



2020 Proxy Season Hot Topics: Part 1 – Ten tips for implementing SEC rule changes in your upcoming Form 10-K and proxy statement

PROXY SEASON HOT TOPICS

[Corporate Governance Alert](#)

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In March 2019, the SEC adopted a collection of amendments to its rules and forms intended to modernize and simplify disclosure requirements applicable to US public companies. For companies preparing their Form 10-K and proxy filings, in this alert we discuss 10 practical tips to keep in mind in light of the new SEC rules and recent guidance.

We invite you to call the authors of this alert or your DLA Piper contact if you have any questions or would like to discuss any of the issues reviewed in the series. In addition, for a more detailed discussion of the new SEC hedging rules and changes to the Form 10-K cover pages and exhibit hyperlinks, please refer to our prior alert, 2019 Proxy Season Hot Topics: Part 3 – SEC hedging rules, auditor report, Form 10-K changes.

10 practical tips

1. Management's Discussion and Analysis

Consider omitting a discussion of the earliest of the three years of financial statements from MD&A, assuming the information has already been disclosed in other SEC filings and that an appropriate reference to the prior filings is included in the current-year Form 10-K. As amended, Item 303 of Regulation S-K now permits registrants to exclude the earliest comparative period from their MD&A. For example, a registrant with a December 31 fiscal year-end could include only the comparison of 2019 to 2018 in its 2019 Form 10-K MD&A and omit the comparison of 2018 to 2017.

As companies consider whether to take advantage of this new reduced disclosure obligation, here are a few items to keep in mind:

- Although not all calendar-year filers have filed their Forms 10-K, many companies have elected to omit discussion of their third year of financial statements. In doing so, many of the companies are still including the third year in their financial tables but not including any narrative disclosure regarding that period.
- Companies will need to make a determination whether the discussion is material. If a company determines that the discussion is necessary to an understanding of its financial condition, changes in financial condition and results of operations, it should either include the discussion or include an express incorporation by reference of the discussion included in the prior year's Form 10-K. Note that a reference to the prior Form 10-K is not sufficient to incorporate that discussion by reference – the incorporation by reference must be explicit.
- In the absence of determining that a discussion of the earliest year is material or necessary, subsequent registration statements that incorporate the Form 10-K by reference will also not require that discussion. However, companies that are considering a public offering should be mindful that any measures relied upon in marketing the offering, such as metrics used in a road show deck, will need to be included in the registration statement for the offering, either explicitly or through incorporation by reference.

2. KPIs and metrics

On January 30, 2020, the SEC provided guidance on key performance indicators (KPIs) and metrics in MD&A. MD&A and KPIs and metrics have been a frequent area of SEC comment, but there has been little recent guidance from the SEC until now. Based on the new SEC guidance, companies should evaluate their presentation of KPIs and metrics to determine whether additional information or disclosure may be necessary in order to make the presentation of the KPI or metric, in light of the circumstances under which it is presented, not misleading.

In particular, the SEC suggested that disclosure should include:

- a clear definition of the metric or KPI and how it is calculated
- a statement of the reasons why the KPI or metric provides useful information to investors and
- a statement of how management uses the KPI or metric in managing or monitoring the performance of the business.

In addition, if the company changes the method of calculation or presentation of a KPI or metric, it should consider whether to provide additional disclosure of the differences in the way the metric is calculated or presented, the reasons for the changes, and the effects of the changes on other information being disclosed or previously reported.

3. Updates to risk factors

Companies should also evaluate their risk factor disclosures in light of new SEC guidance and remarks, including guidance published on December 19, 2019 regarding disclosure obligations that companies should consider with respect to intellectual property and technology risks that may occur when they engage in international operations.

In addition to evaluating whether the industry-specific risks reflect the risks presented by current events and conditions, areas that companies should consider when reviewing the content of their risk factors include:

- LIBOR transition-related risks
- Cybersecurity risks, in particular focusing on timely disclosures when a registrant becomes aware of a cybersecurity incident or risk and updating or correcting any prior disclosure that omitted material facts that would make the disclosure misleading and
- Privacy-related risks, including re-evaluating disclosures associated with the EU General Data Protection Regulation and the California Consumer Protection Act, which went into effect on January 1, 2020.

4. Description of capital stock – add a new Exhibit 4

A new exhibit providing a brief description of all securities registered under Section 12 of the Exchange Act is now required to be filed with the Form 10-K. This disclosure should be substantially identical to the descriptions companies have included in their Form S-3s or other registration statements.

5. Form 10-K cover page

Ensure that the cover page eliminates the check box regarding delinquent Section 16 filers and adds the table disclosing trading symbols and listing exchanges. As discussed in our 2019 Proxy Season Hot Topics publication, note that the cover page also eliminates the check-the-box exception for smaller reporting companies.

6. Exhibit index and inline XBRL changes

Be sure the XBRL vendor tags the cover page, adds “inline” references to XBRL exhibits, and adds Exhibit 104. The exhibit index should be relocated so that it appears before the signature pages of the 10-K. The updated rules also eliminate a requirement to disclose material contracts with a look-back of two years: companies now need only disclose material contracts to be performed in whole or in part at or after the filing of the Form 10-K. Finally, as a reminder, confirm that an active hyperlink to each exhibit is listed in the exhibit index.

7. Property

The updated rules now clarify that companies only need to describe property to the extent material to the company. Even for companies in sectors where property disclosure is customarily brief (such as tech or life sciences), this is a good time to consider simplifications (such as removing disclosures about minor leases).

8. Executive officers

The SEC rules now expressly provide that executive officer information can be omitted from the proxy statement if included in Part I of the Form 10-K under the caption “Information about our executive officers.”

9. Delinquent Section 16 filings

In addition to eliminating the check box requirement on the cover page of Form 10-K, companies can now exclude the “Section 16(a) Beneficial Ownership Reporting Compliance” section in their filings (usually in the proxy statement) if they have no delinquencies to report. If this information is to be included, it is advisable to rename the section “Delinquent Section 16(a) Reports” rather than using the old title, “Section 16(a) Beneficial Ownership Reporting Compliance.”

10. Hedging disclosure

Consider voluntarily disclosing information regarding the ability of employees to hedge company securities, per the SEC’s new hedging rule. Note that the new rule does not apply until fiscal years beginning on or after July 1, 2019, with an extra year for smaller reporting companies and emerging growth companies, and is not applicable to foreign private issuers.

Find out more about the new SEC rules and recent guidance by contacting any of the authors.

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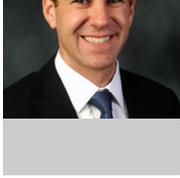
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