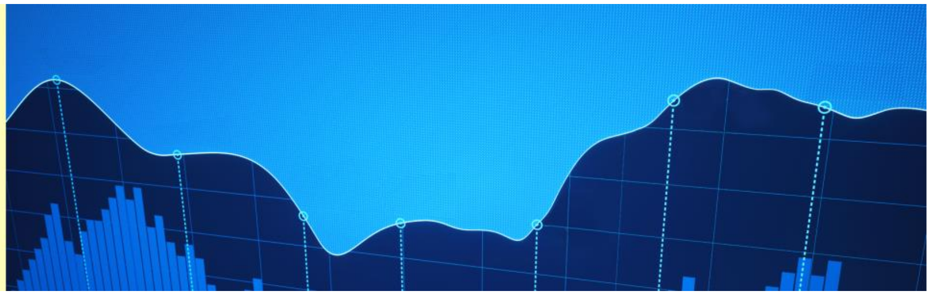

Securities Quarterly Update

January 2023 | Winter Edition

Welcome to the winter edition of Securities Quarterly Update*, a publication that provides updates and guidance on securities regulatory and compliance issues. In this edition, we look at recent developments affecting annual reports, proxy statements and annual shareholder meetings and provide some reminders for 2022 annual reports and the 2023 proxy season.*

Annual Reports

Filer Status. Take a look at the company's non-affiliate public float at the end of the second quarter and assess the company's filer status as of the end of the fiscal year, which will determine filing deadlines for the annual report for that fiscal year and subsequent periodic reports. Whether a company is a "smaller reporting company" or an "emerging growth company" will impact whether the company can include certain scaled-down disclosures. Note that different quantitative thresholds may apply when companies are transitioning from one filer status to another.

Risk Factors. Consider if updated or new risk factors are necessary to address any risks relating to supply chain and logistics challenges, business impacts from Russia's invasion of Ukraine and the international response, tax and regulatory factors, trends in product demand and costs, inflation, labor shortages, interest rate changes, changes in general economic conditions and credit markets, including potential recession, market volatility, and any liquidity issues.

Cybersecurity and data privacy, dependence on emerging technologies, crypto assets, climate change, and other environmental, social and governance (ESG) issues also remain on the SEC's radar. If applicable, review the SEC's recent sample comment letter regarding crypto assets, which is available here. Consider also if any risks have already materialized, thus rendering hypothetical disclosures inadequate in the SEC's view.

Emerging Issues. In addition to risk factors, the emerging issues discussed above may impact other sections of the annual report, including the MD&A, description of business, contingencies, estimates, and legal proceedings.

Russia-Ukraine. In May 2022, the SEC's Division of Corporation Finance issued a sample comment letter outlining public company disclosure requirements relating to the business impact of Russia's invasion of Ukraine and related sanctions, which we reviewed in the summer edition of our *Securities Quarterly Update*. Many of those considerations may remain applicable.

Updated Cover Page Check Boxes. The SEC's new clawback disclosure rules amend annual reports on Form 10-K (and Forms 20-F and 40-F for foreign issuers) to add two new check boxes to the cover page of the form. As a result of these changes, companies will be required to indicate annually (i) whether the financial statements included in the filing reflect the correction of an error to previously issued financial statements, and (ii) if so, whether any of those error corrections are restatements that required a recovery analysis of incentive-based compensation received by any of the company's executive officers during the relevant clawback period.

For more information regarding the new rules, see "SEC Adopts Dodd-Frank 'Clawback' Rules," Thompson Hine *Executive Compensation Update*, November 4, 2022. To date, the SEC has not clarified whether these check boxes should be included in the annual reports for the 2023 proxy season, before the clawback rules are applicable to companies.

Prior Rule Changes Impacting MD&A, Selected Financial Data, and Supplementary Financial Information. As a reminder of the SEC's amended MD&A requirements, see the winter 2022 edition of our *Securities Quarterly Update*.

Reminder to Include Item 9C and Auditors' PCAOB Number and to iXBRL Tag Auditors' Information. To implement the disclosure requirements of the Holding Foreign Companies Accountable Act (which mainly impacts companies with auditors in China), Item 9C (Disclosure Regarding Foreign Jurisdictions that Prevent Inspections) has been added to and remains in Part II of Form 10-K. (Corresponding Item 16I has been added to Form 20-F.) In addition, all companies remain subject to Inline XBRL tagging requirements identifying the name of the company's auditors, the auditors' location (usually the city and state), and auditors' PCAOB ID number.

Non-GAAP Disclosures and Key Performance Indicators. Companies that use non-GAAP financial measures should review the SEC's guidance, including updated compliance and disclosure interpretations relating to non-GAAP financial measures issued in December 2022, which relate to, among other things, when such measures are viewed as misleading or improperly more prominent than GAAP measures. The SEC's guidance regarding key performance indicators may also come in handy.

Exhibits. When updating the company's exhibit index, some companies may have to refile their "securities description" exhibit due to issuances of new securities or other changes at the company. Companies should also review their list of subsidiaries for any changes. Companies should also keep in mind the new insider trading policy and clawback policy exhibits that will be required in the future.

Insider Trading. The SEC has adopted final rules relating to Rule 10b5-1 insider stock trading plans, company insider trading policies and procedures, and certain equity grants. These rules will become effective in late February 2023. The new disclosures and related iXBRL tags in periodic reports on Forms 10-Q, 10-K and 20-F and proxy statements will be required in the first filing that covers the first full fiscal period beginning on or after (i) April 1, 2023 or (ii) October 1, 2023 for smaller reporting companies.

Among other things, companies should review and amend their insider trading policies, which will ultimately be required to be filed as exhibits to their annual reports. For an overview of the new requirements, see "SEC Issues Final Rules on Rule 10b5-1 Insider Stock Trading Plans and Insider Trading Policies and Procedures," Thompson Hine *ESG Collaborative Update*, December 15, 2022.

Glossy Annual Reports. Companies will be required to submit their glossy annual report to shareholders to the SEC on EDGAR in PDF format (retaining color and graphics), as opposed to only posting it on the company's website or sending paper copies to the SEC. This requirement is in addition to filing the annual report on Form 10-K on EDGAR. The glossy annual report is required to be submitted via EDGAR not later than the later of the date on which the report is first sent or given to shareholders or the date on which preliminary copies, or definitive copies, if preliminary filing was not required, of the proxy materials are filed with the SEC.

Proxy Statements

Equity Compensation Plans. Review remaining share availability and terms of equity compensation plans and consider whether any amendments to, or new, equity plans are needed, which would require shareholder approval.

Authorized Shares. Consider whether a sufficient number of authorized shares remains available under the certificate of incorporation to accomplish the company's objectives. Amendments to the certificate of incorporation would require shareholder approval and a preliminary proxy statement, which could be subject to the SEC's review, impacting the annual meeting timeline.

Say-on-Pay and Say-When-on-Pay. Confirm whether a say-on-pay vote on executive compensation is required this proxy season. Many companies will also be required to include their say-when-on-pay vote this year, allowing shareholders to vote on whether advisory votes on executive compensation should be held annually, biannually or triennially.

When drafting resolutions and otherwise preparing for board meetings, recall that the board's determination of the frequency with which it intends to conduct the say-on-pay vote (in light of the results of the shareholders' say-when-on-pay vote) will have to be included in the Form 8-K announcing annual meeting voting results, or an amendment to the Form 8-K filed within 150 calendar days of the annual meeting of shareholders.

Pay for Performance. Pay for performance disclosures, including a new pay for performance table, will be required for the 2023 proxy season. In addition, each quantitative value disclosed in the pay for performance table and footnotes is required to be separately tagged in Inline XBRL format, and the footnote disclosures are also required to be block-text tagged. For an overview of the new requirements, see "Complying with the SEC's New 'Pay Versus Performance' Disclosure Rules," Thompson Hine *Executive Compensation Update,* August 30, 2022.

Smaller reporting companies are permitted to provide scaled-down disclosures and are not required to tag their disclosures using Inline XBRL until the third proxy statement filed that includes pay for performance disclosures. Emerging growth companies and foreign private issuers are exempt from these rules.

Executive Compensation Clawbacks. The SEC has adopted new rules requiring compensation clawback disclosures, including filing of the clawback policy as an exhibit to the annual report. The rules cover both "Big R" and "little r" restatements and will apply to most listed companies, including smaller reporting companies, emerging growth companies, foreign private issuers, and controlled companies.

The rules provide for transition periods, and these disclosures will not be required for the 2023 proxy season. Stock exchanges have until late February to issue their accompanying listing standards. In the meantime, companies may want to consider reviewing and amending their clawback policies. For an overview of the new requirements, see "SEC Adopts Dodd-Frank 'Clawback' Rules," Thompson Hine *Executive Compensation Update*, November 4, 2022.

Officer Exculpation – Potential Proposal to Amend Certificate of Incorporation. Delaware corporations may want to consider whether to amend their certificate of incorporation to provide for officer exculpation in accordance with the recent amendments to the Delaware General Corporation Law (DGCL). Amendments to the certificate of incorporation would require shareholder approval and a preliminary proxy statement, which could be subject to the SEC's review. If included in the proxy statement, companies should clearly articulate the rationale for such a proposal, as both ISS and Glass Lewis will be assessing such proposals on a case-by-case basis.

Board Leadership and Risk Oversight Disclosures. Revisit board leadership and risk oversight disclosures, including the role of the lead director, in light of climate change, human rights, sustainability, biodiversity and natural resources, and other issues. Some companies also received SEC comments regarding their board leadership structure, exact roles, and how and when changes would be considered.

Universal Proxy. For both contested and uncontested director elections, universal proxy rules require companies to provide "against" and "abstain" voting options on proxy cards where such options have legal effect under state law. All proxy statements are also required to disclose deadlines for providing director nomination notices under the universal proxy rules.

Many companies may have advance notice bylaws with earlier deadlines for submission of nomination notices (as compared to the deadlines under the universal proxy rules) but those advance notice bylaws may not require all of the same information that is required by the universal proxy rules. In those cases, to the extent that advance notice bylaws do not require the same information required by the universal proxy rules, proxy statements should specify the requirement for shareholder activists to comply with the additional requirements of the universal proxy rules.

Companies should review the new rules, including recent compliance and disclosure interpretations, and their bylaws in drafting their disclosures.

ESG Disclosures. More companies are including or expanding ESG-related disclosures, from risk factors to information about climate- and other ESG-related risks and opportunities, ESG governance, and human rights and sustainability in supply chains. Although it is not expected to be finalized until sometime in the first half of 2023, the SEC's climate change disclosure proposal is reviewed here. Comments on proposed climate disclosure rules for large federal contractors are due this month. It may be helpful to take a look at the SEC's climate and cybersecurity disclosure guidance such as the SEC's sample comment letter regarding climate change disclosures and the SEC's proposed new rules regarding cybersecurity disclosures (discussed in our update).

Companies should also review their ESG disclosures for greenwashing concerns, as well as for consistency among various ESG disclosures in ESG reports, SEC filings, websites, press releases, investor presentations, marketing materials, customer communications, board materials and other internal communications, and submissions to third parties such as ESG rating agencies and regulators. Note that the Federal Trade Commission (FTC) is seeking comments regarding potential updates to its "Green Guides." Disclosures about engagement with shareholders on ESG issues also remain important.

Director Qualifications and Diversity. Companies may want to consider refreshing proxy disclosures regarding directors' skills and qualifications in light of the new universal proxy rules and the continued emphasis on ESG matters. For instance, consider highlighting directors' talent oversight, cybersecurity and data privacy, climate and sustainability, and other ESG-related experience. Companies should also consider including director diversity disclosures, to the extent they are not currently included or required. Note also that the ISS Governance QualityScore now includes factors assessing presence of diverse directors, the board's oversight of ESG topics, and directors' qualifications relating to climate change and diversity, equity, and inclusion.

Date Change for Nasdaq's Board Diversity Rules. Nasdaq changed its compliance deadlines for its board diversity requirements to December 31. The requirements were previously keyed to the SEC's rule adoption date of August. Nasdaq also now allows Nasdaq-listed companies that post their board diversity matrixes on company websites to provide notice via an email address (rather than solely via the Nasdaq Listing Center).

Proxy Advisors. Take a look at proxy advisors' and institutional investors' voting policies, as applicable. For example, diversity, climate change, oversight of cybersecurity risks, and other ESG-related requirements continue expanding, both substantively and disclosure-wise, and expectations as to the number of outside boards on which directors serve continue to evolve.

Annual Shareholder Meetings

Universal Proxy. With the universal proxy rules now in effect for contested director elections, consider whether any amendments are advisable to the advance notice provisions in the bylaws. Some companies may want to conduct a full review and assessment of their takeover defenses.

Retail Investors. With more investment managers providing pass-through voting options to retail investors, some companies may have to undertake additional solicitation efforts. Some companies also continue to experience increased annual meeting expenses often due to a growing number of small retail positions.

Shareholder Lists. Delaware corporations should also review their bylaws in light of the recent amendments to the DGCL relating to requirements for shareholder lists (which changes are particularly helpful for virtual meetings) and shareholder meeting adjournment provisions. Many companies may be able to amend their bylaws without shareholder approval.

D&O Questionnaires. With the increasing focus on ESG issues around the world, as well as growing greenwashing risks, companies should consider whether D&O questionnaires require any updates to confirm diversity, expertise, and ESG-related statements; assess whether directors' nomination consent is broad enough in light of the new universal proxy rules; and ensure that D&O questionnaires or other questionnaires for obtaining quarterly information in connection with the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA) are updated to include applicable Russian parties. Companies may also want to confirm that there are no interlocking directorships under the Clayton Act in light of increasing regulatory attention on this issue.

FOR MORE INFORMATION

For more information, please contact:

Jurgita Ashley
216.566.8928
Jurgita.Ashley@ThompsonHine.com

Julia Miller
216.566.5831
Julia.Miller@ThompsonHine.com

or another member of our Securities, Capital Markets & Corporate Governance team.

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