

Did you catch these developments for the 2019 proxy statement and Form 10-K?

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The 10-K and proxy season begins in a little over a month for companies with calendar fiscal year-ends. The following governance and disclosure developments should be considered in the course of preparing these filings.

For additional background, see our presentation and supplemental materials for [Preparing for the 2019 SEC Reporting Season](#).

Proxy Statement

Impact of the government shutdown: During the government shut down, the SEC is operating with a skeleton staff, with no capacity for reviewing preliminary proxy statements or no-action requests.

Companies that need to file preliminary proxy materials should continue to file them in accordance with Rule 14a-6(a) of the Exchange Act, at least ten calendar days prior to the date the definitive materials are first sent or given to shareholders. If companies are not advised by SEC staff within that period that there will be a review, they should proceed with the definitive filing and distribution of proxy materials.

While the Division of Corporation Finance has not discussed how no-action requests for shareholder proposals will be handled during the government shutdown, companies should continue to make the submission required by Rule 14a-8(j) via email if they intend to exclude a shareholder proposal. Given that companies must submit no-action requests no later than 80 calendar days before filing definitive proxy statements, it is likely that the SEC staff will have a chance to review and respond to submissions under Rule 14a-8 once the shutdown ends. If the current shutdown is still in effect at the time that the proxy statement is filed, a company would have to decide whether it has a basis to exclude the proposal without the benefit of a no-action letter.

See this [update](#) and this [update](#) on the shutdown's impact on capital markets regulation and this [19-firm memo](#) prepared during the last shutdown.

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Gender diversity voting policies: For meetings held after January 1, 2019, Glass Lewis will generally recommend votes against nominating committee chairs (and potentially other nominating committee members) on boards with no female directors. ISS will do so for meetings held on or after February 1, 2020. Mitigating circumstances disclosed in the proxy statement may influence their recommendations.

Rapidly evolving disclosure of environmental and social programs: More companies are dedicating sections of their proxy statements to describing these initiatives, or referring to applicable disclosure on their websites or in their responsibility reports, while being careful not to incorporate by reference these materials into their filings.

Expanding duties for compensation committees: These committees are overseeing broader issues of human capital management beyond director and executive officer compensation, sometimes in response to allegations of sexual harassment and other misconduct, followed by investor questions. Semler Brossy reports that one-third of DJIA (Dow Jones Industrial Average) 30 companies have a board compensation committee with broader responsibilities, e.g., leadership development and/or other HR areas - many of which signal their breadth in their name, such as Talent & Development Committee or Human Resources Committee.

Updated tax policy discussions in the CD&A: Companies historically may have disclosed that they use best efforts to obtain tax deductions for executive compensation above the \$1 million cap under Section 162(m) of the Internal Revenue Code. Since the exemption for performance-based compensation has been eliminated under the Tax Cuts and Jobs Act, with limited grandfathering for compensation payable pursuant to a written binding contract in effect on November 2, 2017, this disclosure now should be updated.

CEO pay ratio in year two: Companies may keep the median employee from last year, unless there were significant changes to (i) the employee population, (ii) employee compensation arrangements or (iii) the original median employee's circumstances, so that the company reasonably believes its pay ratio disclosure would significantly change. In cases (i) and (ii), the median employee should be re-identified. In case (iii), the company may use another employee whose compensation is substantially similar to the original median employee based on the compensation measure used to select the original employee. If the same median employee is used, briefly disclose the basis for the reasonable belief.

Say-on-frequency for smaller reporting companies: A non-binding say-on-frequency vote is due for those companies that had their last vote in 2013, including most smaller reporting companies. Shareholders may cast an advisory vote on whether to hold the advisory vote on executive compensation ("say-on-pay") every year, every two years or every three years. Per Rule 14a-21 of the Exchange Act, include (i) a statement that the vote concerning the frequency of the say-on-pay vote is being provided as required pursuant to Section 14A of the Securities Exchange Act of 1934, as amended; (ii) a description of the general effect of the say-on-frequency vote, such as whether it is non-

binding; and (iii) the current frequency of the say-on-pay vote and when the next say-on-pay vote will occur. Emerging growth companies ("EGCs") are exempted from say-on-pay and say-on-frequency votes. The SEC also expanded the definition of "smaller reporting company" this year. See discussion below.

Guidance for equity compensation plan proposals: The SEC updated its guidance related to equity compensation plan proposals, see Section 161 of the Proxy Rules and Schedules 14A/14C C&DIs. Among the clarifications provided: Companies should be prepared to disclose all material terms of a plan, even when the proposal is for an amendment of an existing plan. Furthermore, a New Plan Benefits Table (listing benefits or amounts that will be received by each of the named executive officers and certain groups under the proposed plan) will only be called for if the plan is: (i) a plan with set benefits or amounts (e.g., director option plans); or (ii) one under which some grants or awards have already been made subject to shareholder approval.

Annual Report on Form 10-K

Disclosure simplification: As a result of the SEC's Disclosure Update and Simplification rulemaking, certain 10-K disclosure can be eliminated, because the information is outdated or duplicative of information already included in the financial statements in accordance with GAAP or in the MD&A when material to the business.

- **Part I, Item 1, Business:** Companies are no longer required to disclose:
 - three years of segment level financial information,
 - amounts spent on R&D
 - financial information by geographic area
 - risks associated with foreign operations and a segment's dependence on foreign operations
 - facts indicating why performance in certain geographic areas may not be indicative of current or future operations (but consider for the MD&A)
 - reference to the SEC's Public Reference Room, physical address and phone number (but disclose the SEC website, a statement that SEC filings are available there, and the company's website)
- **Part II, Item 5, Market for Registrant's Common Equity:** Companies are no longer required to disclose:
 - high and low sales prices for common equity traded over the last two fiscal years (but disclose trading symbols for each class of common equity traded)
 - frequency and amount of cash dividends declared
 - restrictions that currently or are likely to materially limit a company's ability to pay dividends on its common equity (including restrictions on subsidiaries to transfer funds)
- **Part II, Item 7, MD&A:** Companies should discuss changes in financial condition and results of operations based on geographic area, if they are material to an understanding of the business.
- **Part IV, Item 15, Exhibits:** Companies are no longer required to provide a ratio of earnings to fixed charges as an exhibit.

Update those risk factors: Not only should companies consider new and emerging risks, they should review the status of existing risks. An abstract discussion may not be sufficient if an existing risk has materialized. Earlier this year, as reported [here](#), Altaba (formerly Yahoo! Inc.) agreed to pay a \$35 million penalty to settle charges that it misled investors by failing to disclose one of the world's largest data breaches thus far. Among its violations, Yahoo's post-breach disclosure in quarterly and annual reports was too general, stating that the company faced only the risk of, and negative effects that might flow from, data breaches. The company failed to disclose the actual breach or its potential business impact and legal implications.

Continue to mind the GAAP: In a recent SEC cease-and-desist order discussed [here](#), ADT was fined \$100,000 for failing to give "equal or greater prominence" to the most directly comparable GAAP measures in accordance with Item 10 of Regulation S-K. The company highlighted non-GAAP measures in the headlines and bullets summaries of two earnings releases, without disclosing the GAAP measures until later in the earnings releases.

Leasing and revenue recognition accounting standards: Public entities besides EGCs must adopt the leasing accounting standard (FASB ASC Topic 842) for annual reporting periods beginning after December 15, 2018, including interim reporting periods within that reporting period. For calendar year-end companies, they will adopt the standard on a modified retrospective basis on January 1, 2019, with an initial application date of January 1, 2017. Section 11200 of the SEC Financial Reporting Manual clarifies that filing a registration statement with an earlier comparative period (eg, January 1, 2016) does not change the date of initial application.

Last year, public entities adopted the revenue recognition accounting standard (FASB ASC Topic 606) for annual reporting periods beginning after December 15, 2017, including interim reporting periods within that period. SEC Chief Accountant Wes Bricker has indicated that revenue recognition disclosure will be a top issue for comment this season, and the SEC staff has encouraged companies to refine and supplement their annual disclosures included in subsequent quarterly filings. Areas of judgment, such as identification of performance obligations and the application of principal vs. agent guidance have been the most frequently discussed topics in consultations with the Office of the Chief Accountant. Section 11100 of the SEC Financial Reporting Manual addresses certain disclosure issues related to the adoption of ASC 606. For instance, for companies that adopted ASC 606 using the full retrospective approach, they do not need to apply the standard when reporting selected financial data in the 10-K for periods prior to those periods that are retroactively adjusted, but they must provide information regarding comparability of data presented pursuant to Instruction 2 to the Item 301.

Updates to the 10-K cover page were made in connection with rulemaking for smaller reporting companies and inline XBRL reporting (see our Preparing for the Proxy Season presentation for a markup).

No delivery of hard copies of proxy materials to the [NYSE](#), if the hard copies have

been filed in EDGAR. Nasdaq had abolished this requirement earlier.

More companies qualify as “Smaller Reporting Companies:”

During 2018, as discussed [here](#), the SEC expanded the definition of “smaller reporting company” to include (i) those companies with public float of less than \$250 million as of the last business day of their second fiscal quarter, and (ii) those companies with less than \$100 million of annual revenues and either no public float or public float of less than \$700 million. As a result, additional companies now qualify to provide scaled disclosure in this year’s Form 10-K and proxy statement. If and until the SEC makes corresponding amendments to the definitions of “accelerated and “non-accelerated” filers, smaller reporting companies with public float of \$75 million or more will continue to be accelerated filers that must comply with shorter filing deadlines and provide an auditor’s attestation of management’s assessment of internal control over financial reporting required under Sarbanes-Oxley Act Section 404(b).

And coming up for future 10-Qs and 10-Ks:

Effective for quarters beginning after November 5, 2018 (which means Q1 2019 for calendar companies), amended Rules 8-03(a)(5) and 10-01(a)(7) under Regulation S-X require quarterly (vs annual) analysis of changes in stockholders’ equity and the amount of dividends per share for each class of shares for “the current and comparative year-to-date [interim] periods, with subtotals for each interim period.” These changes were adopted as part of the Disclosure Update and Simplification rulemaking discussed above.

A discussion of critical audit matters, which are related to accounts or disclosures that are material to the financial statements, and involved especially challenging, subjective, or complex auditor judgment, will be included in audit reports for fiscal years ending on or after June 30, 2019 for large accelerated filers and in audit reports for fiscal years ending on or after December 15, 2020 for all other companies to which these requirements apply. The new requirement does not apply to emerging growth companies.

Inline XBRL, which allows filers to embed financial data into the body of an SEC filing, rather than attaching the data as an exhibit, must be implemented as early as fiscal periods ending on or after June 15, 2019 for large accelerated filers; fiscal periods ending on or after June 15, 2020 for accelerated filers and fiscal periods ending on or after June 15, 2021 for all other filers.

And coming up for future proxy statements:

Effective for proxy statements filed during fiscal years beginning on or after July 1, 2019 (July 1, 2020 for smaller reporting companies and emerging growth companies), companies must describe any practices or policies that they have adopted regarding the ability of employees, officers or directors to engage in hedging transactions. Companies may either disclose the full policy, or a “fair and accurate” summary of the policy. Summaries must include the categories of persons and the categories of transactions

specifically permitted or disallowed. Companies that have not adopted hedging policies must disclose that fact or state that hedging transactions are permitted.