure regarding any of the topics only to the extent the information would be material to an understanding of the general development of the business
- ***Material changes to strategy***
 - o One of the four topics listed
 - o Does not mandate that business strategies be disclosed
 - o SEC noted that once a company has disclosed its business strategy (e.g., in a registration statement), it is appropriate for it to discuss the changes to that strategy, to the extent material to an understanding of the development of the business
- ***Eliminated the previously prescribed five-year disclosure timeframe (three-year timeframe for smaller reporting companies)***
- ***Option to update only***
 - o Permits the business description (other than in an initial registration statement) to include only updates from previously filed information (rather than a full restatement), paired with a hyperlink to a single previously filed full discussion
 - o Utility may be limited by general SEC rules regarding incorporation by reference

Item 101: Description of Business cont.

Business narrative (Item 101(c))

- ***Principles-based list of disclosure topics***
 - o Clarifies and expands the principles-based approach of Item 101(c) with a non-exclusive list of disclosure topic examples drawn in part from the topics currently contained in Item 101(c)
- ***Human capital resources disclosure***
 - o Requires a description of (1) a company's human capital resources, including the number of persons employed and (2) any human capital measures or objectives that the company focuses on in managing the business
 - o Depending on the nature of the business and workforce, examples include measures or objectives that address the development, attraction and retention of personnel
- ***Government regulation disclosure***
 - o Expands the current disclosure requirements regarding the material impact of environmental regulations to cover all "material government regulations"

Item 103: Legal Proceedings

- ***Hyperlinks permitted***
 - Permits hyperlinking or cross-references to legal proceedings disclosure responsive to Item 103 located elsewhere in the document, such as in the MD&A, risk factors or notes to the financial statements
- ***Disclosure threshold***
 - Increases the quantitative threshold for disclosure of environmental proceedings to which a governmental authority is a party from \$100,000 to \$300,000
 - A company has the option to select a different threshold that it determines is reasonably designed to result in disclosure of material environmental proceedings

Item 105: Risk Factors

- ***Risk factor summary***
 - If the risk factor section exceeds 15 pages, a company must include, in the forepart of the document, a numbered/bulleted risk factor summary, not to exceed two pages
- ***Materiality standard***
 - Replaces the requirement to disclose the “most significant” factors with a standard to disclose the “material” factors
- ***Organization/Sub-headings***
 - Risk factors must be organized under relevant sub-headings
 - Risks that could apply generally to any company or offering of securities must be included at the end of the risk factor section under the caption “General Risk Factors”

Item 301: Selected Financial Data / Item 302: Supplementary Financial Information

- ***Elimination of selected financial data requirement (Item 301)***
 - Eliminates the requirement to provide the five years of selected financial data in tabular form
- ***Revision of supplementary financial information (Item 302)***
 - Limits the requirement to disclose information about quarterly financial results to only where there have been material retroactive changes to the income statements which pertain to any quarter within the two most recent fiscal years or any subsequent interim period for which financial statements are included or required to be included by Article 3 of Regulation S-X

Item 303: MD&A

- Provides for a new Item 303(a), which sets forth the overall objective of MD&A
- Eliminates the current requirement to provide in Form 10-K the tabular disclosure of contractual obligations
- Eliminates the current requirement to provide a separately captioned “Off-Balance Sheet Arrangements” section
- Clarifies that where there are material changes in a financial statement line item, including where material changes within a line item offset one another, a discussion of the underlying reasons for these material changes is required, in both quantitative and qualitative terms
- Significantly updates and refines the Results of Operations discussion, including, among other things, adopting a “reasonably likely” standard as the disclosure threshold for MD&A (including with respect to known trends, demands, commitments, events and uncertainties)
- For interim periods, permits comparison of the most recently completed quarter to either the corresponding quarter of the prior year or to the immediately preceding quarter
- Adds a new explicit requirement to disclose critical accounting estimates

SEC Guidance on Key Financial and Operating Metrics

- In January 2020, the SEC issued guidance concerning disclosure of key performance indicators (KPIs) and metrics in MD&A
 - o Requires a discussion and analysis of statistical data that in the company's judgment enhances the reader's understanding of MD&A
- To the extent that an existing regulatory disclosure framework (i.e., GAAP or Regulation G/Item 10 of Regulation S-K for non-GAAP financial measures) does not apply, the SEC generally expects the following disclosure to accompany KPIs:
 - o A clear definition of the metric and how it is calculated
 - o A statement indicating the reasons why the metric provides useful information to investors
 - o A statement indicating how management uses the metric in managing or monitoring the performance of the business
- If a company changes the method by which it calculates or presents the metric from one period to another, the guidance provides an additional list of disclosures to include

Other SEC Updates

- ***Elimination of “competitive harm” requirement in streamlined process for confidential treatment***
 - o Under the amended Item 601 of Reg S-K, a company may file redacted material contracts and agreements provided that the redacted information:
 - is not material; **and**
 - is the type of information that the company both customarily and actually treats as private and confidential
- ***Permitting electronic signatures in SEC filings***
 - o Under the amended Rule 302(b) of Reg S-T, a signatory will be permitted to electronically sign SEC filings, provided that the signatory follows certain procedures and the electronic signature meets certain requirements specified in the EDGAR Filer Manual
 - o An attestation must be manually signed before an electronic signature may be used

Annual Reporting Considerations

- COVID-19
 - Cheesecake Factory Enforcement Action (December 2020)
 - Disclosure Considerations as the Pandemic Evolves
- Emphasis on MD&A—Known Trends or Uncertainties
 - Diageo
 - HP
 - BMW
 - General Electric
- Perquisites Enforcement Action

COVID-19

Cheesecake Factory Enforcement Action

- On December 4, 2020, the SEC brought an enforcement action against the Cheesecake Factory for misleading investors about the financial effects of the pandemic
- While the penalty was relatively mild (\$125,000) and the SEC allowed the company to settle without a fraud charge (neither scienter-based or negligence-based), the action serves as an important reminder that the SEC expects companies to “provide as much information as is practicable regarding their current financial and operating status, as well as future operational and financial planning”

COVID-19

Cheesecake Factory Enforcement Action cont.

For context,

- Most of the misleading information alleged by the SEC involved omissions in early disclosures at onset of the pandemic in late March/early April, all of which were ultimately disclosed within a short period following the allegedly misleading disclosures

The Cheesecake Factory did disclose:

- It was withdrawing guidance due to the conditions caused by COVID-19
- It was transitioning to a “to go” or delivery model
- It had drawn down on the last \$90 million of its revolving credit line availability
- It was evaluating additional measures to preserve liquidity

COVID-19

Cheesecake Factory Enforcement Action cont.

In these initial disclosures, however, the SEC alleged that the Cheesecake Factory did not disclose:

- That it had excluded expenses attributable to its corporate operations, which contradicted its statements that its business was “operating sustainably at present”
- That its business was losing money rapidly
- That it had only 16 weeks of cash remaining
- That it had informed its landlords that it would not be paying April rent

COVID-19

Disclosure Considerations as the Pandemic Evolves

- Companies should again refer to existing SEC guidance¹
- Design disclosures to see the company through the “eyes of management”

1. CF Disclosure Guidance: Topic 9 (March 25, 2020) and CF Disclosure Guidance: Topic 9A (June 23, 2020).

COVID-19

Disclosure Considerations as the Pandemic Evolves Cont.

Companies should consider how COVID-19 has impacted their business and operations, including, but not limited to, the following areas:

- Description of Business
 - Change in products/services or demand relating thereto
 - Strategic changes
 - Disruption in supply chains
 - Human capital
 - Travel and access restrictions
 - Regulatory implications of COVID-19
- Risk Factors
- Liquidity and Capital Resources
- Disclosure Controls and Procedures
- Going Concern
- Impairments

Emphasis on MD&A—Known Trends or Uncertainties

- Registrants must “describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations.” Regulation S-K, Item 303(a)(3)(ii)².
- This discussion “shall focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition.” Instruction 3 to Regulation S-K, Item 303(a)³.
- During 2020, the SEC continued to emphasize the importance of disclosing trends and uncertainties through enforcement actions against high profile companies.
- It is important to note that in none of these enforcement actions was there a finding that any of the affected companies had engaged in accounting fraud or improper revenue or expense recognition.* Rather, for each of the enforcement actions discussed, the alleged misstatements or omissions were in each case, substantively, for a failure to comply with the above MD&A disclosure standards concerning known trends or uncertainties.

*The BMW action involved practices and disclosures beyond just Item 303-type disclosures. And, BMW is not a US publicly-reporting company. BMW did, however, conduct multiple Rule 144A bond offerings from 2016 to 2019 aggregating approximately \$14 billion. It was these offerings that provided the SEC jurisdiction to bring the enforcement action under the Securities Act of 1933, versus the Securities and Exchange Act of 1934.

2. As discussed earlier in this presentation, Regulation S-K, Item 303 has been significantly revised and updated.

3. See footnote 2.

Emphasis on MD&A—Known Trends or Uncertainties

Diageo (February 2020)

- Diageo is international brewer and distiller of alcoholic beverages
- The SEC alleged that Diageo engaged in channel stuffing by shipping unneeded products to distributors through aggressive sales practices. The practices later resulted in increased distributor inventory levels that ultimately resulted in Diageo entering into various contractual arrangements with its distributors to reduce their inventory levels through a process referred to as “destocking.”
- The SEC enforcement order concluded that Diageo failed to disclose significant known trends and uncertainties resulting from such practices
- Specifically, the overshipments versus demand resulted in increased distributor inventory levels; the initial positive impacts the overshipments had on sales and profit growth; and the ultimate negative impact they were reasonably likely to have on future sales.

Emphasis on MD&A—Known Trends or Uncertainties

BMW (September 2020)

- The SEC’s enforcement action against BMW related to inaccurate disclosures about BMW’s sales volume in the United States
- BMW reported to investors its retail sales volume, which is a non-financial key performance metric
- In effort to meet internal retail sales targets, BMW offered dealers incentives (\$1,000 to \$3,000 per vehicle) to take additional cars designated as demos or service loaner vehicles, often on the last day of the month and whether or not needed by the dealers. The placements are treated as “retail sales” by BMW.
- This resulted in a build up of demo and loaner inventory by the dealers and made it more difficult to sell new car inventory because the dealers prioritized sales of their inventory over the new car inventory.

Emphasis on MD&A—Known Trends or Uncertainties

BMW (September 2020) cont.

- For the period from January 2015 through March 2017, demos and loaners accounted for 27% of BMW North American sales and in certain months more than 40%
- Internal documents showed that executives were concerned with this practice and called in “problematic” and “not sustainable”; dealers referred to it as “late-inning monthly close shenanigans”
- BMW also allegedly utilized a cookie jar reserve of previously sold, but unreported sales (where sales exceeded internal targets) to cushion later months where sales fell short of internal targets
- Although BMW disclosed to investors that its retail sales metric was an estimate of sales and included vehicles delivered for dealer use or service loaners, it omitted to disclose:
 - BMW’s reliance of the program to increase retail sales volumes, and
 - the magnitude of the use of program, including that the dealer placements were treated as sales whether or not they were needed or used for such purpose by the dealers

Emphasis on MD&A—Known Trends or Uncertainties

HP Inc. (September 2020)

- HP manufactures and sells personal computers, printers and printer supplies.
- In an effort to meet quarterly sales targets, regional managers at HP used a variety of incentives to accelerate, or “pull-in” sales that were otherwise forecasted to materialize in later quarters.
- In addition, in one international region, HP sold printing supplies at substantial discounts to distributors known to be selling outside of their territory in violation of HP policy and the respective distributor agreements. These out of territory sales resulted in significant margin erosion compounded by the cannibalization of other HP sales in these territories
- The SEC alleged that HP failed to disclose known trends and uncertainties associated with these sales practices, including that the trend of increased quarter-end discounting, resulting in margin erosion and channel inventory buildup, would have an adverse impact on future quarter results causing HP’s results to not be indicative of future operating results.

Emphasis on MD&A—Known Trends or Uncertainties

General Electric (December 2020)

- General Electric is an industrial company that operates a number of lines of business, including power, renewable energy and aviation
- The enforcement action involved two lines of GE's various businesses
- In GE's Power division, an important part of this business is long-term service contracts for power turbines (that GE also manufactures and sells). The resulting service contracts involve maintenance payments over multiple years with revenue being recognized under the cost of completion method. Under the cost of completion method, the total costs estimated to be incurred by GE over the life of the contract are estimated. For each dollar of cost incurred, a determined profit margin is applied and recognized as revenue, whether billable to GE at that time or not.

Emphasis on MD&A—Known Trends or Uncertainties

General Electric (December 2020) cont.

- As part of its periodic updates of the estimates relating to these long-term contracts, GE lowered the future estimated costs to be incurred, which resulted in a higher profit margin. The resulting impact of these lowered costs had the immediate effect of higher revenue recognition (much of which was reported as deferred revenue since it was not yet billable to the customer pursuant to the terms of the contract).
- Related to the above, in order to show improved Industrial Cash Flow (a non-GAAP metric), GE increased its sales of receivables (factoring) to its subsidiary GE Capital by: (1) selling unbilled receivables of up to five years out, versus its historical practice of selling only receivables collectable within one year and (2) providing pricing and other concessions to entice customers to modify long-term contracts to permit factoring to GE Capital.
- As a result of the above actions, GE was able to report significantly increased profits. In its press release and filings, however, the SEC alleged that GE failed to disclose the impact of the practices and actions and rather attributed the improvement to other items. In short, by pulling forward more than \$2 billion in cash from future years. According to Stephanie Avakian, SEC Enforcement Director, “. . . simply, they took from the future to benefit the present.”

Emphasis on MD&A—Known Trends or Uncertainties

General Electric (December 2020) cont.

- The second aspect of the enforcement action related to the GE's insurance business, specifically long-term care reinsurance policies
- GE recorded favorable reserve adjustment in 2015 despite known trends of increasing costs associated with these policies
- Subsequently, in 2017, GE recorded a \$9.5 billion charge as a result of unfavorable reserve adjustments

Perquisites Enforcement Action

- As a reminder that the SEC remains focused on the reporting of executive compensation, specifically perquisites, following is a short summary of a recent enforcement action.
- On September 30, 2020, the SEC settled an enforcement action against Hilton Worldwide Holdings, Inc. for failing to disclose \$1.7 million worth of travel-related perquisites and personal benefits to its named executive officers, including the Chief Executive Officer.
- The implicated perquisites include personal use of Hilton’s corporate aircraft and hotel stays by executive officers.
- In its enforcement order, the SEC emphasized that the exception from disclosure for benefits that are integrally and directly related to an executive’s job is very narrow. Business purpose or convenience does not affect the classification of an item as a perquisite where it is not “integrally and directly” related to the performance of the executive’s job.
- The enforcement action that it was generated through the use of risk-based data analytics to uncover potential violations related to corporate perquisites
- Similar action brought against RCI Hospitality and the two executives that received the non-reported perquisites (including corporate charitable contributions to the school that one of the executive’s children attended)

Executive Compensation Update – CARES Act

- Recipients of loans and loan guarantees under the “Emergency Relief and Taxpayer Protection” program in Section 4003 of the CARES Act are subject to the executive compensation restrictions set forth in the CARES Act.
- Duration of Restrictions. The period during which a business must adhere to the CARES Act executive compensation restrictions varies based on the CARES Act program under which relief was provided.
 - Generally, the executive compensation restrictions must be in place for a period beginning on the loan date and ending one year after the loan is no longer outstanding.
 - A different restrictive period applies to businesses that receive assistance under Section 4116, which limits the executive compensation restrictions to a two-year period from March 24, 2020 to March 24, 2022.

Executive Compensation Update – CARES Act

- Compensation Limits. For the applicable restriction period, total compensation is limited for employees who earned over \$425,000 in total compensation in 2019.
 - For employees who earned between \$425,000 and \$3M, total compensation may not exceed the total compensation that the business paid the employee in calendar year 2019.
 - For employees who earned more than \$3M, total compensation may not exceed the sum of (1) \$3M and (2) 50% of the amount by which the employee's 2019 total compensation exceeded \$3M.
- Severance pay and other benefits upon termination also may not exceed two times the maximum total compensation that the business paid the employee in calendar year 2019.

Executive Compensation Update- Incentive Compensation

- Compensation Committees need to consider how COVID-19 has impacted their businesses and how management has responded. Committees should consider their ability to use discretion and whether it is appropriate to do so.
- Going into 2021, Compensation Committees need to consider 2021 performance goals and whether changes should be made in light of the ongoing pandemic.
 - Should non-financial goals be introduced in industries affected by COVID-19?
 - Should the award mix remain unchanged?
 - Should ESG-related goals be implemented?

Executive Compensation Update – Section 162(m)

- The Tax Cuts and Jobs Act (“TCJA”) amended Section 162(m), which generally limits the deductibility of compensation paid to certain “covered employees” of a public company to \$1M per year. Prior to the TCJA, payments of qualified performance-based compensation made to covered employees were exempt from the \$1M limitation.
- On December 18, 2020, the IRS issued final regulations under Section 162(m).
- The final rules are generally consistent with the proposed rules.
 - Extension of exercise period for nonqualified stock option or stock appreciation right will not result in a loss of grandfathered status if the extension is in accordance with Section 409A.
 - Nonqualified deferred compensation under account balance and non-account balance plans are generally consistent with the proposed regulations, but the final regulations provide additional detail on calculating the grandfathered amounts.

Environmental, Social and Governance Trends and Development

Employee Health and Safety and Business Continuity

“We have taken the necessary steps to ensure that we continue to supply our customers and protect the safety of our employees... We have taken steps to enhance employee safety within our facilities by promoting the practice of social distancing where feasible, providing reminders to wash or disinfect their hands, avoiding unnecessary face touching, placing hand sanitizers within our operating environments, and periodically cleaning and disinfecting our facilities... During the second quarter of 2021, we also implemented on-site workplace temperature screening as we continue to adapt our health and safety practices in response to the COVID-19 pandemic.” – McKesson 10-Q

“As our Company continues to respond to the COVID-19 pandemic, we have prioritized our focus on associate care, including extra pay and benefits as well as masks and gloves; increased cleaning and sanitation measures; customer safety; and new associate hiring. Additionally, we've shifted the timing of certain capital spending and consulting projects, and reduced marketing and travel in response to the COVID-19 pandemic.” – Walmart 10-Q

Environmental, Social and Governance Trends and Development

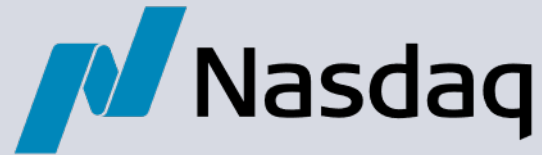
Diversity

AB 979 Requirements

Board Size	Number of Directors from Underrepresented Communities	Deadline
1-4	One	December 31, 2021
5-8	Two	December 31, 2022
9+	Three	December 31, 2022

Environmental, Social and Governance Trends and Development

Diversity



Nasdaq to Advance Diversity through New Proposed Listing Requirements

PUBLISHED

DEC 1, 2020 7:15AM EST

Standardized disclosure framework to drive greater transparency on corporate governance

Introduces governance partnership to support board composition planning and execution

NEW YORK, Dec. 01, 2020 (GLOBE NEWSWIRE) -- Nasdaq (Nasdaq: NDAQ) today filed a proposal with the U.S. Securities and Exchange Commission (SEC) to adopt new listing rules related to board diversity and disclosure. If approved by the SEC, the new listing rules would require all companies listed on Nasdaq's U.S. exchange to publicly disclose consistent, transparent diversity statistics regarding their board of directors. Additionally, the rules would require most Nasdaq-listed companies to have, or explain why they do not have, at least two diverse directors, including one who self-identifies as female and one who self-identifies as either an underrepresented minority¹ or LGBTQ+. Foreign companies and smaller reporting companies would have additional flexibility in satisfying this requirement with two female directors.

Environmental, Social and Governance Trends and Development

Environmental

Amazon Sustainability Report



Renewable Energy

Amazon has a company-wide goal to power our operations with 100% renewable energy by 2025. In 2019, we reached 42% renewable energy across our business. As of June 2020, Amazon has 91 solar and wind projects across the globe that have the capacity to generate over 2,900 megawatts and deliver more than 7.6 million megawatt hours of energy annually—enough to power more than 680,000 U.S. homes.

Shipment Zero

Shipment Zero is Amazon's vision to make all Amazon shipments net zero carbon, with a goal of delivering 50% of shipments with net zero carbon by 2030. Shipment Zero means that the fulfillment operations we undertake to deliver a customer's shipment are net zero carbon—from the fulfillment center where an item is picked off the shelf, to the materials used to package the item, and the mode of transportation that gets the package to the customer's door.

Electric Vehicles

In 2019, Amazon ordered 100,000 new electric delivery vehicles from Rivian, a U.S. electric vehicle manufacturer. This order, the largest order ever of electric delivery vehicles, sends a signal to the marketplace to start inventing and developing new technologies that large, global companies need to transition to a low-carbon economy. Amazon plans to have 10,000 of the new electric vehicles on the road as early as 2022 and all 100,000 vehicles on the road by 2030.



Sustainable Packaging

Amazon created our Frustration-Free Packaging program to encourage manufacturers to package their products in easy-to-open, 100% recyclable packaging that is ready to ship to customers without the need for an additional shipping box. Since 2015, we have reduced the weight of outbound packaging by 33% and eliminated more than 880,000 tons of packaging material, the equivalent of 1.5 billion shipping boxes.

Environmental, Social and Governance Trends and Development

Political Spending / Lobbying

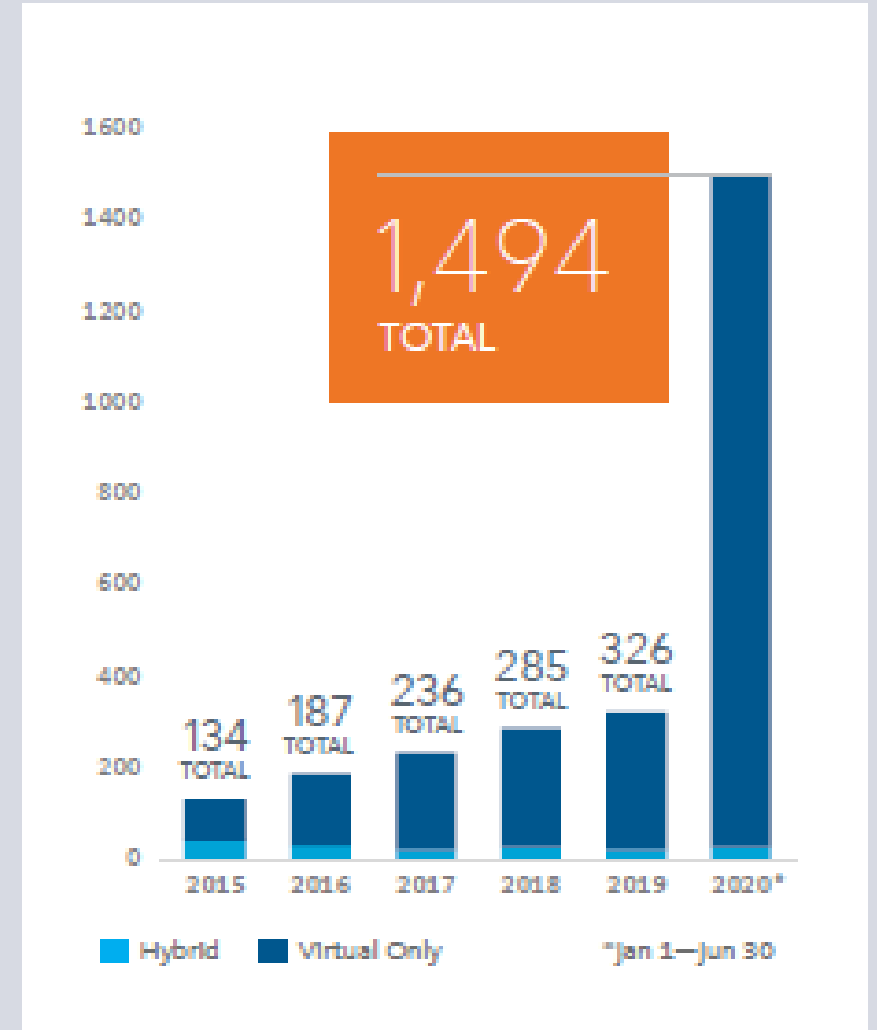
Resolved, Shareholders request that the Company provide a report, updated semiannually, disclosing the Company's:

1. Policies and procedures for making, with corporate funds or assets, contributions and expenditures (direct or indirect) to (a) participate or intervene in any campaign on behalf of (or in opposition to) any candidate for public office, or (b) influence the general public, or any segment thereof, with respect to an election or referendum.
2. Monetary and non-monetary contributions and expenditures (direct and indirect) used in the manner described in section 1 above, including:
 - (a) The identity of the recipient as well as the amount paid to each; and
 - (b) The title(s) of the person(s) in the Company responsible for decision-making.

The report shall be presented to the board of directors or relevant board committee and posted on the Company's website within 12 months from the date of the annual meeting.

“Virtual Proxy Season 2.0”

- Broadridge has been hosting virtual annual meetings since 2009.
- Per Broadridge’s “Virtual Shareholder Meetings: 2020 Mid-Year Facts and Figures,” COVID-19 accelerated upward trend (exponentially):



2020 Virtual Annual Meetings: By The Numbers

- 80% of issuers using Broadridge in 2020 were first-time adopters.
- 75,000 people attended; average attendance:
 - Large-Cap: 122
 - Small-Cap: 30
- Shareholder questions:
 - 97% of issuers allowed live questions
 - 11% of issuers allowed pre-meeting questions
 - On average, five shareholder questions were asked per meeting (max: 316!)
 - Correlation between number of shareholder questions and shareholder proposals
- Average meeting duration:
 - WITH shareholder proposals: 34 minutes
 - WITHOUT shareholder proposals: 18 minutes

Bumps In The Road; Lessons Learned

- Lack of transparency regarding shareholder questions – e.g., technical limitations made questions visible only to management, not other shareholders.
 - Not allowing questions during the meeting
 - Not making questions viewable during the meeting, or publishing them after the meeting
 - Not clarifying how questions were selected to be answered (if only a subset was addressed)
 - Concluding Q&A portion of the meeting with (false) statement that “no other questions were asked”
- “Street name” shareholders did not receive the credentials necessary to participate in the meeting as shareholders, and instead were only able to attend as guests.
- Limitations on presentations by proponents of shareholder proposals – e.g., requiring pre-meeting submission of a written statement to be read aloud by management.
- Technical difficulties; lack of real-time technical support.
- COVID-19 circumstances were rapidly changing; many issuers availed themselves of emergency relief under state law and SEC guidance.

Silver Linings; Future Opportunities

- Virtual meetings are more accessible for shareholders
 - Increased engagement between management and shareholders
- Efficiency in conduct of meeting
- Lower costs for issuers and shareholders
- Reduced environmental impact

Considerations For 2021 Virtual (?) Annual Meeting

1. Review state law and charter documents; consider hybrid vs. virtual-only meeting.
2. Connect with virtual meeting service provider ASAP.
 - a) Review lessons learned from 2020, if applicable
 - b) Decide on virtual meeting format (e.g., video, audio-only, etc.)
 - c) Address technical issues (e.g., real-time technical support) and develop contingency plan(s)
 - d) Dry runs
3. Engage with major shareholders to gather feedback from 2020 experience, if applicable, and share information about 2021 virtual annual meeting.
4. Update annual meeting rules and script to address concerns about 2020 Q&A sessions.

Considerations For 2021 Virtual (?) Annual Meeting cont.

5. Provide clear (plain English) instructions on how shareholders can participate in the 2021 virtual annual meeting.
 - a) Proxy Statement (note ISS and Glass Lewis voting policies)
 - b) Company website
6. Consider posting appropriate questions, and management's responses, on the company's website following the meeting.
7. Archive the meeting video/audio and make it available on the company's website.
8. Monitor changing circumstances and be prepared to adapt.
 - a) State law and SEC guidance
 - b) Be ready to pivot to virtual-only meeting, even if that is not preferred
 - c) Consider how flexibility and contingency plans may affect disclosure

Governance Trends

“There is now a growing recognition in the investment community that expectations of shareholders and other stakeholders should extend beyond the financial bottom line, and that the sustainability and credibility of a corporation’s long-term strategy cannot be assessed without taking into account the interdependencies between a corporation and its employees, customers, communities, the environment and other stakeholders.” Martin Lipton – 2018

“In hindsight, 2019 may come to be viewed as a watershed year in the evolution of corporate governance.” Martin Lipton - 2019

Reporting Standards and Frameworks

1. CDP – Carbon Disclosure Project; measures environmental impacts
2. CDSB – Climate Disclosure Standards Board; align corporate reporting model to equate natural capital and financial capital
3. CRD – Corporate Reporting Dialogue; dialogue and alignment among standard setters
4. GRI – Global Reporting Initiative; sustainability reporting standards
5. IIRC – International Integrated Reporting Council; global coalition promotes communication about value creation as the next step in the evolution of corporate reporting
6. GRESB – Global Real Estate Sustainability Benchmark; private coalition assesses sustainability performance of real estate assets

Reporting Standards and Frameworks cont.

7. ISO – International Organization for Standardization; develops consensus-based standards
8. PRI – Principles for Responsible Investment; ESG checklist for hedge funds
9. SASB – Sustainability Accounting Standards Board; 79 industries covered
10. SDGs – Sustainable Development Goals; 169 specific targets and 230 indicators sponsored by the United Nations
11. TCFD – Task Force on Climate Related Financial Disclosures; makes recommendations for disclosures
12. Edelman Trust Barometer – Survey of more than 600 institutional investors

Reporting Standards and Frameworks cont.

13. Drucker Institute company rankings – Assessment of company performance in customer satisfaction, employee engagement and development, innovation, social responsibility and financial strength
14. Greenhouse Gas Protocol – standards for accounting for greenhouse gas emissions and carbon removal
15. UN Global Compact – 17 Sustainable Development Goals (SDGs)
16. Embankment Project for Inclusive Capitalism (EPIC) – metrics to help businesses articulate the value created for investors and other stakeholders

Reporting Standards and Frameworks cont.

17. Equilar Diversity Index – measures presence of women on Russell 3000 boards
18. ISS now scores ESG activity in addition to its governance score
19. Glass Lewis, using data from Sustainalytics, rates ESG performance against ESG risk
20. U.S. Chamber of Commerce issued its “Project Go + I” report with voluntary ESG reporting best practices
21. Institute of International Auditors and Neel Corporate Governance Center – American Corporate Governance Index; Measures the quality of corporate governance among U.S. public companies

Metrics and Framework Standardization

- World Economic Forum, with help from Deloitte and other accounting firms, has proposed a unified disclosure framework
- The International Federation of Accountants has proposed a sustainability standards board
- CDP, CDSB, GRI, IIRC, and SASB have undertaken a joint effort to create a comprehensive reporting format
- Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector will apply from March 2021. It is intended to harmonize disclosures provided by “financial market participants” and “financial advisers” and forms part of the European Commission’s Action Plan on sustainable finance

Rating and Scoring Services

- Morningstar – Sustainalytics
- State Street Global Advisors “R-Factor”®
- MCSI (several ESG indexes)
- S&P Global ESG Scores
- Northern Trust ESG Analytics
- ISS Custom Climate Voting System
- T. Rowe Price Responsible Investing Indicator Model
- Thompson Reuters Refinitiv ESG (formerly ASSET4)

Factors Favoring Increased ESG Disclosure

- Recent world events
- BRT and WEF raised awareness
- Stakeholder Capitalism vs. Shareholder Capitalism, and the purpose of a corporation
- Pressure from investors
- Evolution of insurance underwriting
- EU leadership
- Compensation Committee developments
- Regulatory activity [side note – watch for California SB973 implementation regulations]

Factors Favoring Increased ESG Disclosure

- Caremark litigation activity
 - Innovation – Clovis Oncology
 - Product integrity – Marchand v. Barnhill
 - Environmental sustainability – Inter-Marketing Group v. Armstrong
 - Non-discrimination in the workplace – Pinterest
 - Accuracy of financial statements – Hughes v. Hu

Factors Contrary to Increased ESG Disclosure

- Private ordering and principles-based disclosure is preferable to one size fits all ESG mandated disclosure
- Neither ESG disclosure nor ESG activity is the same as ESG results. Regarding diversity, there is a difference between goals, quotas, and discrimination
- Accountability – profits demonstrate it clearly; ESG activity not so clearly. “Accountability to everyone is accountability to no one.”
- DOL new rules on ESG factors in ERISA governed proxy voting and investment
- SEC reluctance to commit to mandated ESG disclosures beyond the new human capital resources disclosure requirement
- Litigation risk (ask GAP, Oracle, Facebook, Qualcomm, NortonLifeLock, Danaher Corp., Monster Beverage, Cisco, and Signet Jewelers)
- In the long run, perhaps Milton Friedman was right

Discord at the SEC

- Current Commissioners are:
 - Elad Roisman (R) – Interim Chair
 - Hester Peirce (R)
 - Caroline Crenshaw (D)
 - Allison Lee (D)
- The SEC's Investor Advisory Committee and its ESG Subcommittee have recommended increased ESG disclosure mandates
- Who will be the next Chair?
 - Top prospects – Gary Gensler or Robert Jackson
 - Almost top prospects – Preet Bharara or Roger Ferguson
 - Also mentioned – Kara Stein or Valerie Caproni

Beyond the Tipping Point

- It is clear that 2021 will require the Board to increase the focus on its oversight responsibilities, with more attention to stakeholder perspectives – especially social and environmental concerns
- There is an expectation that the Board will expand the disclosure of its oversight role
- Acknowledge that expectations have increased on several levels, and that increased Board commitment, resources, and focus is required
- ESG proposals were down a bit in 2020 but should increase markedly in 2021
- The Board should consider paying more attention to '34 Act and voluntary reporting
 - Disclaimers on forward looking statements
 - COVID-19 impact disclosures
 - Environmental disclosures
- Increased emphasis on Board internal evaluations and refreshment policies could be critical

Thank you Questions?

© 2021 Snell & Wilmer L.L.P. All rights reserved. The purpose of this presentation is to provide information on current topics of general interest and nothing herein shall be construed to create, offer, or memorialize the existence of an attorney-client relationship. The content should not be considered legal advice or opinion, because it may not apply to the specific facts of a particular matter. As guidance in areas is constantly changing and evolving, you should consider checking for updated guidance, or consult with legal counsel, before making any decisions. The material in this presentation may not be reproduced, distributed, transmitted, cached or otherwise used, except with the express written consent of Snell & Wilmer.



Jeffrey Beck

jbeck@swlaw.com



Kevin Zen

kzen@swlaw.com



Joshua Schneiderman

jschneiderman@swlaw.com



Anne Meyer

ameyer@swlaw.com



Jon Cohen

jcohen@swlaw.com



Jeff Scudder

jscudder@swlaw.com