

Preparing for the 2020 Proxy and Annual Report Season

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PRACTICES Corporate, Capital Markets and Securities, Emerging Companies and Venture Capital

A significant number of recent updates to SEC disclosure obligations will be effective for the 2020 proxy and annual report season. Below is a list of important items that public companies should consider for the upcoming reporting cycle.

Disclosure of Hedging Policies

Registrants have already been required to describe material policies regarding the hedging of the economic risk of owning securities when discussing the compensation of named executive officers within Compensation Discussion and Analysis. Item 407(i) of Regulation S-K expands upon these requirements by requiring disclosures concerning hedging policies from a corporate governance perspective rather than only an executive compensation perspective. Although the new rule does not require registrants to adopt a hedging policy, registrants will now be required to make more fulsome disclosures concerning their hedging practices or policies, including:

- Either a fair and accurate summary or the full text of their hedging practices or policies.
- The categories of hedging transactions that are specifically permitted and the categories of hedging transactions that are specifically disallowed.
- How hedging policies affect all employees and directors, as opposed to just executive officers.
- If they do not have a hedging policy, that no such policy exists, without regard to whether they view hedging policies as material from a compensation perspective.

The new disclosure requirement applies to proxy and information statements related to the election of directors. Smaller reporting companies and emerging growth companies will be required to begin providing hedging policy disclosures in proxy and information statements for the election of directors for fiscal years beginning on or after July 1, 2020.

Registrants should review any existing hedging policies and procedures to determine if any changes might be necessary considering the heightened public disclosure requirements. If registrants do not have any such policy, registrants should consider creating and implementing hedging policies and procedures in time for their next proxy or information statement.

Communication of Critical Audit Matters (CAMs)

Additional disclosure requirements under Auditing Standard 3101, *The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion*, have begun to take effect. Under the new standard, auditors are required to communicate critical audit matters, or CAMs, arising from the current period's audit in their audit report. CAMs are matters communicated or required to be communicated to the audit committee that (i) relate to accounts or disclosures that are material to the financial statements and (ii) involved especially challenging, subjective or complex auditor judgment. For each identified CAM, the auditor must describe in its audit report the principal considerations that led the auditor to determine that the matter was a CAM and how the CAM was addressed in the audit and refer to the relevant financial statement accounts or disclosures. These new CAM disclosures apply to large accelerated filers for fiscal years ending on

or after June 30, 2019 and to all other filers for fiscal years ending on or after December 15, 2020. In preparation for the new standard, companies should consider conducting “dry-runs” to determine what matters currently constitute CAMs, request drafts of CAM disclosures from their auditors and educate investor relations personnel about CAMs so they are prepared for investor questions.

SEC Disclosure Modernization and Simplification Updates

The SEC’s FAST Act Modernization and Simplification of Regulation S-K rule, adopted in March 2019, has also come into effect for most issuers.

MD&A; Reg. S-K Item 303

Registrants are permitted to exclude the earliest of three years of comparative financial results in MD&A if they have included the discussion in any prior filing on EDGAR and that discussion is not necessary to an understanding of the registrant’s financial condition, changes in financial condition or results of operations. Registrants excluding the discussion of the earliest year based upon this change must identify the location in the prior filing where the omitted discussion may be found.

Further, registrants are no longer required to discuss their financial condition, changes in financial condition and results of operations in a year-over-year comparison format and are instead permitted the discretion to present this information in any way that enhances the reader’s ability to understand the information. However, the SEC does not expect many registrants to change from providing year-over-year comparisons.

Description of Property; Reg. S-K Item 102

Disclosure concerning principal physical properties only must be included to the extent such property is material to the registrant.

Directors, Executive Officers, Promoters and Control Persons; Reg. S-K Item 401

Identity and background information about executive officers is not required to be repeated in proxy or information statements if such information has already been included in the registrant’s Form 10-K. Registrants electing to utilize this exception must include such disclosure under a heading “Information about our Executive Officers” in Part I of their Form 10-K.

Beneficial Ownership Reporting Compliance; Reg. S-K Item 405

Instructions to Item 405 permit and encourage registrants not to provide disclosure for delinquencies under Section 16(a) if the registrant has no delinquencies to report. The amendments also change the caption from “Section 16(a) Beneficial Ownership Reporting Compliance” to “Delinquent Section 16(a) Reports.”

In addition, the amendments eliminate the checkbox on the cover page of Form 10-K where a registrant indicates whether there are any Section 16 delinquencies to report.

Exhibits; Reg. S-K Item 601

Annual reports on Form 10-K are now required to include a description of securities as an Item 601(b)(4) exhibit. This exhibit must include the information required by Item 202(a)-(d) and (f) of Regulation S-K for all securities of the registrant registered under Section 12. Previously, this information was only required to be filed within registration statements.

Registrants now have additional flexibility with respect to the two-year lookback for material contracts. Previously, all registrants, including registrants with established reporting histories, were required to file material agreements entered within a two-year lookback period, even if the agreements had been performed or terminated. Now, only “newly reporting registrants” are required to file all material contracts that were entered into within two years of the applicable filing. All registrants continue to be required to file material contracts that must be performed in whole or in part at or after the filing of the registration statement or report.

Cover Page Update

Cover pages of Forms 8-K, 10-K and 10-Q now require disclosure of the national exchange or principal U.S. market for their securities registered under Section 12(b) as well as the title of class and trading symbol of each such registered security. Data on cover pages must be tagged in Inline XBRL once the Inline XBRL phase-in applies to the registrant. Inline XBRL included on the cover page is required to be filed in a new Item 601(b)(104) exhibit, “Cover Page Interactive Data File,” in the exhibit index. For Forms 10-K and 10-Q, the new exhibit can cross-reference the existing Item 601(b)(101) exhibits through language such as “Cover Page Interactive Data File (formatted as Inline XBRL and contained in Exhibit 101).” Interactive Data Compliance and Disclosure Interpretation 101.04, issued on August 20, 2019, provides that the staff will not object if registrants do not include an Item 601(b)(104) exhibit to a Form 8-K if no exhibits would otherwise be included on the Form 8-K.

Inline XBRL

Large accelerated filers have already been required to transition to Inline XBRL, which requires embedding XBRL data into the filing, for financial statements information disclosures. Accelerated filers must transition to Inline XBRL commencing with their first Form 10-Q for a fiscal period ending on or after June 15, 2020, and all other filers must similarly transition for reports with fiscal periods ending on or after June 15, 2021. Once a registrant transitions to Inline XBRL, each Item 601(b)(101) exhibit in the exhibit index must include the word “inline” in its title description for the exhibit.

Risk Factor Update

As highlighted by an enforcement action against Facebook in July 2019, the SEC has continued its focus on misleading risk factor disclosure. The SEC believes that risks that are phrased in the hypothetical can create the misleading impression that such a risk has not occurred. Accordingly, when conducting their annual review and supplementation of risk factors, registrants should pay close attention to risk factors describing hypothetical risks and update them to disclose any such risks that have occurred.

Several other trending areas that may be ripe for risk factor disclosure or updates include the risks related to Brexit, the transition away from LIBOR, cybersecurity and data privacy. Depending upon their impact upon the registrant, these trending topics may also warrant discussion in other sections of filings, including business, MD&A and litigation.

Director and Officer Questionnaire Update

As of the publication of this Alert, there have not been any changes to SEC rules or NYSE or NASDAQ listing standards during 2019 that would require an update to director and officer questionnaires. Although it has currently not yet been approved by the SEC, NASDAQ has

proposed a change to its definition of “family member,” which may impact director and officer questionnaires.

Disclosure of diversity characteristics about directors and officers in proxy statements has become more prevalent in recent years. Registrants electing to disclose self-identified diversity information in their proxy or information statements or that are required to make certifications about diversity to government agencies may consider adding questions to director and officer questionnaires designed to elicit such information. Regulation S-K Compliance and Disclosure Interpretation 116.11, issued on February 6, 2019, states that the staff expects registrants to disclose self-identified diversity characteristics in proxy statements for the election of directors to the extent they were considered by the board or a nominating or governance committee.

For additional information regarding these and other proxy season updates, please contact any member of Haynes Boone’s [Capital Markets and Securities Practice Group](#).