

Katten Partners Present 2022 Proxy Season Update

Published by *Capital Markets Compass* | Issue 2

December 22, 2021

On December 2, Larry Levin and Alyse Sagalchik, partners in Katten's Capital Markets practice, along with Ernst & Young LLP and Meridian Compensation Partners (Meridian), shared updates for the 2022 proxy season as part of Katten's annual proxy season program. As discussed during the presentation, there are various matters for registrants to consider as the 2022 proxy season nears, many of which are briefly discussed below.

- ***Amendments to Regulation S-K Financial Disclosure***. In February, the US Securities and Exchange Commission (SEC) adopted amendments to Regulation S-K items that impact financial disclosures in Form 10-K that are frequently incorporated by reference into proxy statements for annual meetings. Specifically, the amendments (i) eliminated Item 301 of Regulation S-K, thereby removing the requirement to provide five years of selected financial data, and (ii) revised Item 302 of Regulation S-K such that companies are no longer required to provide two years of selected quarterly financial data in tabular form, but, instead, when there are one or more material retrospective changes for any of the quarters within the last two fiscal years and any subsequent interim period for which financial statements are included, are required to disclose the reasons for those changes. The amendments also modified Item 303 of Regulation S-K, by, among other things:

1. adding a new subsection that requires companies to disclose the principal purposes of Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A) from management's perspective, including an emphasis on both an analysis of short-term results and future prospects;
2. modifying the requirements for liquidity and capital resources disclosure, to require companies to provide a broad discussion of material short- and long-term cash requirements (including capital expenditures) in lieu of the former requirement to discuss material commitments for capital expenditures;

3. revising the requirement relating to costs and revenues to clarify that companies are required to disclose known events that are "reasonably likely" to cause (rather than those that "will cause") a material change in the relationship between costs and revenue;
4. clarifying that companies are required to disclose material changes in net sales or revenue, rather than only material increases;
5. eliminating the requirement to discuss the impact of inflation and price changes unless they are part of a known trend or uncertainty that had or is expected to have a material impact on the company;
6. replacing the requirement to discuss off-balance sheet arrangements with a more general requirement to integrate disclosure of off-balance sheet arrangements within the broader context of MD&A;
7. eliminating the requirement to include a contractual obligations table; and
8. permitting companies, when discussing interim results, to compare their most recently completed quarter to either the corresponding quarter of the prior year (as currently required) or to the immediately preceding quarter. Note that, if a company changes its presentation from period to period, the company must discuss the reasons for changing the basis of comparison and provide both comparisons in the first filing in which the change is made.

These changes are part of the SEC's continued efforts to modernize and simplify disclosure requirements, reducing compliance burdens while still improving the quality and accessibility of disclosure to the marketplace. These amendments became effective in February but companies are required to comply with them beginning with the Form 10-K for their first fiscal year ending on or after August 9.

- ***Climate Change Disclosure***. As companies prepare for the 2022 proxy season, they should also take into account the SEC's September sample comment letter on climate change in which the SEC noted that companies should consider additional MD&A disclosure regarding the impact of climate change and climate change regulation on operations and financial results. The SEC's illustrative comment letter noted that a number of existing rules require disclosure regarding climate-change related risks and opportunities and indicated that, where a registrant includes disclosure in its corporate social responsibility report (CSR report) that is more expansive than in its SEC filings, the registrant may be required to explain why it did not provide the same level of disclosure in its SEC filings.
- ***Human Capital Management and Other ESG Matters***. In 2020, the SEC adopted a rule requiring public companies to disclose in their Form 10-K information related to human capital management matters to the extent such disclosure would be material to an understanding of

their business. Meridian conducted a study of human capital matters disclosure as well as other ESG matters that provides interesting insights into the ways in which companies are approaching those issues.

- ***Risk Factor Disclosure***. The SEC continues to focus on risk factor disclosure. Risks that may be particularly relevant for upcoming annual reports include risks related to cybersecurity, COVID-19 developments, labor and supply shortages and supply chain issues, inflation, the transition away from LIBOR, the uncertain tax environment, changing trade relations, the impact of climate change and related regulation and heightened antitrust enforcement.
- ***Shareholder Proposals***. In September 2020, the SEC adopted amendments to Rule 14a-8 that, among other things, (i) revise the ownership thresholds for shareholders to be eligible to submit an initial shareholder proposal, (ii) clarify that a single person may not submit multiple proposals at the same shareholders' meeting (whether the proposal is submitted as a shareholder or as a representative of a shareholder), and (iii) raise the required level of support that a shareholder proposal must receive in order to be eligible for submission at a future shareholders' meeting. The amendments apply to any shareholder proposal submitted for an annual or special meeting to be held on or after January 1, 2022 but provide for a transition period for the application of the increased ownership submission thresholds.
- ***Board Diversity***. In August, Nasdaq adopted board diversity rules that, subject to specified exceptions and accommodations, generally require a Nasdaq-listed company to have (or explain why it does not have) at least two "diverse" members of its board of directors consisting of one director who self-identifies as female and one director who self-identifies as an "underrepresented minority" or LGBTQ+. An "underrepresented minority" means, for this purpose, an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or two or more of the foregoing. The board diversity requirement applies to foreign private issuers (FPIs) as well, except that, for this purpose, FPIs may use a definition of "diverse" that aligns with the demographic characteristics of underrepresented groups in the country of the registrant's principal executive office and may satisfy the rule by having either (i) one female director and one director of a historically underrepresented community or (ii) two female directors. There are also accommodations under the rule for Nasdaq-listed issuers that qualify as smaller reporting companies or that have small boards (meaning a board consisting of five or fewer members).

The Nasdaq board diversity rule also requires all Nasdaq-listed companies to publicly disclose information voluntarily provided by directors with respect to their self-identified gender, racial characteristics and LGBTQ+ status in a prescribed matrix. After the first year of disclosure, the matrix must disclose the diversity statistics for both the current year and the immediately preceding year. A

Nasdaq-listed issuer must initially include a board diversity matrix by the later of (a) August 8, 2022 or (b) the date on which it files its proxy statement or, if it does not file a proxy statement, the date on which it files its Form 10-K or 20-F during the 2022 calendar year.

- ***Continued SEC Focus on Perk Disclosure***. As reflected in SEC enforcement actions in 2021, the SEC continues to focus on perquisite disclosure in proxy statements. In that regard, issuers should be aware of compliance and disclosure interpretation (C&DI) 219.05 issued by the SEC staff in September 2020, which provides guidance to issuers concerning the evaluation of perquisites in the context of the ongoing COVID-19 pandemic. Read a more detailed description of the guidance.
- ***Virtual/Hybrid Shareholder Meetings***. As the 2022 proxy season approaches, it is anticipated that many companies will hold their meetings virtually or using a hybrid model. While most public companies are likely already aware of the SEC staff's and proxy advisory firms' guidance in 2020 concerning virtual and hybrid shareholder meetings, it is important to (i) remember to review and analyze pertinent state laws and a company's corporate governance documents to ensure that the desired format of a company's shareholder meeting is permitted thereunder, (ii) consider ways to ensure transparency, even if the shareholder meeting is entirely or partially virtual, and (iii) include appropriate disclosure in the company's proxy statement concerning the logistical details of the meeting, the availability of technical support prior to and during the meeting and any procedures and requirements for shareholders to be able to access and/or participate in the meeting.

For more information,view the presentation slides or watch the full recorded webinar.

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