

DON'T FORGET: MORE REMINDERS FOR YOUR 2023 PROXY/ANNUAL REPORT CHECKLIST

Jan 31, 2023

Based on recent developments, we have additional items to supplement our October 10, 2022 post, which highlighted key considerations for the 2022 proxy and annual report season.

Risk factors

In addition to the “hot topics” discussed in our October 10, 2022 post, consider other risks including:

- *Declaration of end of pandemic.* With the Administration announcing the COVID public health emergency will expire on May 11, 2023, companies should evaluate whether any changes to existing pandemic-related risk factors are needed. While health care providers and patients may experience the most immediate effects, with the loss of free tests, treatments and vaccines, companies should consider whether any collateral consequences could materially affect them.
- *Possible future water allocation quotas in Western states.* As a result of the inability of seven Western States to reach a negotiated resolution on allocation of sharply lower water flows from the Colorado River, companies and residents in those states may face harsh cuts forced to be made by the Interior Department. The timing and outcome of any future DOI actions remain uncertain, although administrative procedures and potential litigation may take some time. Unless drought conditions improve, companies may need to consider the impact of any quotas on their operations, suppliers, customers and other aspects of their businesses, and recognize that individual states may experience disparate water reductions.
- *Developments in China,* including its economic slowdown, pandemic challenges and U.S. relations, including supply chain implications.
- *Effect of U.S. political developments on stock market and U.S. economy,* including potential implications of a Congressional impasse over the U.S. debt limit or possible future U.S. government shutdown over budget disagreements.

- *Volatile market conditions*, including potential recessionary pressures, inflation, interest rate increases and inflation, and their impact on customers and capital markets.

Additional reminders:

- As discussed in our [July 13, 2021 post](#), recent court and, as previously [noted](#), SEC decisions make clear that companies can face liability for presenting risks as “hypothetical” when, in fact, a material adverse event has actually occurred, such as a material cybersecurity breach.
- Include a [summary \(concise, bulleted or numbered, and not more than two pages\)](#) where the risk factors section exceeds 15 pages.
- Move risks that are not specific to the company to a “General Risk Factors” sub-section.

Non-GAAP compliance

As detailed in our [December 16, 2022 post](#), companies should review their SEC reports and investor communications to conform to the SEC’s new guidance on non-GAAP financial measures, particularly some persistent practices the staff views as misleading.

Disclosing termination of executive officers

SEC rules call for specific disclosures upon termination of an executive officer:

- In Form 8-Ks, the date of and fact of termination of covered officers (a principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or named executive officer) as well as the entry into or material amendment of any material compensatory arrangement for a PEO, PFO or NEO such as new material severance arrangements.
- In the case of S-K Item 402 (which applies to Form 10-Ks and proxy statements), among other things, all material elements of compensation of named executive officers as well as material factors regarding agreements that provide for payments to a named executive officer in connection with his or her termination. The instructions to CD&A call for disclosure of “specific decisions that were made or steps that were taken that could affect a fair understanding of the named executive officer’s compensation” including “factors considered in decisions to increase or decrease compensation materially.”

In a recent enforcement case, a company’s proxy statement disclosed that an NEO termination took place without cause, resulting in the accelerated vesting of equity awards. In a divided decision, the settlement order concluded that the company should have disclosed that it exercised discretion in treating the termination as “without cause,” where the facts supported termination “with cause” and the forfeiture of such awards. The order did not expressly call for an explanation of the reasons for the termination, instead focusing on the company’s failure to disclose that it had exercised

discretion to treat the termination as without cause. However, the dissent expressed concern that the order “can be read to suggest that the underlying reasons for why the company decided to terminate a named executive officer ‘without cause’ instead of ‘with cause,’ and vice versa, need to be disclosed under Item 402.”

Although the settlement order creates uncertainty as to precise disclosure requirements, companies can take steps to reduce the risk of falling into a disclosure trap, including:

- Focusing on the “determination” or “election” made by the company or the board of directors, instead of stating without qualification that a termination took place without cause, even if there may be a good faith basis.
- Clarifying, where appropriate, that a termination without cause followed negotiation or a mutual agreement between the company and the former executive, instead of unilateral determination of the trigger event under the employment agreement.
- Considering the materiality to investors of the particular type of termination, including any payment obligation of the company in the case of termination without cause as compared to with cause.
- Avoiding “spin” that might mischaracterize the nature of a termination, such as describing a termination as “retirement” when an executive will not actually receive retirement benefits or other circumstances where there may not be a good faith basis for the treatment of the former executive.
- Avoiding language that might lead to inferences about circumstances or facts that are best left unsaid, due to confidentiality, privilege or other factors. At the same time, if an executive will receive large severance amounts, companies should be prepared to defend the decision in the event of shareholder actions challenging the board’s judgment.

New Delaware annual meeting rules and office exculpation

As discussed in our [December 13, 2022](#) post:

- Companies no longer need to make their stockholder lists available at their annual meeting; however, the list must still be made available during the preceding ten days
- Unless a company’s bylaws state otherwise, if a virtual meeting of stockholders is adjourned, including due to a technical failure, the company is not required to re-notice the meeting if the time, date and place of the adjourned meeting are (1) announced at the meeting, (2) displayed during the time scheduled for the meeting on the virtual platform used for the meeting or (3) set forth in the original notice of meeting.

Additionally, the Delaware statute was recently amended to permit exculpation of certain officers from personal liability for monetary damages for breaches of the fiduciary duty of care for direct claims only (not derivative claims). Companies may want to consider whether to seek stockholder approval of charter amendments to provide for exculpation. However, it may make sense to wait another year to evaluate the experience of proposals submitted this year; with both ISS and Glass Lewis evaluating such proposals on a case-by-case basis, taking into account certain factors, companies will need to provide strong rationales. Further a charter amendment proposal would trigger the obligation to make a preliminary filing with the SEC.

Electronic filing of Form 144s

As discussed in our [October 10, 2022 post](#), Form 144s will soon need to be submitted electronically. The compliance date has been announced, and is April 13, 2023. The SEC has created a webpage compiling [Form 144 - Resources for Filing Electronically](#) that includes detailed instructions and guidance.

- Companies should alert insiders to the new requirement and get started in obtaining the necessary Edgar codes. Additionally, they or the insiders should begin discussions with relevant brokers to work out how responsibilities for 144 filings will be handled in the future.

Get ready for new incentive compensation clawback rules

As discussed in our [December 22, 2022 post](#), companies should take steps to comply with the SEC's new clawback rules. The compliance deadline for companies could be as early as April 28, 2023 or as late as January 27, 2024 depending on when the applicable listing standards become effective.

Get ready for disclosure requirements of new insider trading rules

As discussed in our [December 15, 2022 post](#), companies will need to comply with the new disclosure requirements in Exchange Act periodic reports (Forms 10-Q, 10-K, and 20-F and in any proxy or information statements) regarding Rule 10b5-1 trading arrangements as well as option or option-like equity grants, and issuer insider trading policies and procedures. Key dates include:

- February 27, 2023 – effective date of rule requirements for new 10b5-1 plans
- April 1, 2023 – disclosure and tagging requirements for companies apply beginning with the first filing that covers the first full fiscal period that begins on or after April 1, 2023. Smaller reporting companies are given an additional six months to comply (October 1, 2023).
 - A calendar-year company will need to comply with new S-K Item 408(a) in its second quarter 10-Q and full proxy/10-K disclosure and exhibit filing requirements in its 10-K for FY 2023.
- April 1, 2023 – effective date for new requirements for Section 16 insiders to disclose gifts on Form 4 within two business days and to identify transactions intended to comply with Rule

Other considerations

- As discussed in our [October 27, 2022 post](#), there are two new check boxes on the cover of Forms 10-K, 20-F, and 40-F as to:
 - Whether the financials included in the filing reflect correction of an error to previously issued financials; and
 - Whether any of those error corrections are restatements that required a recovery analysis of incentive-based compensation received by any of the company's executive officers during the relevant recovery period.

In new [CDI 121H.01](#), the staff acknowledges that, while the check boxes do appear in current SEC forms, it does not expect compliance with the new clawback disclosure requirements until companies are required to have a recovery policy under applicable listing standards.

- Reminder to review:
 - Remaining balances of shares registered on Form S-8s to determine whether a new S-8 needs to be filed to avoid inadvertent sales of unregistered shares.
 - Eligibility for using Form S-3 for any outstanding shelf or ongoing registration statements.
 - The company's 10-K filing status, e.g., large accelerated filer, accelerated filer, etc.
- Review proxy disclosure requirements on board leadership structures, including Chair/CEO roles, how the board administers risk oversight and lead independent directors, in light of recent SEC comment letters, avoiding "boilerplate" approaches and providing sufficient color.
- Nasdaq [delayed the compliance date](#) from August 7 to December 31, 2023 for listed companies to have, or explain why they don't have, at least one diverse director (and by later dates, two), in order to simplify implementation of the board diversity rules.
- Confirm all required attestations and procedures are in place for any electronic signatures used for SEC filings.
- The SEC recently posted plans that indicate it anticipates taking final action on some key proposals by this April, including:
 - Climate change disclosure, see our [March 22, 2022 post \(Highlights of the SEC's Proposed "Rules of the Road" for Climate-Related Disclosures\)](#).

- Cybersecurity risk governance, see our [March 9, 2022 post \(SEC proposes new cybersecurity disclosure requirements\)](#).
 - SPACs, see our [April 1, 2022 post \(Is the party over? SEC proposes substantial new requirements for SPACs and de-SPAC transactions\)](#).
 - Beneficial ownership reporting modernization, see our [February 16, 2022 post \(Big changes to 13D-13G reporting proposed by SEC\)](#).
 - Share repurchase disclosure modernization, see our [December 22, 2021 post \(Pulling Back the Curtain - SEC Proposes Expanded Share Repurchase Disclosures\)](#).
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- The SEC also announced plans to publish proposals by this April in areas such as Human Capital Management Disclosure, Regulation D and Form D Improvements, Revisions to the Definition of Securities Held of Record and Cybersecurity.

RELATED CAPABILITIES

- Securities & Corporate Governance

MEET THE TEAM



R. Randall Wang

St. Louis

randy.wang@bclplaw.com

[+1 314 259 2149](tel:+13142592149)

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