View on our website.

GIBSON DUNN

Securities Regulation & Corporate Governance Update

December 20, 2024

Considerations for Preparing Your 2024 Form 10-K and 2025 Proxy Statement

An annual update of observations on new developments and highlights of considerations for calendar-year filers preparing their Annual Reports on Form 10-K for 2024 and proxy statements for annual meetings in 2025.

Each year we offer our observations on new developments and highlight select considerations for calendar-year filers as they prepare their Annual Reports on Form 10-K. This year, we are also including a discussion of select proxy statement considerations. This alert touches upon recent rulemaking from the U.S. Securities and Exchange Commission (the "SEC" or "Commission"), emerging trends among reporting companies, recent comment letters issued by the staff of the SEC's Division of Corporation Finance (the "Staff") and developments in the securities litigation and SEC enforcement landscape.

Despite the forthcoming changes in presidential administration and Commission leadership, public companies continue to be subject to rules adopted and guidance issued during Gary Gensler's chairmanship. While we anticipate that changes in Commission leadership will likely result in shifts in the SEC's disclosure review focus and enforcement priorities, we believe public companies are wise to stay the course and react to changes in policy or practice with respect to SEC and investor disclosures only after such changes are implemented.

An index of the topics described in this alert is provided below.

I. New Disclosure Requirements for 2024 Form 10-Ks and 2025 Proxy Statements

The pace of SEC rulemaking regarding public company disclosures slowed in 2024 compared to prior years, particularly the period of breakneck rulemaking that began when Chair Gensler

became the Chair of the Commission in 2021 and continued through the end of 2023. The main disclosure requirements that became effective in 2024 resulted from final rules adopted by the SEC in December 2022.

While the SEC's Regulatory Flexibility Agendas for Spring and Fall 2024 continued to include a bevy of new rulemaking projects, only a few impacting the disclosure obligations of public companies made it to the proposed or final rule stage. When the Trump-appointed Chair, currently expected to be former SEC Commissioner Paul Atkins, takes over at the SEC, several of the rulemaking projects that currently remain under consideration (e.g., board diversity, human capital) are likely to be relegated to the back burner or abandoned altogether.

Set forth below are discussions of the most significant new disclosure requirements that public companies need to consider heading into 2025.

A. New Form 10-K Disclosure Requirements

1. Discuss Insider Trading Policies and Procedures in the Form 10-K (and Proxy Statement)

Pursuant to Item 408(b) of Regulation S-K, companies with a December 31 fiscal year end will be required to disclose whether they have adopted insider trading policies and procedures governing the purchase, sale, and other dispositions of their securities by directors, officers, and employees, or the company itself, that are reasonably designed to promote compliance with insider trading laws, rules, and regulations, and any listing standards applicable to the company. If a company has not adopted such insider trading policies and procedures, it must explain why it has not done so.

Form 10-K vs. Proxy Statement

The information required by Item 408(b) must be included in Part III, Item 10 of Form 10-K[1] every year (either directly or by forward incorporation by reference to the proxy statement) and in the proxy statement for any meeting involving the election of directors.

Because companies are permitted to forward incorporate Form 10-K Part III information by reference to a proxy statement filed within 120 days of the end of the year covered by the Form 10-K, companies may decide to simply include the disclosure in the proxy statement as is commonly done with other Part III information. Companies that decide to go this route should make sure that the insider trading disclosure in the proxy statement is adequately covered by the incorporation by reference language included in Item 10 of Form 10-K. To comply with Exchange Act Rule 12b-23, companies should identify in the Form 10-K the information intended to be incorporated as well as the section of the proxy statement in which that information can be found.

Based on a review of the 95 S&P 500 companies that had filed an insider trading policy as of November 22, 2024, we compiled several observations that are set forth in this alert. For information about the results of an earlier survey based on our review of the insider trading policies filed by S&P 500 companies as of June 30, 2024, see our client alert "Early Insights from

Insider Trading Policies Filed by S&P 500 Companies under the SEC's New Exhibit Requirement" (the "September 2024 Insider Trading Policy Survey").[2]

Out of the above-mentioned 95 companies, 56 have filed both their proxy statement and their Form 10-K.[3] Of these 56 companies, 95% included the disclosure in their proxy statement, with 57% including the disclosure only in the proxy statement (and incorporating by reference in the Form 10-K); 32% including the disclosure in the proxy statement and Form 10-K; and 9% having a deficient Form 10-K because they did not include or incorporate by reference the disclosure. The remaining 5% of the 56 companies had a deficient proxy statement because they included the disclosure only in the Form 10-K.

Content of Item 408(b) Disclosure

Companies seem to take varying approaches to the content of their Item 408(b) disclosure. While some of the companies that included the disclosure in both the Form 10-K and the proxy statement had the same or virtually the same disclosure in both filings, others varied it, with some companies largely tracking the language provided in Item 408(b) in the Form 10-K, referring readers to the policies and procedures filed as exhibits to the Form 10-K, but providing more detailed disclosure in their proxy statement, and other companies including more detailed disclosure in the Form 10-K than the proxy statement. A majority of the companies that included the disclosure only in the proxy statement included more detailed disclosure than the language provided in Item 408(b), in many cases by including the key terms of the policy and weaving into the discussion the hedging policy disclosure required by Item 407(i).

"Policies and procedures governing … the registrant itself"

As mentioned above, Item 408(b) requires a company to disclose whether it has adopted insider trading policies and procedures governing transactions in company securities by the company itself, and, if so, to file the policies and procedures, or, if not, to explain why.

Of the 95 S&P 500 companies that had filed their insider trading policy as of November 22, 2024, a majority (69%) did not address insider trading policies or procedures governing companies' transactions in their own securities.[4] Twenty-six percent of the surveyed companies addressed this requirement by including in their primary insider trading policy a brief sentence or two about the company's policy of complying with applicable laws when trading in its own securities. Four percent of the surveyed companies filed a separate company repurchase policy, either as a separate exhibit (3%) or with the company's primary insider trading policy as a single exhibit (1%).

Comparing these findings to the results of our survey of insider trading policies as of June 30, 2024 shows that more companies are complying with the requirement to file policies applicable to company transactions. In fact, almost half of the companies that filed their insider trading policy exhibits after August 30, 2024 complied with the requirement, as compared with 22% of companies that had filed as of June 30, 2024.

2. File Insider Trading Policies and Procedures with the Form 10-K

Pursuant to the exhibit requirements in Item 601(b)(19) of Regulation S-K and the new insider trading rule in Item 408(b)(2), calendar year-end companies are required to file with their 2024 Form 10-K "[a]ny" "insider trading policies and procedures governing the purchase, sale, and/or other dispositions of the registrant's securities by directors, officers and employees, or the registrant itself, that are reasonably designed to promote compliance with insider trading laws, rules and regulations, and any listing standards applicable to the registrant."

In September 2024, we published our September 2024 Insider Trading Policy Survey. The discussion below covers some of the questions raised by the new exhibit requirement and looks at how some filers handled these issues.

Ancillary Materials to Primary Insider Trading Policy

For many companies, there is not simply one document setting forth every policy applicable to directors, officers and employees that is "reasonably designed to promote compliance with insider trading laws, rules and regulations, and [applicable] listing standards." A company's primary insider trading policy is frequently accompanied by:

- appendices or other ancillary documents setting forth additional details, such as a schedule listing the people subject to additional trading windows or preclearance procedures, additional guidelines applicable to Rule 10b5-1 trading arrangements, or frequently asked questions;
- training materials used to promote compliance with insider trading laws, rules, regulations, and listing standards by directors, officers, and employees; and/or
- specific instructions for how directors, officers, and employees can obtain preclearance or any other approvals referenced in the policy (e.g., who to contact, what systems to use).

Similarly, for the convenience of its users, historically some policies hyperlinked to other information relevant to the policy, such as applicable definitions, examples of what constitutes material non-public information ("MNPI"), and a routinely updated schedule of quarterly trading blackout windows.

When preparing to file Exhibit 19 to Form 10-K, companies will want to consider whether any of these ancillary materials should be filed with the company's primary insider trading policy. In the absence of guidance from the SEC, one reasonable approach would be to file any ancillary materials that impose additional substantive requirements on directors, officers, and employees, but omit ancillary materials that simply repeat or provide examples or interpretations of the requirements set forth in the main policy.

Based on the insider trading policies filed as of November 22, 2024, a significant majority (86%) of the companies filed only a single insider trading policy and no other related policies or documents (even where the insider trading policy referenced other related policies).[5] In the small number of cases where multiple policies were filed, the additional policies were often supplemental guidelines or policies covering topics typically not applicable to all employees at larger companies (e.g., trading windows, preclearance procedures, 10b5-1 plans).

Unwritten Procedures

Item 408(b)(2) seems to presume the policies and procedures are in writing, but nowhere has the SEC addressed what is to be done to comply with the exhibit requirement in Item 601(b)(19) if the policy or, more likely, procedures are not written. In the absence of guidance from the SEC, to the extent companies have policies or procedures that are not written, they will need to decide whether to (1) memorialize their previously unwritten policies or procedures in writing (either through a detailed description or a more high-level summary) so they can be filed or (2) leave the policies or procedures unwritten and forego filing.

Personal Information in Policies

Many insider trading policies have historically included the names and contact information for the individuals responsible for administering the policy. In anticipation of the filing requirement, many companies have removed that information from the policy altogether. We also believe it is reasonable to retain the information in the internal, non-public facing policy but to redact the information from the exhibit filed with the Form 10-K pursuant to Item 601(a)(6), which allows companies to redact information "if disclosure of such information would constitute a clearly unwarranted invasion of personal privacy (e.g., disclosure of bank account numbers, social security numbers, home addresses, and similar information)."

3. iXBRL Tagging for Cybersecurity Disclosures

Beginning with the 2024 Form 10-K, the required cybersecurity disclosures that calendar year-end companies first began including in their 2023 Forms 10-K pursuant to Item 106 of Regulation S-K will need to be tagged in Inline XBRL ("iXBRL"), including by block text tagging narrative disclosures and detail tagging quantitative amounts.[6] The SEC has stated that companies must use the "Cybersecurity Disclosure (CYD)" taxonomy tags within iXBRL to tag these disclosures.[7] Companies need to be aware that significant judgment will be required to apply these tags. Not only will companies be required to determine the provision of Item 106 to which each part of the narrative disclosure is responsive, but companies will also need to determine which flags to mark as "true" or "false."

Importantly, under the CYD taxonomy, there is a flag for "Cybersecurity Risk Materially Affected or Reasonably Likely to Materially Affect Registrant," and it is our understanding that to properly apply the flag, each company must select "true" or "false." As discussed in Section II.A. (Cybersecurity) below, the requirement to describe whether any risks from cybersecurity threats have materially affected or are reasonably likely to materially affect the registrant caused consternation among many companies and resulted in wide variety of responses during the first year of compliance. With the iXBRL requirement going into effect, companies that have addressed Item 106(b)(2) by including slightly vague or ambiguous disclosure in Item 1C or by cross-referencing their risk factors will need to carefully consider how they will handle these new tagging requirements.

B. New Proxy Statement Disclosure Requirements

1. Option Award Grant Timing Disclosures

The SEC adopted new rules requiring companies to disclose their policies and practices related to the timing of granting option awards (including stock appreciation rights) and the relationship between grants and the release of MNPI. Specifically, pursuant to Item 402(x) of Regulation S-K, companies must explain how the board decides when to grant these awards (e.g., whether they follow a set schedule), whether the board or compensation committee considers MNPI when deciding the timing and terms of such awards (and if so, how they consider such MNPI) and whether the company has timed the release of MNPI to influence the value of executive compensation. In addition, a new table is required to be included for option awards granted during the last fiscal year to a named executive officer within four business days before or one business day after the filing of a Form 10-Q or Form 10-K, or the filing or furnishing of a Form 8-K that discloses MNPI. Companies are required to include the narrative policies and practices disclosure regardless of whether the company has actually made grants of option awards close in time to the release of MNPI. Although these rules apply only to options and similar awards, we expect many companies to include, or expand on existing, narrative disclosures regarding their policies and practices related to the timing of full value awards as well (i.e., restricted stock units, restricted stock, and performance stock units).

2. Discuss Insider Trading Policies and Procedures in the Proxy Statement (and Form 10-K)

As a result of the overlapping obligations, this proxy statement requirement is discussed above in the section titled “New Form 10-K Disclosure Requirements.”

Please click below to view the complete update and endnotes on Gibson Dunn's website:

Read More

The following Gibson Dunn lawyers assisted in preparing this update: Aaron Briggs, Gina Hancock, Elizabeth Ising, Michael Kahn, Julia Lapitskaya, Brian Lutz, James Moloney, Mark Schonfeld, Michael Titera, David Woodcock, Lauren Assaf-Holmes, Spencer Bankhead, Clinton Eastman, Lucy Hong, Rob Kelley, David Korvin, Stella Kwak, Risa Nakagawa, Antony Nguyen, Meghan Sherley, Geoff Walter, Mike Ulmer, and Timothy Zimmerman.

Gibson Dunn’s lawyers are available to assist with any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work in the firm’s Securities Regulation and Corporate Governance, Executive

Compensation and Employee Benefits, or Capital Markets practice groups, or any of the following practice leaders and members:

Securities Regulation and Corporate Governance:
Elizabeth Ising – Co-Chair, Washington, D.C. (+1 202.955.8287, eising@gibsondunn.com)
James J. Moloney – Co-Chair, Orange County (+1 949.451.4343, jmoloney@gibsondunn.com)
Lori Zyskowski – Co-Chair, New York (+1 212.351.2309, lzyskowski@gibsondunn.com)
Aaron Briggs – San Francisco (+1 415.393.8297, abriggs@gibsondunn.com)
Thomas J. Kim – Washington, D.C. (+1 202.887.3550, tkim@gibsondunn.com)
Brian J. Lane – Washington, D.C. (+1 202.887.3646, blane@gibsondunn.com)
Julia Lapitskaya – New York (+1 212.351.2354, jlapitskaya@gibsondunn.com)
Ronald O. Mueller – Washington, D.C. (+1 202.955.8671, rmueller@gibsondunn.com)
Michael Scanlon – Washington, D.C.(+1 202.887.3668, mscanlon@gibsondunn.com)
Michael A. Titera – Orange County (+1 949.451.4365, mtitera@gibsondunn.com)

Executive Compensation and Employee Benefits:
Sean C. Feller – Los Angeles (+1 310.551.8746, sfeller@gibsondunn.com)
Krista Hanvey – Dallas (+1 214.698.3425, khanvey@gibsondunn.com)
Kate Napalkova – New York (+1 212.351.4048, enapalkova@gibsondunn.com)
Gina Hancock – Dallas (+1 214.698.3357, ghancock@gibsondunn.com)

Capital Markets:
Andrew L. Fabens – New York (+1 212.351.4034, afabens@gibsondunn.com)
Hillary H. Holmes – Houston (+1 346.718.6602, hholmes@gibsondunn.com)
Stewart L. McDowell – San Francisco (+1 415.393.8322, smcdowell@gibsondunn.com)
Peter W. Wardle – Los Angeles (+1 213.229.7242, pwardle@gibsondunn.com)