GIBSON DUNN

February 4, 2020

CONSIDERATIONS FOR PREPARING YOUR 2020 PROXY STATEMENT

To Our Clients and Friends:

As a companion to our recent alert on considerations for preparing your 2019 Form 10-K (available here), below we offer our observations on new developments and recommended practices to consider in preparing the 2020 Proxy Statement. In particular, there are a number of important substantive and technical considerations that public companies should keep in mind in light of changes to U.S. Securities and Exchange Commission ("SEC") rules, developments relating to institutional investor and proxy advisory firm policies, and the continuing evolution of corporate governance best practices.

1. ***Address New Hedging Disclosures and Consider in Advance the Need to Revise Related Policies***

Many companies already provide proxy statement disclosure about their hedging policies, particularly as applicable to directors and executive officers, but these disclosures may need to be expanded in light of the new SEC rule requiring hedging policy disclosures. Companies also should review their policies and determine whether any changes are appropriate.

In December 2018, the SEC approved final rules implementing Section 955 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which requires companies to disclose their practices or policies with respect to hedging transactions by directors, officers and other employees. The new disclosures, found in Item 407(i) of Regulation S-K, are required for proxy statements that relate to the election of directors during fiscal years beginning on or after July 1, 2019; however, there is a one-year delay for smaller reporting companies and emerging growth companies.

Pursuant to the final rules, companies must provide a summary of their practices or policies (whether written or not) or disclose them in full. The disclosure must state who is covered by the hedging practices or policies and which categories of hedging transactions are specifically permitted or specifically disallowed (including the company's determinations about what activities are covered by the practices or policies). If a company does not maintain policies or practices on hedging, it must disclose this fact or affirmatively state that hedging transactions generally are permitted. According to a review of the first 40 proxy statements that included the newly required disclosures, every company disclosed that it had a hedging policy in place and 62% had hedging policies that cover both directors and all employees.[1] The final rules largely sidestep difficult definitional questions by providing that companies may use their own policies' and practices' terms and the categories of persons covered. Companies need not identify every type of transaction that is permissible if not specifically addressed in their policies or practices and need not address categories of transactions or persons that are not covered.[2]

Placement of the disclosure also should be considered. Item 407(i) does not specify where the disclosure should appear in the proxy statement, so companies have flexibility in this regard. At many companies, the Compensation Discussion and Analysis ("CD&A") already addresses hedging policies as they apply to named executive officers ("NEOs"). In light of this, in the release adopting Item 407(i), the SEC noted that companies have three options:[3]

- include the new hedging disclosure outside the CD&A and provide separate disclosure for NEOs in the CD&A;
- include the new hedging disclosure outside the CD&A and incorporate it into the CD&A with a cross-reference; or
- include the new hedging disclosure in the CD&A.

According to the review (mentioned above) of the first 40 proxy statements filed under the new rules, 60% of companies included their hedging disclosures only in the CD&A, 15% included these disclosures only somewhere other than the CD&A, and 25% included the disclosure in both the CD&A and elsewhere in the proxy statement. Some companies may not wish to include the new hedging disclosure in the CD&A, as it would result in CD&A disclosure about compensation policies for individuals other than NEOs and make the disclosure subject to the say-on-pay vote. As an alternative, companies could include the new disclosure in a proxy section discussing general corporate governance best practices or next to the pay ratio disclosure.

2. ***Consider Bolstering the Description of Audit Committee Oversight***

Companies should consider bolstering the description of the audit committee's work in light of the SEC's December 2019 statement on audit committees. The statement, which was released by SEC Chairman Jay Clayton, Chief Accountant Sagar Teotia, and the Director of the Division of Corporation Finance, William Hinman, addresses the role of the audit committee in financial reporting and highlights key reminders regarding audit committee oversight responsibilities.[4]

In recent years, many companies have voluntarily expanded their proxy statement disclosures about the role and responsibilities of the audit committee. For example, there has been an uptick in disclosures about the committee's role in selecting the lead audit partner and factors the committee considers in evaluating the qualifications and performance of the outside auditor. Although the SEC's December 2019 statement covers a range of topics (as discussed in more detail in our blog[5]), a theme that runs through the observations is an emphasis on active engagement by the audit committee. Companies can use the proxy statement to highlight key practices the audit committee uses to engage proactively on these topics. This could include disclosure about how the committee:

- sets the "tone at the top" and emphasizes the importance of an environment that supports integrity in the financial reporting process;
- oversees processes for monitoring auditor independence;

- oversees implementation of new accounting standards;
- oversees and participates in the resolution of internal control issues, where identified;
- communicates with the outside auditor on matters related to the conduct of the audit and on critical audit matters expected to be described in the auditor's report; and
- reviews and understands non-GAAP measures, and related company policies and disclosure controls.

3. ***Prepare for and Address New Institutional Investor and Proxy Advisory Firm Policies***

Companies should review key investor and proxy advisory firm policies and evaluate their disclosures in light of those policies. Policy changes can occur even once proxy season is underway, which happened in 2019 with the "overboarding" policies of some institutional investors. Accordingly, it is important for companies to check regularly for policy updates in case it is necessary to respond by filing additional soliciting materials. As of the date of this alert, Vanguard has issued its 2020 proxy voting policies (with minimal changes from 2019), but 2020 proxy voting policies for BlackRock and State Street have not been published (although each has announced their priorities in 2020 with respect to ESG issues, as discussed below).[6]

Changes in overboarding policies had a discernible impact on support levels for directors in 2019,[7] so companies should pay particular attention to this area in 2020. The table below summarizes the current overboarding thresholds of certain major institutional investors and proxy advisory firms, according to their respective voting policies, but companies should familiarize themselves with the thresholds of all their major stockholders. If a director exceeds the relevant limits, steps can be taken (such as stepping off a board or publicly committing to do so) to avoid an adverse vote or voting recommendation. Notably, as part of the updates to its 2020 voting policies, Vanguard appears to have introduced some flexibility and may consider supporting directors who exceed its limits "because of company-specific facts and circumstances that indicate the director will indeed have sufficient capacity to fulfill his/her responsibilities."

Institution	**Maximum Public Company Boards Permitted**
BlackRock	· 2 public company boards for directors who are <u>CEOs</u> of public companies (only 1 outside board other than where they are CEO) · 4 public company boards for all other directors
Vanguard	· 2 public company boards for directors who are <u>NEOs</u> of public companies (only 1 outside board other than where they are an NEO)

	· 4 public company boards for all other directors
State Street	· 3 public company boards for directors who are CEOs of public companies · 6 public company boards for all other directors
ISS	· 3 public company boards for directors who are CEOs of public companies (2 outside boards other than where they are CEO) · 5 public company boards for all other directors
Glass Lewis	· 2 public company boards for directors who are executives of public companies · 5 public company boards for all other directors

In light of continued investor focus on board diversity, consideration should also be given to adopting and disclosing a "Rooney Rule" (named for an NFL policy requiring every team with a head coaching vacancy to interview at least one or more diverse candidates). A robust version of the Rooney Rule would state that as part of the search process for each new director, the nominating/corporate governance committee includes women and minorities in the pool of candidates and instructs search firms to do so. Boards could go further and also commit to interviewing at least one woman and one minority director candidate.

Companies may also wish to provide additional specificity about director attendance at board and committee meetings. Under a 2020 update to its voting policies, Glass Lewis will generally recommend votes "against" the chair of the nominating/corporate governance committee "when directors' records for board and committee meeting attendance are not disclosed," or when a company discloses that one or more directors attended less than 75% of board and committee meetings but it is not possible to determine who those directors are. SEC rules already require companies to name any directors who fall below this 75% threshold, but the rules do not require any disclosures about meeting attendance for directors who meet this threshold. In explaining the reason for this new policy, Glass Lewis states that "attendance at board and committee meetings is one of the most basic ways for directors to fulfill their responsibilities to shareholders and that disclosure of attendance records is a critical element in evaluating the performance of directors more generally." It is not clear what level of specificity Glass Lewis expects to see under this policy. Some companies already include a general statement about directors' aggregate attendance at meetings in the proxy statement—for example, a statement to the effect that each director attended at least x% of board and applicable committee meetings held during the fiscal year. At a minimum, companies should consider including this type of affirmative statement, in addition to evaluating whether more detailed disclosure would be appropriate.

Finally, companies should be aware of changes at Glass Lewis that will impact pay-for-performance evaluations and say-on-pay voting recommendations in 2020. The changes are the result of Glass Lewis's transition, effective January 1, 2020, to CGLytics as its exclusive global partner for compensation data and analytics. According to Glass Lewis, because of the transition, peer companies in 2020 will be "significantly different" from those used under the prior methodology. This, in turn, will result in changes to both pay-for-performance grades and voting recommendations at individual companies. At the market-wide level, there will be no changes to the distribution of grades or against voting recommendations because grades are dispersed evenly under the pay-for-performance methodology.

4. ***Review Prior Proxy Advisory Firm Reports and Shareholder Engagement Takeaways***

Companies should revisit their 2019 ISS and Glass Lewis reports, as well as takeaways from their off-season engagements with investors, in order to identify any matters that should be addressed or given further emphasis in the proxy statement. That way, if ISS or Glass Lewis included cautionary language in a company's report, or criticized aspects of the company's corporate governance or executive compensation practices, or if a company received feedback from major stockholders about a particular practice, the company can address this issue appropriately. The company can then describe steps taken or changes made, and any mitigating factors, in the proxy statement.

As an example, beginning in 2020, ISS will begin recommending votes "against" board members who are responsible for approving director compensation where there is a "pattern," for two or more years, of awarding "excessive" compensation without disclosure of a "compelling rationale" or other mitigating factors. ISS delayed the application of this policy for a year beyond its planned 2019 effectiveness, but in 2019 included cautionary language in its reports for companies where director compensation raised concerns under this policy. Companies that received cautionary language under this policy in 2019 will need to expand their director compensation disclosures to add the "compelling rationale" ISS expects to see. This rationale should provide a reasoned explanation for why the board's director compensation levels are appropriate, including addressing topics such as the philosophy behind the director compensation program, how the program aligns directors' interests with those of shareholders, how compensation is linked to directors' responsibilities and expertise, the mix of compensation, how the board and responsible committee make decisions about director compensation and how director pay levels compare to peers. As director compensation remains a subject of shareholder litigation, there is value in addressing these considerations in the proxy statement, whether or not ISS identifies a company as having "excessive" director compensation.

5. ***Consider Adding or Expanding Discussion of "Hot Topics" Like Human Capital Management and Other ESG Topics***

Companies should consider adding or expanding discussion in the proxy statement of "hot topics" like human capital management and other ESG matters that are particularly relevant to them. Human capital is both a board and a management issue, so companies should consider addressing both the board's (and any committees') role—in overseeing areas like human capital strategy and corporate culture—and key policies and practices that the company has implemented with respect to topics such as diversity and inclusion, pay equity and employee development. During the last year, there has been an increase in the number of companies that have amended their board committee charters to include explicit language about oversight of human capital and ESG matters.

Companies should also consider highlighting in the proxy statement their other key ESG activities. Summarizing key achievements or targets will assist investors who may not take the time to review more detailed documents such as sustainability or corporate social responsibility reports. Describing company ESG reports available on the company's website also will alert investors about where they can find more information. For example, in his annual letter to CEOs issued in January 2019,[8] BlackRock CEO Larry Fink asked companies in which BlackRock invests to: (a) publish disclosures in line with industry-specific guidelines issued by the Sustainability Accounting Standards Board by year-end (or disclose a similar set of data in a way that is relevant to their businesses); and (b) disclose climate-related risks in line with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD), which should include the company's plan for operating under a scenario where The Paris Agreement's goal of limiting global warming to less than two degrees is fully realized, as expressed by the TCFD guidelines. Companies that publish these reports or plan to do so in 2020 should consider stating as such in their proxy statements. Such disclosures may also help companies increase their "R-Factor" scores. The "R-" (or "Responsibility") Factor is State Street's system for rating companies' business operations and governance based on financially material and sector-specific ESG issues, using SASB as a foundation. In late January, in a letter to boards of directors,[9] State Street's CEO announced that in 2020, State Street will begin voting "against" directors at companies in the S&P 500 and certain major non-U.S. indices that are "laggards" based on their "R-Factor" scores and cannot articulate how they plan to improve their scores.

On the governance side, companies may wish to articulate their views on corporate purpose in light of the Business Roundtable's 2019 Statement on the Purpose of a Corporation[10] and discuss how their practices align with the Investor Stewardship Group's Corporate Governance Principles for U.S. listed companies.[11] Companies whose major shareholders include State Street should be aware that, as a founding member of the Investor Stewardship Group, State Street "proactively monitor[s]" companies' adherence to these principles. Consistent with the "comply-or-explain" expectations established by the principles, State Street encourages companies to proactively disclose their level of compliance with the principles. In instances of non-compliance, when companies cannot explain the nuances of their governance structure effectively, either publicly or through engagement, State Street may vote against the independent leader of the company's board. Finally, companies that have not already started doing so should consider enhancing their disclosures about the board evaluation process, including discussing significant changes that resulted from this process.

At the same time, care needs to be taken when including ESG disclosures in the proxy statement. As with any other public statements, companies should confirm the accuracy of the ESG disclosures they propose to include in the proxy statement. Statements that could be viewed as overstatements or rendered inaccurate by events subsequent to the filing of the proxy statement should be avoided. There should not be significant "divides" between disclosures in the proxy statement and information included in more detailed subject matter publications, such as sustainability or corporate social responsibility reports. Commitments to achieve specific ESG goals or targets, as well as statistics and metrics, should be accompanied by appropriate disclaimer language stating (for example) that goals are aspirational and not guarantees or promises. Companies should think carefully about whether to include hyperlinks to external ESG publications or website content, and it is advisable to include a statement that any hyperlinked material is not incorporated by reference into the proxy statement.

Finally, it may be helpful to include key words to help get credit for ESG practices from various ESG rating services. Governance QualityScore evaluates company practices in four categories: Board Structure, Compensation, Shareholder Rights, and Audit & Risk Oversight. In the compensation category, two new data points now consider the level of disclosure on environmental and social performance measures under short- and long-term incentive plans for executives. On short-term (typically annual) plans, ISS will consider the extent of disclosure of specific performance criteria and disclosed hurdle rates. On long-term plans, ISS will evaluate long-term equity and cash awards granted in the most recent fiscal year based on pre-determined metrics and target goals. For both types of plans, ISS will consider various company-disclosed environmental, social or general sustainability performance measures, such as those focusing on climate change and energy usage or labor conditions in the supply chain.

6. ***Don't Forget to Implement Recent SEC Rule Amendments***

In March 2019, the SEC adopted a number of changes to modernize and simplify disclosure requirements.[12] While most of these changes took effect last May, calendar-year filers will be implementing a number of the amendments for the first time in the upcoming Form 10-K and proxy statement. The amendments that impact the Form 10-K are discussed in our recent client alert.[13]

The changes that impact the proxy statement amended Regulation S-K and include:

- Revised disclosure heading for late and missed Section 16 reports: The amendments change the disclosure heading required by Item 405(a)(1) of Regulation S-K from "Section 16(a) Beneficial Ownership Reporting Compliance" to "Delinquent Section 16(a) Reports." Moreover, the amendments add an instruction encouraging companies to exclude this disclosure item altogether if there are no reportable missed or late Section 16 filings.

- Simplification of Section 16 due diligence: The amendments also eliminate the requirement for Section 16 persons to furnish reports to companies and clarify that companies may, but are not required to, rely only on Section 16 reports that have been filed on EDGAR (as well as any written representations from the reporting persons) to assess Section 16 delinquencies. This change will likely have limited practical impact, because most companies prepare and file these reports on behalf of Section 16 insiders.

- Executive officer information: The amendments revise Item 401 to clarify that any disclosure about executive officers required by Item 401, including information about business experience under Item 401(e), need not be repeated in the proxy statement if it appears in the Form 10-K. This change formalizes an existing staff interpretation on the instruction in Item 401 that permits inclusion of executive officer information in the Form 10-K. Prior to the amendment, the instruction did not explicitly cover all of the information in Item 401.

- Update to outdated auditing standard reference: The amendments also update a provision related to the audit committee report by removing a reference to AU section 380, *Communication with Audit Committees*, which was superseded by Auditing Standard No. 1301. As amended, Item 407(d)(3)(i)(B) of Regulation S-K now includes a general reference to "the applicable requirements of the Public Company Accounting Oversight Board (PCAOB) and the [SEC]." Many companies have already updated their audit committee reports accordingly, but it is advisable to review the audit committee report and confirm the correct auditing standard is referenced or the more general language is used.

7. ***Consider Plain English Enhancements***

Unlike Forms 10-K, the proxy statement has evolved to become a shareholder engagement tool. As a result, many large cap companies have transformed their proxy statements from legal documents to disclosures that both address various stakeholder concerns and comply with the various SEC and other requirements. All companies would benefit from considering five key questions in order to enhance the readability of their proxy statements:

- Short: Does the proxy statement use more words than needed?

- Skimmable: Can the reader get the "gist" from a five-minute scan of the proxy statement (*g.*, bold, active headings break up text and "previews" are included for key sections, such as "Why the Board Believes Its Leadership Structure is Appropriate")?

- Logical: Does the flow of information in the proxy statement reflect the disclosure priorities (*g.*, the most important information is placed up front instead of five pages of Q&A)?

- Layered: Does the proxy statement include a summary that effectively highlights key themes and significant changes discussed in the proxy statement?

- Audience-focused: Is the proxy statement drafted for the various audiences who will review it (*g.*, retail investors, employees, media, SEC, proxy advisors and institutional investors)?

8. ***Review These Important Shareholder Proposal Reminders***

Companies should keep in mind the following requirements and best practices related to shareholder proposals included in the proxy statement:

- Deadline for company response: The statement in response by the company or the board of directors to any shareholder proposal included in the proxy statement must be provided to the proponent(s) at least 30 calendar days before definitive proxy materials are filed with the SEC.[14]

- Disclosure about shareholder proponents: The proxy statement must include either the name, address and shareholdings of each proponent or a statement that the company will provide this information promptly upon receiving an oral or written request.[15] Some companies satisfy this requirement using a hybrid approach where there are numerous co-filers: they include in the proxy statement the required information with respect to the lead proponent and then indicate that the name, address and shareholdings of the co-filers will be provided promptly upon request.

- Meeting attendance: State law, not the SEC proxy rules, governs the procedures for attending the annual meeting. The proxy statement should describe the extent to which these procedures must be followed by the proponent or its designated representative in order to be admitted to attend the meeting (for example, if pre-registration and identification are required).
- Description of shareholder proposals: A shareholder proposal included in the proxy statement must include the title provided by the proponent. However, a company is not required to use the proponent's title as the title in the company's table of contents or on the proxy card. Moreover, it is the company's responsibility to ensure that the description of the shareholder proposal on the proxy card "clearly identif[ies] and describe[s] the specific action on which shareholders will be asked to vote."[16]

9. ***Consider Recent Criticism of Non-GAAP Disclosures in CD&A***

Companies should review any non-GAAP disclosures included in the CD&A in light of recent criticisms about the use of these measures and assess whether a reconciliation to GAAP or other additional disclosures are appropriate for certain of these disclosures.

In April 2019, the Council of Institutional Investors ("CII") submitted a rulemaking petition to the SEC on the use of non-GAAP financial measures in the CD&A. Instruction 5 to Item 402(b) of Regulation S-K provides that when target levels for non-GAAP performance measures are disclosed in the CD&A, companies are not required to comply with the non-GAAP measure disclosure rules in Regulation G and Item 10(e) of Regulation S-K. However, companies still must disclose how the non-GAAP measure is derived from the company's audited financial statements. In its rulemaking petition, CII asked the SEC to eliminate Instruction 5, thereby making all non-GAAP financial measures in the CD&A subject to Regulation G and Item 10(e), and require that the reconciliation to GAAP be included in the proxy statement or via a hyperlink in the CD&A.

The CII petition echoed other criticism of the increasing use of non-GAAP measures in CD&As, including an April 2019 *Wall Street Journal* op-ed co-authored by Robert Pozen and SEC Commission Robert J. Jackson, Jr.[17] Despite the CII rulemaking petition and other public criticism, Division of Corporation Finance Director Hinman recently expressed support for the current treatment of non-GAAP measures in the CD&A. At a conference in December 2019, Director Hinman suggested that the current disclosure requirements, coupled with Staff review and comment on the use of non-GAAP measures in the CD&A, are sufficient to address unclear disclosure and "help people understand the comp disclosure better and give more confidence to investors on that process."[18]

Although it appears unlikely that the SEC will take action in response to the CII petition, in light of ongoing scrutiny and criticism of the use of non-GAAP measures in the CD&A, companies should continue to be mindful of the limitations of Instruction 5 to Item 402(b) and its disclosure requirements. As noted by Director Hinman, where this disclosure is omitted, the Staff will ask companies to comply with Instruction 5 to Item 402(b) and explain how the non-GAAP financial performance measure target level is calculated based on the company's financial statements. We expect that investors will also be focused on this disclosure. In early January 2020, many large companies received letters from the Say on Pay Working Group, which includes union pension funds and other investors with over $1 trillion in assets under management and advisement. The letter cites the CII petition and urges these companies "to provide clear disclosure in the CD&A of any adjustments to GAAP performance metrics." In addition, companies including non-GAAP measures outside the CD&A should exercise care in complying with the non-GAAP rules and related interpretations.[19]

10. ***Include Additional Disclosures if Holding a Virtual-Only Annual Meeting***

Companies that plan to hold a virtual-only annual meeting should confirm that their proxy statement includes appropriate disclosures about the logistics of the meeting and how shareholders can participate.

In recent years, an increasing number of companies have opted to replace their traditional in-person annual shareholder meetings with virtual-only meetings. Although in-person meetings remain the most common approach, according to a recent study by ISS, 7.7% of Russell 3000 companies held a virtual-only annual meeting during the 2019 proxy season—up from 2.4% in the 2015 proxy season. In response to the growing popularity of virtual-only meetings, Glass Lewis implemented a new policy on virtual-only shareholder meetings that took effect in 2019. Under this policy, Glass Lewis analyzes the company's disclosure of its virtual meeting procedures and may recommend votes "against" the members of the nominating/corporate governance committee if the company does not provide "effective" disclosure assuring that shareholders will have the same opportunities to participate at the virtual meeting as they would at in-person meetings.

In light of increased scrutiny from Glass Lewis and other stakeholders, companies holding virtual-only meetings during the upcoming proxy season should be mindful of providing effective proxy disclosure regarding the virtual meeting. Examples of effective proxy disclosure include:

- a brief explanation of why the company chose to hold a virtual-only meeting—this can be of particular utility for companies holding a virtual-only meeting for the first time;
- clear instructions on how shareholders can attend the meeting online;
- a description of how shareholders can ask questions during the meeting;
- the company's guidelines on how questions and comments will be recognized and disclosed to meeting participants;
- procedures for posting questions and answers on the company's website as soon as practical after the meeting; and
- procedures for how the company will deal with any potential technical issues regarding accessing the virtual meeting, including providing technical support.[20]

---

[1] *See* Frederic W. Cook & Co., Inc., *Company Hedging Policies: Observations from New Proxy Disclosures, available at* https://www.fwcook.com/content/documents/Publications/10-10-19_Company_Hedging_Policies_Observations_from_New_Proxy_Disclosures.pdf.

[2] *See Final Rule: Disclosure of Hedging by Employees, Officers and Directors*, Section III.B.3, *available at* https://www.sec.gov/rules/final/2018/33-10593.pdf.

[3] *See id.*, Section III.D.3.

[4] *Available at* https://www.sec.gov/news/public-statement/statement-role-audit-committees-financial-reporting.

[5] *Available at* https://securitiesregulationmonitor.com/Lists/Posts/Post.aspx?ID=390.

[6] Their respective voting policies are available here (BlackRock), here (Vanguard), and here (State Street).

[7] *See* ISS, *United States: Director Elections & Governance Shareholder Proposals (2019 Proxy Season Review)* (Aug. 23, 2019).

[8] *Available at* https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter?cid=ppc:CEOLetter:PMS:US:NA&gclid=CjwKCAiAsIDxBRAsEiwAV76N869cGeDhtDX1ekYstnqdXrT0XllD6nasi7-T25o4HIi-NxnuM1h7iRoCZlkQAvD_BwE&gclsrc=aw.ds.

[9] Available at https://www.ssga.com/us/en/institutional/ic/insights/informing-better-decisions-with-esg.

[10] *Available at* https://opportunity.businessroundtable.org/wp-content/uploads/2019/08/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf.

[11] *Available at* https://isgframework.org/corporate-governance-principles/.

[12] *Available at* https://www.sec.gov/rules/final/2019/33-10618.pdf.

[13] *Available at* https://www.gibsondunn.com/considerations-for-preparing-your-2019-form-10-k/.

[14] *See* Exchange Act Rule 14a-8(m)(3).

[15] *See* Exchange Act Rule 14a-8(l)(1).

[16] *See* Exchange Act Rule 14a-4(a)(3) and Exchange Act Rule 14a-4(a)(3); C&DI Question 301.01.

[17] *See* Robert J. Jackson, Jr. and Robert C. Pozen, *Executive Pay Needs a Transparent Scorecard*, Wall Street Journal (Apr. 10, 2019), ***available at*** https://www.wsj.com/articles/executive-pay-needs-a-transparent-scorecard-11554936540.

[18] *See* Soyoung Ho, *SEC Official Signals No Rulemaking on Non-GAAP Measures for CEO Pay*, Thomson Reuters (Dec. 18, 2019), *available at* https://tax.thomsonreuters.com/news/sec-official-signals-no-rulemaking-on-non-gaap-measures-for-ceo-pay/.

[19] In particular, C&DI 108.01 (Non-GAAP Financial Measures) addresses non-GAAP financial information that is not related to target levels and is included in the CD&A or elsewhere in the proxy statement.

[20] For more information, *see* Broadridge, *Principles and Best Practices for Virtual Annual Shareowner Meetings* (2018), *available at* https://www.broadridge.com/_assets/pdf/broadridge-vasm-guide.pdf.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding these issues. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work in the Securities Regulation and Corporate Governance and Executive Compensation and Employee Benefits practice groups, or any of the following practice leaders and members:

Securities Regulation and Corporate Governance Group:

Elizabeth Ising - Washington, D.C. (+1 202-955-8287, eising@gibsondunn.com)
James J. Moloney - Orange County, CA (+ 949-451-4343, jmoloney@gibsondunn.com)
Lori Zyskowski - New York (+1 212-351-2309, lzyskowski@gibsondunn.com)
Brian J. Lane - Washington, D.C. (+1 202-887-3646, blane@gibsondunn.com)
Ronald O. Mueller - Washington, D.C. (+1 202-955-8671, rmueller@gibsondunn.com)
Michael A. Titera - Orange County, CA (+1 949-451-4365, mtitera@gibsondunn.com)
Gillian McPhee - Washington, D.C. (+1 202-955-8201, gmcphee@gibsondunn.com)
Courtney C. Haseley - Washington, D.C. (+1 202-955-8213, chaseley@gibsondunn.com)
Aaron K. Briggs - San Francisco (+1 415-393-8297, abriggs@gibsondunn.com)
Julia Lapitskaya - New York (+1 212-351-2354, jlapitskaya@gibsondunn.com)

Executive Compensation and Employee Benefits Group:

Stephen W. Fackler - Palo Alto/New York (+1 650-849-5385/+1 212-351-2392, sfackler@gibsondunn.com)
Michael J. Collins - Washington, D.C. (+1 202-887-3551, mcollins@gibsondunn.com)
Sean C. Feller - Los Angeles (+1 310-551-8746, sfeller@gibsondunn.com)
Krista Hanvey – Dallas (+ 214-698-3425, khanvey@gibsondunn.com)

GIBSON DUNN