

UPDATES AND REMINDERS FOR UPCOMING QUARTERLY FILINGS

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As calendar-year companies prepare for upcoming quarterly reports, here are some updates and reminders:

UPDATES TO RISK FACTORS

Hot Topics. Consider whether any material updates to risk factors are appropriate, taking into account recent economic, social and political developments, such as:

- Cybersecurity risks, as illustrated by our [November 1, 2023 post](#) regarding the SEC's enforcement action against SolarWinds alleging deficiencies in the company's controls and disclosures. Companies should also consider relevant 8-K events, as discussed in our [July 27, 2023 post](#), as well as consistency, or alignment, with 10-K disclosures of risk management and governance.
- Effect of U.S. political developments on the stock market and U.S. economy, including potential changes to Congress or the Administration.
- Potentially wide-ranging risks of artificial intelligence, as discussed in our [May 24, 2023 post](#). The Administration highlighted some of the key risks in its [October 30, 2023 executive order](#) designed to promote "safe, secure and trustworthy" applications.
- Climate change and extreme weather events, including, physical, financial and regulator risks, taking into account regulatory developments in the [European Union](#), [California](#) and [the SEC](#), subject to legal challenges, as noted below.
- Continuing economic uncertainties related to changes in the inflation and interest rate environment. However, in light of current conditions, companies should consider potential effects on companies from declining inflation and flat or potentially declining interest rates as well.

- Continuing effect of the international conflicts, including the Ukraine war, the Israel-Hamas conflict, tensions between China and Taiwan, among others, including any direct or indirect effects on a company's business. As illustrated in the SEC's staff's [sample comment letter regarding the invasion of Ukraine](#), companies should consider, among other things, direct and indirect exposures through their operations, employee base, investments, sanctions or legal or regulatory uncertainties as well as actual or potential disruptions in supply chains, commodity or resource prices. business relationships or assets.
- Developments in China, including its economic slowdown, tariff challenges and changing U.S. relations, including supply chain implications.
- Exposure to commercial real estate, for companies with large portfolios of loans or participations, in light of vacancies, interest rates, inflation and/or declining valuations.

General Reminders. Additional reminders for risk factors:

- Stay mindful of the "buried facts" doctrine, under which disclosure may be found to be false and misleading where its significance is obscured or buried. To avoid potential questions such as those in the recent trial of [Sam Bankman-Fried](#), it can be helpful to list risks in general order of significance and filter out trivial or irrelevant information.
- As previously discussed, presenting risks as "hypothetical" or speculative when, in fact, a material adverse event has actually occurred, such as a material cybersecurity breach, can be misleading.
- If restating risk factors, include a summary (concise, bulleted or numbered, and not more than two pages) where the risk factors section exceeds 15 pages.

SEC WARNINGS ABOUT "AI WASHING"

Two investment advisors recently [settled charges for making false and misleading statements about their purported use of AI](#). In the announcement, the SEC's director of enforcement stated:

"As more and more investors consider using AI tools in making their investment decisions or deciding to invest in companies claiming to harness its transformational power, we are committed to protecting them against those engaged in 'AI washing.' As today's enforcement actions make clear to the investment industry – if you claim to use AI in your investment processes, you need to ensure that your representations are not false or misleading. And public issuers making claims about their AI adoption must also remain vigilant about similar misstatements that may be material to individuals' investing decisions."

Just as with challenges of "greenwashing," companies should carefully review and document AI disclosures and avoid unsubstantiated claims.

According to the SEC staff at a recent conference, many large accelerated filers now reference AI in some way in their 10-Ks, potentially implying competitive risks for companies that are not currently addressing AI in their businesses. Depending on materiality to a particular company, consideration might also be given to adopting AI policies, taking into account the [NIST AI Risk Management Framework](#), and addressing board oversight.

RETURN TO STATUS QUO FOR SHARE REPURCHASE DISCLOSURES

As discussed in our [November 27, 2023 post](#), the Fifth Circuit denied the SEC's request for additional time to substantiate the new stock repurchase disclosure rules and subsequently [vacated the rules](#) the next month. As a result, the share repurchase disclosure requirements reverted to those in effect before the vacated rules. For convenience, the SEC recently posted links to the prior disclosure requirements:

- [Item 703](#) of Regulation S-K
- [Form 10-K](#)
- [Form 10-Q](#)
- [Form 20-F](#)

CONTINUE TO ADDRESS D&O TRADING PLANS

Calendar fiscal year end filers other than smaller reporting companies have been required to provide quarterly disclosure about Rule 10b5-1 trading plans since the second quarter of 2023, as discussed in our [December 15, 2022 post](#). For smaller reporting companies, [CDI 120.26](#) sets forth a delayed schedule, requiring disclosure of plan adoptions, modifications or terminations that occur on or after October 1, 2023 and provide disclosure beginning with the quarter ending December 31, 2023.

LEGAL PROCEEDING DISCLOSURES

As discussed in our [August 7, 2023 post](#), companies should think twice before describing a lawsuit as "without merit."

KEEP TRACK OF RELATED PARTY TRANSACTIONS

Another company recently [settled charges](#) for failing to disclose payments to family members of executives. According to the [SEC order](#), Skechers failed to disclose:

- its employment of two relatives of executive officer/directors.

- a consulting relationship involving a person who shared a household with an executive officer/director.
- two of executive officer/directors owing more than \$120,000 to the company for personal expenses paid for the company but not yet reimbursed by the executives.

As discussed in our [July 7, 2023 post](#), the SEC enforcement division has shown heightened focus on perquisites and related person transactions. Accordingly, companies should remind insiders of the scope of relevant disclosure obligations and take steps to refresh their controls and policies to identify and track those items.

REPORTING ANNUAL MEETING RESULTS

If a company is holding a say-when-on-pay vote this year, Item 5.07(d) of Form 8-K requires disclosure of the decision on how frequently that say-on-pay votes will take place. The disclosure is required no later than 150 days after the shareholder meeting, but in no event later than 60 days before the deadline for 14a-8 proposals. This means the disclosure could be included in an amended 5.07 Form 8-K (if not included in the original 8-K with voting results) or in a subsequent Form 10-Q or 10-K filed before the deadline.

FILING STATUS AND PUBLIC FLOAT DAY

Companies with a calendar year end should prepare to conduct their public float calculation as of June 30, 2024, to determine their filing status for next year.

REMINDERS OF UPCOMING DEADLINES

- **Climate disclosure rules voluntarily stayed.** On April 4, 2024, the SEC announced its decision to [voluntarily stay](#) the recently adopted [climate disclosure rules](#) pending the completion of judicial review of various consolidated Eighth Circuit petitions challenging the validity of those rules.
- **Schedule 13Gs and 13Ds.** September 30, 2024 is the compliance date for the revised Schedule 13G filing deadlines and December 18, 2024 is the compliance date for the structured data requirements for Schedules 13D and 13G, as discussed in our [October 12, 2023 post](#). Companies should remind insiders to the extent applicable to them.
- **Annual insider trading policy disclosures.** Beginning in 2025 for calendar year companies, as discussed in our [December 15, 2022 post](#), Form 10-Ks must address (1) whether or not (and if not, why not) the company has adopted insider trading policies and procedures and (2) if adopted, such trading policies and procedures. Additionally, companies will need to file their insider trading policies and procedures as exhibits to the 10-K.

- **New equity grant policy disclosures.** Beginning in 2025 for calendar year companies, as discussed in our [December 15, 2022 post](#), Form 10-Ks and proxy/ information statements will need to disclose grant policies and practices for options, SARs and similar instruments. Additionally, if, during the last fiscal year, the company has made grants to NEOs within four business days before or one business day after the release of material non-public information – e.g., the filing of a periodic report or the filing or furnishing of a current report on Form 8-K that contains material nonpublic information – the company must disclose specified details about those grants in tabular format, including the percentage change in the market value of the securities underlying the award between those dates.
- The compliance dates vary depending on the company’s fiscal year end and filer status. As discussed by the SEC staff in [CDI 120.26](#), for companies other than smaller reporting companies (“SRCs”):
 - December 31 fiscal year-end – Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended December 31, 2024.
 - June 30 fiscal year-end – Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended June 30, 2024.
- For SRCs, the following dates apply:
 - December 31 fiscal year-end– Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended December 31, 2024.
 - June 30 fiscal year-end – Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended June 30, 2025.
- Similarly, [CDI 120.27](#) explains that the new disclosures for proxy or information statements is required for annual meetings after completion of the first full fiscal year beginning on or after April 1, 2023 (or October 1, 2023 in the case of SRCs).

RELATED PRACTICE AREAS

- Securities & Corporate Governance

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