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Preparing for the 2025 Annual Report and Proxy Statement Season

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This alert highlights recent updates to Securities and Exchange Commission (SEC) disclosure obligations effective for the 2025 Form 10-K and proxy statement season, as well as other regulatory updates companies should consider. The topics below include key SEC and stock exchange-required updates but do not cover other updates that companies should take into consideration, such as voting guidelines of proxy advisory firms and institutional investors, which are beyond the scope of this alert.

Insider Trading Policies

Companies must now provide annual disclosure of insider trading policies and procedures in Form 10-K and proxy statements and file insider trading policies and arrangements as an exhibit to the Form 10-K. Item 408(b) of Regulation S-K requires companies to disclose whether they have adopted insider trading policies and procedures applicable to directors, officers and employees as well as the company itself. If a company has not adopted such policies and procedures, it must explain why it has not done so. This information must be tagged in Inline XBRL. While most companies have previously adopted insider trading policies for their directors, officers and employees, the requirement to disclose whether the policy applies to the companies themselves has raised questions about the appropriate way to respond. Rather than revise its insider trading policy to add the potentially awkward concept of the policy applying to the company itself, a company may want to make a statement similar to the following: “While the company is not subject to the insider trading policy, the company does not trade in its securities when it is in possession of material nonpublic information other than pursuant to previously adopted Rule 10b5-1 trading plans.”

In addition, Item 601(b)(19) of Regulation S-K now requires companies to file their insider trading policies as an exhibit to the Form 10-K. Since the policies will now be public, companies should review their policies for any changes they want to make prior to filing them as an exhibit since any future changes will be visible to the public.

In light of this examination, there are a couple potential modifications to consider. First, the SEC has stated that, in its view, a donor of securities would violate Section 10(b) of the Securities Exchange Act of 1934 (the Exchange Act) if the donor gifts securities when aware of material non-public information (MNPI) and knew, or was reckless in not knowing, that the donee would sell the security prior to public disclosure of the MNPI. Therefore, companies should examine whether to treat gifts with the same guardrails as traditional sales of securities, such as pre-clearance and “blackout” period restrictions. Another option would be to permit *bona fide* gifts while a donor is in possession of MNPI, provided that the donee agrees to not sell the security until the MNPI has been disclosed. A third option, though potentially riskier, would be to include the SEC’s view in the policy and let insiders decide when to gift securities and the restrictions put on the gift.

Second, companies should consider the scope of their insider trading policies relating to trading in the securities of other companies (*i.e.*, peers, competitors, industry participants or public companies generally). In the recent “shadow insider trading” case, *SEC v. Panuwat*, the SEC took the position that insider trading laws apply where an insider is in possession of MNPI about his or her own company and then trades on the basis of that information in securities of another public company in which a market connection exists due to the economic correlation between the two companies (*i.e.*, market comparisons and trading similarities). In the *Panuwat* case, the jury found that the terms of the company’s insider trading policy could be read to prohibit trading in another public

company's securities while in possession of information about a pending acquisition of the insider's own company. Of note, the SEC did not limit its position to the express language of the insider trading policy itself. Rather, the SEC argued, on a principal/agency theory, that notwithstanding the language of the insider trading policy, the insider had a duty of trust and confidence to his employer as a result of his employment and was therefore prohibited from using MNPI for personal benefit. While the future use of this novel theory in the insider trading space remains to be seen, companies should avoid overly broad language in their policies that might expand liability to covered persons.

Timing of Stock Option and SAR Grants

Companies will now have to disclose their policies and practices regarding the timing of stock option and stock appreciation right (SAR) awards. Item 402(x) of Regulation S-K requires the disclosure of the following information: (i) how the board of directors determines when to grant stock options or SARs (for example, a predetermined schedule); (ii) whether the board of directors or committee thereof takes MNPI into account when determining the timing and terms of stock option and SARs grants, and if so, how it does so; and (iii) whether the company has timed the disclosure of MNPI for the purpose of affecting the value of executive compensation. Since this disclosure is new, companies should reevaluate their policies and practices regarding the timing of their stock option and SARs grants in order to determine if any updates are appropriate prior to the first disclosure in 2025.

Also, if during the most recently completed fiscal year, the company has awarded options and SARs to a named executive officer in the period beginning four business days before the filing of a periodic report on Form 10-Q or Form 10-K, or the filing or furnishing of a Form 8-K that discloses MNPI (other than a Form 8-K disclosing a material new stock option or SAR award grant) and ending one business day after the filing or furnishing of such Form 10-Q, 10-K or 8-K, the company must include a table disclosing the name of the named executive officer receiving the grant, the grant date, the number of securities underlying the award, the exercise price of the award, the grant date fair value of the award and percentage change in the closing market price of the securities underlying the award between the trading date ending immediately prior to the disclosure of MNPI and the trading day beginning immediately following the disclosure of MNPI. This information must be tagged in Inline XBRL.

Cybersecurity

Although the SEC-required disclosure addressing cybersecurity incidents as well as cybersecurity risk management, strategy and governance was in effect for 2024, the SEC has provided an update regarding when to use Item 8.01 of Form 8-K instead of Item 1.05. In May 2024, the Corp Fin director explained that voluntary disclosure of cybersecurity incidents that are not material, or for which a materiality determination has not yet been completed, should not be disclosed under Item 1.05, as some companies had been doing, but rather should instead be disclosed under Item 8.01. However, if such cybersecurity incident is later determined to be material, the company should file an Item 1.05 Form 8-K within four business days of the subsequent materiality determination.

In June 2024, the SEC issued five compliance and disclosure interpretations (CDIs) regarding Item 1.05 of Form 8-K. In Questions 104B.05 and 104B.06, the SEC noted that even if a company makes a ransomware payment before determining if the incident resulting in the ransomware payment is material, the company still must file an Item 1.05 Form 8-K if the incident is ultimately determined to be material. This is due to the fact that the public should be informed of a material incident even if it is resolved prior to the materiality determination. Question 104B.07 has the same fact pattern but an insurance policy was available to cover most of the ransomware payment. The SEC takes the position that the availability of the insurance proceeds does not necessarily make the ransomware attack immaterial. The fact that the company may not be able to obtain a similar insurance policy

in the future or that such policy could be more expensive in the future must be considered by the company in making the materiality determination. Question 104B.08 addresses whether a small ransomware payment automatically makes the cybersecurity incident immaterial. While the size of the payment can be a factor in determining materiality, it should not be the sole basis for making the decision. The Item 1.05 of Form 8-K adopting release states: “A lack of quantifiable harm does not necessarily mean an incident is not material. For example, an incident that results in significant reputational harm to a registrant ... may not cross a particular quantitative threshold, but it should nonetheless be reported if the reputational harm is material.” Question 104B.09 reflects that a series of related immaterial cybersecurity incidents could result in an Item 1.05 of Form 8-K disclosure of a material cybersecurity incident. This could occur where the same malicious actor engages in a number of smaller but continuous cyberattacks that are either collectively quantitatively or qualitatively material, or where multiple malicious actors exploit the same vulnerability and impact the company’s business materially.

Artificial Intelligence Washing

As artificial intelligence (AI) becomes more prevalent, companies must ensure that they can support the statements they make regarding AI. The SEC refers to overstating a company’s AI capabilities as “AI Washing.” In March 2024, the SEC chair reminded companies to make sure that there is a reasonable basis for the AI claims they make and the risks they face regarding AI use, and that this reasonable basis should be disclosed to investors. Whether AI Washing is done by investment advisers, broker-dealers or companies, it may violate U.S. securities laws. Therefore, companies should reevaluate their AI statements and make any necessary updates in upcoming disclosures.

Nasdaq Diversity Phase-In Struck Down

On Dec. 11, 2024, the U.S. Court of Appeals for the Fifth Circuit struck down the board diversity rules of the Nasdaq Stock Market, LLC (Nasdaq). Therefore, at this time, Nasdaq reporting companies are not required to (i) include the board diversity matrix in their proxy statement or on their website or (ii) have or explain why they do not have diverse directors on their board. However, companies may consider voluntarily disclosing self-identified diversity-related information to meet investor expectations or the voting policies of institutional investors or proxy advisory firms.

The SEC has indicated that it is evaluating the ruling and considering its options. With the upcoming change in administration, it seems less likely that the SEC will appeal the decision to the U.S. Supreme Court. For more information on the Fifth Circuit’s decision, please see [this Haynes Boone Alert](#).

Corporate Transparency Act Enjoined

On Dec. 3, 2024, the U.S. District Court for the Eastern District of Texas issued a nationwide preliminary injunction enjoining the Corporate Transparency Act (CTA) and the U.S. government’s enforcement of the beneficial ownership reporting requirements. The Department of Justice appealed the court order to the U.S. Court of Appeals for the Fifth Circuit, which issued two contradictory orders in a three-day period. The second order upheld the injunction. On Jan. 1, 2025, the Department of Justice filed a petition with the Supreme Court requesting a stay of the injunction. FinCEN has announced that it will comply with the injunction and that companies that would otherwise be required to file beneficial ownership information with FinCEN are not required to file it or subject to liability for failure to do so while the injunction is in effect. Those companies are permitted to voluntarily submit such information.

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For more information on the injunction, please see the below Haynes Boone Alerts:

[December Surprise: Nationwide Preliminary Injunction Halts Enforcement of the Corporate Transparency Act](#)

[The CTA Injunction is Back – BOI Filings Not Required \(Again...and For Now\)](#)

For further information, please contact a member of the Haynes Boone [Capital Markets and Securities Practice Group](#).