

Securities Law Matters to Consider for 2017

January 9, 2017 – Governance & Compliance Insider

by James Guttman

2016 was a busy year for securities law developments, with the SEC adopting and proposing new rules and issuing significant interpretations that will affect SEC reporting companies in the coming years. We have highlighted a few of these recent developments in this post as companies prepare for the upcoming reporting cycle.

With the new incoming U.S. administration it is important to note that some of the rules that were adopted by the SEC in the past few years may be repealed or amended, and some of the rules that are currently being finalized by the SEC may not be adopted or may be further modified or delayed.

New Rules and Interpretations

Proxy Cards – “Clear and Impartial”

On March 22, 2016, the SEC released a proxy card interpretation, which serves as a reminder that proxy cards must “clearly and impartially” identify each item to be voted on by shareholders.

The full text of the SEC’s interpretation can be found here:

<https://www.sec.gov/divisions/corpfin/guidance/exchange-act-rule-14a-4a3-301.htm>

Paper Copies of Annual Reports

On November 3, 2016, the SEC released an interpretation which stated that companies may post an electronic version of its annual report to shareholders on its corporate web site by the dates specified in [Rule 14a-3\(c\)](#), [Rule 14c-3\(b\)](#) and Form 10-K, respectively, in lieu of mailing paper copies or submitting it on EDGAR. The report must remain accessible for at least one year after posting.

See our previous post on this topic here: <http://governancecomplianceinsider.com/sec-staff-makes-life-a-little-easier-for-reporting-companies-by-permitting-annual-reports-to->

Related People

- James Guttman

Related Capabilities

- Corporate Governance & Compliance
- Mergers & Acquisitions
- Government Enforcement & Corporate Investigations

[shareholders-to-be-posted-on-company-websites/](#)

NASDAQ Golden Leash

On July 1, 2016, the SEC approved a change to the NASDAQ Listing Rules that will require NASDAQ listed companies to publicly disclose “golden leash” arrangements. “Golden leash” arrangements are generally defined as agreements or arrangements made by activist shareholders to pay a director or director nominee in connection with his or her service on, or candidacy for, a company’s board of directors, usually in connection with a proxy fight.

The final rules for “Golden Leash Arrangements” are described further in our complete summary here:

<https://www.dorsey.com/newsresources/publications/client-alerts/2016/07/disclosure-of-golden-leash-arrangements>

Form 10-K Summary Disclosure

On June 1, 2016, in accordance with the Fixing America’s Surface Transportation Act (the “FAST Act”), the SEC issued an interim final rule amending Form 10-K by adding a new Item 16 to permit companies to provide certain summary disclosure in the annual report, provided that each item in the summary includes a cross-reference by hyperlink to the related more detailed disclosure in the report to which the item relates. The new summary section is not required and the SEC has provided issuers with flexibility on how best to prepare the summary. The full text of the SEC’s interim final rule can be found at the following link: <https://www.sec.gov/rules/interim/2016/34-77969.pdf>

The FAST Act is further described in our summary here:

<https://www.dorsey.com/newsresources/publications/client-alerts/2015/12/fast-act-company-disclosure-capital-markets-access>

Non-GAAP financial measures

On May 17, 2016, the SEC issued new interpretations regarding the use of non-GAAP financial information by public companies. The new interpretations provide specific guidance for certain types of non-GAAP financial information including providing examples on how to describe GAAP measures with equal or greater prominence and how to avoid making non-GAAP measures misleading.

See our summary here: <https://www.dorsey.com/newsresources/publications/client-alerts/2016/05/tighten-use-of-non-gaap-financial-measures>

Pay Ratio Disclosure

Most public companies will be required to make the pay ratio disclosure following their first full fiscal year beginning on or after January 1, 2017. For a typical, calendar-year reporting company, the first pay ratio disclosure would be made in its proxy statement for

its 2018 annual meeting. The SEC released an interpretation on October 19, 2016 to provide additional guidance on the upcoming disclosure requirements.

For a summary of the interpretations see our discussion here:

<https://www.dorsey.com/newsresources/publications/client-alerts/2016/10/new-cdis-help-issuers>

For a discussion of the final rules see our summary here:

<https://www.dorsey.com/newsresources/publications/client-alerts/2015/08/sec-issues-final-rule-for-pay-ratio-disclosure>

Disclosure of Government Payments by Resource Extraction Issuers

On June 27, 2016, the SEC adopted rules requiring disclosure of government payments by resource extraction issuers. The rules will require resource extraction issuers to disclose payments made to the U.S. federal government or foreign governments, including foreign subnational governments, for the commercial development of oil, natural gas or minerals. Resource extraction issuers are required to comply with the new rules starting with their fiscal year ending no earlier than September 30, 2018. A resource extraction issuer with a December 31 fiscal year end will be required to file its first resource extraction payment report no later than 150 days after December 31, 2018, which is May 30, 2019.

The full text of the final rules are found here: <https://www.sec.gov/rules/final/2016/34-78167.pdf>

Proposed Rules

Mining Disclosure Rules

The SEC proposed new rules relating to disclosure by companies engaged in material mining operations in SEC reports. The proposed rules were subject to a comment period that was extended to September 26, 2016. The SEC is in process of reviewing the comments and we anticipate that new proposed rules or final rules will be released in 2017.

The proposed rules are summarized here:

<https://www.dorsey.com/newsresources/publications/client-alerts/2016/07/new-mining-disclosure-rules>

Clawback Policies

On July 1, 2015, the SEC proposed rules regarding clawback policies and disclosure, requiring the recovery of incentive-based compensation of officers in cases of material non-compliance with accounting reporting requirements. The SEC received comments on the proposed rules and the SEC is in the process of drafting new rules. We anticipate

that new rules will be adopted in 2017.

The proposed rules are summarized here:

<https://www.dorsey.com/newsresources/publications/client-alerts/2015/07/sec-issues-proposed-rules-for-clawback-policies>

Proxy Cards – Universal Ballots

On October 26, 2016, the SEC proposed the mandated use of universal ballots in contested director elections at annual meetings. A universal ballot or proxy card is a single proxy card that includes the names of both management and dissident nominees. The universal ballot would allow shareholders to vote for any combination of director nominees using one proxy card.

The proposed rules are summarized here:

<https://www.dorsey.com/newsresources/publications/client-alerts/2016/10/sec-proposes-universal-ballots>