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Kirkland Alert

Preparing for Potential Updates to Human Capital Management & Board Diversity Disclosure Requirements

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Recent market and regulatory trends in the U.S. relating to environmental, social and governance (“ESG”) matters have increased the expectation that corporations provide enhanced disclosures with respect to human capital management (“HCM”) and diversity, equity and inclusion (“DEI”).

In 2021, in response to new Regulation S-K amendments, companies expanded disclosures related to HCM and DEI matters in their proxy statements and 10-Ks and saw a marked increase in investor support for DEI-related shareholder proposals compared to prior years. President Biden has signed a number of executive orders focused on HCM and DEI, among other ESG topics.[1] In line with this agenda, and as a response to growing investor pressure to expand ESG disclosures, the U.S. Securities and Exchange Commission (“SEC”) has indicated in its Spring 2021 regulatory agenda that proposed rules entitled “Human Capital Management Disclosure” and “Corporate Board Diversity” could be released as early as October 2021.

This *Alert* provides a brief overview of existing HCM- and diversity-related disclosure requirements and recent developments related to the anticipated proposed rules, and offers suggestions on how public companies can prepare for the potential changes ahead.

Existing SEC Disclosure Requirements Related to HCM and Board Diversity

Human Capital Management

Momentum toward enhanced HCM disclosure requirements has been building in recent years. Effective November 9, 2020, the SEC finalized changes to Item 101 of Regulation S-K to require companies to provide, to the extent material to an understanding of the registrant's business taken as a whole, a description of the company's human capital resources, including any human capital measures or objectives that the company focuses on in managing the business. Notably, the amendment did not define the term "human capital," and companies have broad discretion in deciding which human capital measures or objectives to disclose. The amendments reflected then-SEC Chair Jay Clayton's commitment to a principles-based, rather than prescriptive, approach to disclosure by requiring only that companies disclose material information, rather than requiring specific metrics. SEC Commissioners Lee and Crenshaw voted against these HCM amendments to Regulation S-K, in part because the amendments remain silent on the topic of diversity and fail to mandate certain minimal metrics with respect to HCM.

Board Diversity

SEC disclosure requirements related to board diversity have been limited to date, though recent indications suggest this may soon change. In 2009, the SEC approved a rule that requires public companies to disclose whether a nominating committee has a policy with regard to the consideration of diversity in identifying director nominees and, if so, how this policy is implemented and how the nominating committee or the board assesses the effectiveness of the policy. The rule did not, however, require any disclosure regarding the demographics of the board. In 2019, the SEC issued two Compliance & Disclosure Interpretations (116.11 & 133.13) to clarify that if a board considers an individual nominee's self-identified diversity characteristics (e.g., race, gender, ethnicity, religion, nationality, disability, sexual orientation or cultural background), the SEC now expects proxy disclosures to identify such characteristics and how they were considered.

Some SEC officials have aimed to further expand diversity disclosure requirements in recent years. In 2016, then-Chair Mary Jo White directed her staff to review the agency's rules for disclosing board diversity and to prepare recommendations to propose amending the rules to require companies to include more meaningful board member and nominee diversity disclosures in their proxy statements, but no such proposed rule was advanced before her term ended. As mentioned above, Commissioners Lee and Crenshaw have also publicly highlighted diversity as an issue that is important to investors.

Growing Investor Interest in HCM and DEI Matters

Interest in corporate HCM and DEI performance has grown in recent years among employees and the general public, and investors and global financial regulatory bodies have also expanded their focus on disclosures around these topics. The COVID-19 pandemic has contributed to an increased focus on HCM, including on companies' safety enhancements for employees and continuity planning in response to remote work. DEI issues have garnered far greater attention since the Black Lives Matter movement, with the renewed national focus on racial justice also reverberating across corporate America.

Investors have also escalated pressure on companies to disclose HCM and DEI information. For example, an August 2021 Ernst & Young study found that DEI-related shareholder proposals increased in number and support this year. Approximately 130 proposals related to DEI topics were submitted for meetings through June 2021, and the proposals that went to a vote averaged 42% support (31% received majority support). This marked an increase from about 90 proposals for all of 2020, which averaged only 25% support (18% received majority support). Many of these proposals included requests for companies to publicly release data confidentially reported by the company to the Equal Employment Opportunity Commission ("EEOC"), including quantitative information about the racial, ethnic and binary gender makeup of a company's workforce. Institutional investors have played a part in this trend — for example, in January 2021, State Street Global Advisors announced that in 2022, it would vote against the Chair of the Compensation Committee at companies in the S&P 500 that do not disclose their EEO-1 survey responses. The New York City Comptroller also wrote to the majority of CEOs at S&P 100 companies in 2020 as part of a campaign seeking public disclosure of each company's EEO-1 workforce demographic data.

As a result of these developments and the November 2020 changes to Regulation S-K, companies appear to be expanding their voluntary disclosures on HCM and DEI. An Intelligize study of 427 10-Ks filed by S&P 500 companies between November 9, 2020, and March 5, 2021, found that filers, as a whole, addressed an array of HCM topics such as diversity, health and safety, training, recruiting, and retention. Specifically, the study found that 90% of 10-K filers discussed diversity and inclusion within their HCM descriptions in 2020, and more than 60% gave diversity its own heading. Companies are also increasingly using their proxy statements to clarify how HCM and DEI matters are addressed, as reported by Ernst & Young. For example, 70% of Fortune 100 companies stated in their 2021 proxy statements that HCM matters are overseen by a board committee, up from 44% in the previous year. More specifically, 53% of Fortune 100 company boards disclosed that they now assign HCM oversight to their compensation committee, and 93% of the relevant committees state that such oversight includes DEI. The report also found that Fortune 100 companies voluntarily disclosing their board's racial/ethnic diversity in proxy statements reached 86% in 2021 (up from 54% in 2020), and that a majority of Fortune 100 companies factored diversity-related considerations (e.g., diverse leadership representation, diversity metrics across the workforce and support for racial equity and inclusion in the communities in which the company operates) into executive compensation. Another 2021 report by As You Sow found that nearly half (46%) of the largest companies by market cap in the S&P 500 release their consolidated EEO-1 reports, as do more than 25% of the 100 largest employers in the S&P 500; of the companies that fall within both categories, 57% (30 of 53) release their EEO-1 reports.

These expanded voluntary disclosures and a new diversity rule from Nasdaq may have influenced the SEC to consider new disclosure requirements. In late 2020, Nasdaq proposed new listing rules mandating certain board diversity requirements through a "comply or explain" framework, which the SEC ultimately approved in August 2021. SEC Chair Gary Gensler stated that the Nasdaq rules "reflect calls from investors for greater transparency about the people who lead public companies," and will "allow investors to gain a better understanding of Nasdaq-listed companies' approach to board diversity, while ensuring that those companies have the flexibility to make decisions that best serve their shareholders."

Momentum in favor of expanded board diversity disclosure requirements has also become global, as more exchanges around the world enact or propose new requirements. In just the last few months, the Hong Kong Stock Exchange proposed changes to its corporate governance codes and listing rules to enhance diversity standards and support gender diversity; the Tokyo Stock Exchange updated its corporate governance codes to require increased diversity disclosures; the UK's Financial Conduct Authority launched a consultation on proposals to improve transparency for investors on the diversity of listed company boards and their executive management teams; and the Singapore Exchange Regulation published a consultation paper proposing that issuers be required to have a board diversity policy and provide disclosures on related targets, plans and timelines in annual reports. Such developments may influence the SEC as it now prepares its own proposed rules on corporate board diversity this fall.

Anticipating the Direction of Forthcoming HCM and Board Diversity Disclosure Requirements

SEC Chair Gensler's recent statements on HCM and board diversity indicate that he supports enhanced disclosure requirements and has instructed SEC staff to address these topics. For example, Chair Gensler said in a June 2021 speech that new HCM disclosure requirements could include metrics such as workforce turnover, skills and development training, compensation, benefits and workforce demographics including diversity, and health and safety. In August 2021, he also tweeted that he asked SEC staff to propose recommendations for the consideration of new HCM disclosures, such as the metrics listed above. In addition, Bloomberg reported that in June 2021, Commissioner Lee also suggested that the SEC should consider requiring companies to publicly disclose gender and diversity workforce data they provide in confidentially filed EEO-1 reports, and that the SEC "should be working with the [EEOC] to learn how the SEC might leverage the information companies send to the EEOC."

Most recently, Chair Gensler further emphasized the importance of HCM and diversity disclosures during a September 14 hearing before the Senate Committee on Banking, Housing and Urban Affairs. In response to questioning from senators, Chair Gensler reaffirmed the SEC's focus on increasing HCM disclosures, stating: "[today's] investors are increasingly looking for consistent, comparable and decision-useful disclosures" around human capital, among other areas. Citing his prior experience evaluating companies at Goldman Sachs, he noted it was common for valuations analyses to encompass information about "the employees, what they're paid, how many are part-time, how many are full-time, where they're located, retention and the like," and that such information has, over the years, become even more "critical to the valuations of the company."

Considerations for Companies in Advance of Proposed Rules

While the text of any to-be-proposed HCM and corporate board diversity disclosure rules remains unknown, companies can anticipate that forthcoming rules are likely to include more prescriptive requirements than current SEC rules, and will lead to increased SEC oversight and public scrutiny with respect to their HCM and diversity disclosures. Any such proposed rules may not be finalized until 2022, which, in turn, may not impact reporting requirements until 2023. In the meantime, companies can take steps to prepare, including:

- **Assess and improve disclosures and disclosure controls.** In advance of any new rules, companies can evaluate and update their existing HCM and DEI disclosures for upcoming 10-K, 20-F and proxy statement filings: identifying inconsistencies and gaps in disclosure through benchmarking against peers and market-leading disclosure; updating disclosures for the current environment, especially pandemic-related changes; and ensuring that the appropriate metrics are identified to collect data to support future disclosures. While quantitative information was not required in the November 2020 rule and most filers to date have not included quantitative information, a proposed SEC rule is likely to require disclosure of data such as diversity statistics. Of equal importance is assessing the strength of HCM and DEI data quality controls and identifying and implementing any necessary improvements. This involves assessing the consistency of voluntary disclosures around HCM and DEI and established standardized processes to identify key data sources, developing a cadence for revisiting key metrics each period and assessing the consistency between any SEC-required disclosure and voluntary disclosure (i.e., within a company's stand-alone Sustainability or ESG report, social media or other corporate communications). Such an assessment can ensure clear processes to confirm accurate and consistent data is being shared across various platforms used by the company to communicate its DEI and HCM goals.

- **Evaluate and strengthen HCM and DEI policies and programs.** A variety of factors can impact a company's strategy on HCM and DEI, including the importance of such issues to its key stakeholders (e.g., its investors, employees and customers); peer performance, internal resources and expertise; and challenges gathering or maintaining comparable DEI or HCM data across different jurisdictions or business units. With the assistance of counsel, companies can evaluate these factors and develop or strengthen existing policies; develop, benchmark and monitor key performance indicators ("KPIs," such as employee engagement scores; employee retention and turnover; employee training budgets, time and participation rates; diversity representation on the board and by employee category; and pay equality measured as a ratio of compensation by employee category); and design corporate governance structures to bolster their HCM and DEI oversight and performance.
- **Coordinate with counsel to determine the company's stance on HCM and board diversity proposed rules.** Companies can coordinate with counsel to develop a plan for the review of and response to forthcoming proposed rules, including whether to submit a comment letter to the SEC. Companies may consider submitting comments independently or participating in submissions by industry associations.

We will continue to closely monitor SEC activity with respect to HCM- and diversity-related disclosure requirements and intend to publish a follow-up *Alert* when proposed rules are issued.

1. See Executive Order on Protecting the Federal Workforce, Executive Order on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce and Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation. ↩

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Suggested Reading

- 01 October 2021 Kirkland Alert The SEC’s Recent and Planned Activity on Climate Change Disclosures: What Companies Can Do To Prepare
- 23 September 2021 Speaking Engagement Energy, Climate, ESG & Environmental Matters in Congress and the Biden Administration Webinar
- 17 September 2021 In the News 'Do-gooder' companies tout sustainability for a bigger payday when they IPO. But their promises are limited.