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Preparing for the 2020 US Proxy and Annual Reporting Season

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Hedging Disclosure

- Item 407(i) of Regulation S-K requires issuers to disclose
  - Whether employees (including officers) or directors are permitted to purchase financial instruments or otherwise engage in transactions that hedge or offset (or are designed to) any decrease in market value of their equity awards or shares they otherwise hold directly or indirectly.
  - The specific categories of hedging transactions that are permitted and prohibited.
- "Hedging" is explicitly not defined.
  - The SEC considers "hedging" to be a broadly applied principle capturing any and all transactions designed to establish downside price protection.

Hedging Disclosure (cont'd)

- Issuers may either:
  - Describe policies and practices in full; or
  - Provide a fair an accurate summary that includes covered persons and categories of transactions prohibited and permitted.
- Disclosure should explain whether different policies apply to different classes of the Issuer's securities.
- No written policy or practice in place? Disclosure must disclose that fact or state that hedging is generally permitted.
- Issuers are not required to disclose specific hedging transactions that have occurred.

Hedging Disclosure
Timing and Applicability

- New hedging disclosure must be included in any proxy or information statement relating to an election of directors during fiscal years beginning on or after:
  - Accelerated and Non-Accelerated Filers: July 1, 2019 (2020 Proxy Season)
  - Smaller reporting companies and emerging growth companies: July 1, 2020 (2021 Proxy Season)
- Listed closed-end funds and foreign private issuers are not subject to the hedging disclosure rule, although the rule will apply to business development companies.

Pay Ratio Disclosure

- Item 402(u) of Regulation S-K
  - Median annual total compensation of all company employees (except CEO)
  - Annual total compensation of CEO
  - The ratio of these 2 amounts (either numerically in relation to 1, as in 200-to-1, or narratively as a multiplier of the other, as in 200 times)
  - Brief nontechnical overview of the methodology used to identify the median employee and his or her compensation, including:
    - The date used to identify the median employee
    - Any reasonable estimates used in identifying the median employee
    - Any adjustments to compensation amounts used to determine median employee, including analyzing compensation for permanent employees or cost-of-living adjustments

Pay Ratio Disclosure
Lessons from Year 2

- For most companies, disclosure has been limited to that required by the rule, with not a lot of additional explanation
- A number of companies took advantage of the provision that allows the median employee to only have to be identified once every 3 years
  - Permitted unless there has been a change in the employee population or compensation arrangements that would result in a significant change to the pay ratio disclosure
- Some companies presented pay ratio information for both 2018 and 2017
- Companies that included a supplemental pay ratio typically did so to present a lower ratio by excluding a one-off event or the impact of employees in a lower-pay country

Pay Ratio Disclosure
Lessons from Year 2

- Companies often provided additional information if they perceived their pay ratio to be unusually high
- Some companies provided supplemental information about the median employee or employee population, although no companies appeared to provide the level of detail sought by some institutional investors
- Some companies relied on the exemption that allows for the exclusion of non-US employees who make up 5% or less of the total employee population
- It doesn't appear that any company relied on the exemption that allows for exclusion of non-US employees if home country data privacy laws and regulations are such that, despite reasonable efforts to obtain and process the necessary information, the company could not do so without violating those laws or regulations

Developments in CD&A Disclosure

- Item 402 of Regulation S-K requires a company to discuss the material elements of executive compensation, including:
  - The objectives of the compensation programs
  - What the compensation programs are designed to reward
  - Each element of compensation
  - Why the company pays each element of compensation
  - How the amount for each element is determined
- Increasingly being used as an additional means of shareholder engagement rather than just a disclosure document
- Addressing concerns of ISS and large shareholders results in far more information being disclosed than required
- Also used to provide support for company say-on-pay proposals and company compensation plan proposals

Developments in CD&A Disclosure

Additional Disclosure Tools

- A summary or overview of the CD&A and related compensation tables that hits the high points at the beginning of the discussion
- A table of contents for CD&A to allow a reader to more easily navigate longer discussions
- An overview of company results of operations, particularly when tied to compensation decisions
- A discussion of compensation issues discussed in shareholder outreach and how those issues have been addressed or are being addressed
- Rewriting CD&A in an easier-to-read format
  - Use of plain English and avoidance of jargon
  - Use of graphs, charts and other visual means of presentation
  - Discussions of compensation realized versus amounts realizable

Say-on-Pay Proposals

- SEC requires a separate advisory vote on executive compensation at least once every 3 years
  - Most companies vote annually
- SEC requires a separate advisory vote at least once every 6 years to determine whether shareholders want the say-on-pay vote to occur every 1, 2 or 3 years
  - Most companies recommend an annual vote
- CD&A needs to address whether the say-on-pay vote was considered in determining compensation policy and decisions and, if so, how

Say-on-Pay Proposals

Recent Results in Say-on-Pay Votes*

Say-on-pay proposals		
Year	**Average Support**	**Failure Rate**
2019	90.85%	2.40%
2018	90.90%	2.40%
2017	91.40%	1.29%

- Average vote results were 30% lower for companies with an ISS "against" recommendation

*Source: D.F. King, 2019 The Debriefing: Season Review and Fall Engagement Guide

Say-on-Pay Proposals
Disclosure Considerations

- Items to consider, particularly if concerned about vote
  - Provide detailed rationale for how the compensation program ties to and supports shareholder value and strategic goals
  - Explain anomalies in compensation amounts, especially if the impact is only in 1 year
  - Reach out to shareholders, understand their concerns, provide additional information to address concerns, consider future revisions to compensation programs to address concerns and be transparent in disclosure about each of these items
  - Particularly highlight improvements made
  - Discuss any "hot buttons" directly and how they support shareholder value
  - Consider providing additional information concerning historical pay, company performance and shareholder returns
  - Consider need to file additional soliciting material

Potential Rule Changes

- Rulemaking petition regarding disclosures on use of non-GAAP financial measures in CD&A
  - Petition submitted April 29 by the Council of Institutional Investors seeking rule change to require a reconciliation be included
- Compensation clawbacks (Proposed in 2015)
  - Dodd-Frank Section 954
  - No anticipated action date
- Pay-versus-performance disclosure (Proposed in 2015)
  - Dodd-Frank Section 953(a)
  - No anticipated action date

Rule 14a-8 Basics

- Rule 14a-8 contains requirements for shareholder proposals
- The rule provides both procedural and substantive grounds for exclusion of a shareholder proposal from the proxy statement
- Some procedural grounds set time frames for notice and cure periods
  - Check proposals promptly for technical deficiencies and take required steps to preserve grounds for exclusion
- Companies need to inform the SEC, typically through a no-action request, of intention to exclude a proposal
  - Incoming letters posted https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8-incoming.shtml

SEC Rule 14a-8 Proposed Amendments

- On November 5, 2019, the SEC proposed amendments to Rule 14a-8
- Ownership level for submission of proposal would be a sliding scale
  - $2,000 in market value of company securities held continuously for at least 3 years
  - $15,000 in market value of company securities held continuously for at least 2 years
  - $25,000 in market value of company securities held continuously for at least 1 year
- Specified documentation when proposal made using a representative
- Proponent must state availability to meet with company in 10 to 30 days after submission
- One proposal rule would apply on a per person basis (so same person can't submit proposal in own name and one as representative)

SEC Rule 14a-8 Proposed Amendments (cont'd)

- Resubmission range for exclusion of proposal on substantially same subject matter as proposal included in proxy statement during preceding 5 years would increase to
  - less than 5% of votes in favor if submitted once
  - less than 15% of votes in favor if submitted twice
  - less than 25% of votes in favor if submitted three or more times
- Resubmitted proposal could be excluded if less than 50% support and shareholder support declined 10%
- Proposed amendments are subject to a 60-day comment period before the SEC finalizes any rule changes
  - We don't expect Rule 14a-8 changes to be finalized in time for 2020 proxy season

Significant Change in Staff Procedures

- Staff will no longer automatically provide a written response of its views for all no-action requests
  - Staff more likely to issue a written response for broadly applicable guidance about complying with Rule 14a-8
- Staff may respond orally to some of the requests
- Staff may respond that
  - It concurs
  - It disagrees
  - It declines to state a view

Potential Shareholder Proposal Topics

- Independent chair
- Lobbying/political contributions
- Supermajority vote
- Actions by written consent
- Shareholder right to call meeting
- Board diversity
  - NYC Comptroller "Rooney Rule" initiative
  - CEOs as well as new directors
- Employment diversity
- Gender pay gap
- Human rights
- Environmental/climate change/sustainability
- Opioid crisis
- Drug pricing
- Gun safety

Shareholder Proposals Receiving Majority Support in 2019

- Examples of some proposals that received *majority* support in 2019
  - Declassification of board
  - Voting requirements
  - Workplace diversity
  - Political contributions/lobbying
  - Clawbacks
  - Proxy access adoption
  - Opioid risk
  - Human rights
- Significant *minority* support for proposal may have an impact

Staff Legal Bulletin 14I

- SLB 14I issued in November 2017 addressed four topics:
  - Ordinary business exclusion under Rule 14a-8(i)(7)
    - Exception for policy issue that is sufficiently significant
  - Economic relevance exclusion under Rule 14a-8(i)(5)
    - Less than 5% of total assets, net earnings and gross sales
    - Unless otherwise significantly related to company
  - Proposal by proxy documentation
  - Words in graphs and images count for 500-word limit

Staff Legal Bulletin 14J

- SLB 14J issued in October 2018 addressed three topics:
  - Board analyses of economic relevance or ordinary business exclusions
  - Scope and application of micromanagement necessary for ordinary business exclusion
  - Scope and application of ordinary business exclusion for proposals touching upon senior executive/director compensation, based on
    - Focus of the proposal
    - Whether primary aspect of targeted compensation is broadly available and whether officer/director eligibility implicates significant compensation matters
    - Micromanagement

SLB 14J's Six Factors for Board Analyses

- 1 - The extent to which the proposal relates to the company's core business activities
- 2 - Quantitative data, including financial statement impact, related to the matter that illustrate whether or not a matter is significant to the company
- 3 - Whether the company has already addressed the issue in some manner, including the differences between the proposal's specific request and the actions the company has already taken, and an analysis of whether the differences present a significant policy issue for the company

SLB 14J's Six Factors for Board Analyses (cont'd)

- 4 - The extent of shareholder engagement on the issue and the level of shareholder interest expressed through that engagement
- 5 - Whether anyone other than the proponent has requested the type of action or information sought by the proposal
- 6 - Whether the company's shareholders have previously voted on the matter and the board's views as to the related voting results

Impact of Board Analyses on Staff Responses to No-Action Requests

- Staff does **not** automatically grant no-action requests for exclusions of shareholder proposals containing a board analysis
- In 2018 and 2019, Staff both accepted and denied
  - No-action requests containing board analyses
  - No-action requests without board analyses
- Staff considers board analyses helpful, but not determinative
- Board analysis not required
- If submitting a no-action request with a board analysis, address at least some of the six factors identified in SLB 14J

Senior Executive Compensation/Director Proposals under SLB 14J

- SLB 14J specifies that senior executive and/or director compensation proposals can be excluded as ordinary business
  - If a primary aspect of the targeted compensation is broadly available to a general workforce
  - But company must demonstrate that the executives' or directors' eligibility does not implicate significant compensation matters
- Therefore no-action request should do more than argue that compensation is pursuant to the same plan or type as workforce
  - Explain why no significant compensation issue is involved

Staff Legal Bulletin 14K

- SLB 14K issued in October 2019 addressed:
  - Analytical framework of Rule 14a-8(i)(7)
  - Board analyses to demonstrate that the policy issue raised is not significant to the company
  - Scope and application of micromanagement under Rule 14a-8(i)(7)
  - Proof of ownership letters

SLB 14K—Rule 14a-8(i)(7)

- Significant Policy Exception
  - Does proposal deal with a matter relating to *company's* ordinary business operations?
  - Does proposal raise a policy issue that transcends *company's* ordinary business operations?
  - Policy issue may be significant to one company but not significant to another
  - No-action request should explain the significance of the relevant issue to *that company*

SLB 14K—Rule 14a-8(i)(7) (cont'd)

- Board Analysis—Company Previously Addressed Matter
  - Delta analysis
    - Difference between company steps and requested action
  - Delta analysis can be useful where
    - Company has acted to address the issues raised by a proposal but may not have substantially implemented the proposal
    - Company's actions diminished the significance of the policy issue to such an extent that the proposal no longer presents a policy issue that is significant for the company

SLB 14K—Rule 14a-8(i)(7) (cont'd)

- Board Analysis—Prior Vote
  - Discuss prior shareholder votes on matter and the board's view of the related voting results
  - Discussions not persuasive when companies argued
    - Majority of shareholders voted against the prior proposal
    - Voting results mitigated by the impact of proxy advisory firms' recommendations
    - Voting results based on shares outstanding not significant
  - Include robust discussion explaining how the company's subsequent actions or intervening events bear on significance to the company

SLB 14K—Rule 14a-8(i)(7) (cont'd)

- Micromanagement
  - Different results for proposals on same subject based on the level of prescriptiveness in each proposal
    - Even if the proposal is advisory in nature
    - Supporting statement taken into account
  - Staff is not likely to concur with micromanagement if the proposal defers to management's discretion

SLB 14K—Proof of Ownership

- Shareholder must provide proof of continuously held ownership of requisite share amount for at least one year
- In 2011, Staff Legal Bulletin No. 14F provided a suggested format for proof of ownership
  - Staff encourages use of sample language, but no requirement to do so
- Don't submit no-action request based on drafting variances in proof of ownership letter if the language is clear and sufficiently evidences minimum ownership requirements

Voluntary Notices of Exempt Solicitations

- Some proponents file voluntary notices of exempt solicitations urging shareholders to vote
  - For a shareholder proposal, or
  - Against a management proposal
- These notices allow proponents to respond to the company's statement of opposition without any word limitation
- Proxy CD&Is 126.06 and 126.07 permit this practice and specify requirements for cover information
- Notices appear on company's EDGAR page identified as a "PX14A6G" filing type
- Companies don't have to respond, but should review such filings

Proxy Voting Advice Guidance—Solicitation

- SEC issued proxy voting advice guidance on August 21, 2019
  - Commission level guidance
- Rule 14a-1(l) defines solicitation broadly
  - Communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy
- Proxy voting advice provided by a firm marketing its expertise for proxy voting determinations is a solicitation
  - Even if applying client's guidelines
  - Even if advice not followed

Proxy Voting Advice Guidance—Anti-Fraud

- Rule 14a-9 antifraud provisions apply to solicitations, regardless of whether solicitations are exempt information and filing requirements
- Proxy voting advice may not contain materially false or misleading statements or omit material facts necessary to make advice not misleading
- Examples of what must be disclosed
  - Explanation of methodology and material deviations
  - Information about third party sources and differences from company disclosures
  - Material conflicts of interest

SEC Proposed Amendments to Proxy Solicitation Rules for Proxy Voting Advice

- On November 5, 2019, SEC proposed amendments to proxy solicitation rules
- Proposal would specify circumstances when proxy voting advice is a solicitation
- Proposal would establish conditions for proxy advisory firms relying on proxy solicitation exemptions, including
  - Disclosure of material conflicts of interest
  - Mandatory opportunity for companies to review and provide feedback if definitive proxy statement filed at least 25 days before meeting
    - 5 business days if filed more than 45 days in advance; 3 business days if filed between 25-45 days in advance
  - Providing link to company's views on the proxy voting advice in the advisory firm's report

SEC Proposed Amendments to Proxy Solicitation Rules for Proxy Voting Advice (cont'd)

- Amendment to Rule 14a-9 would provide examples of when failure to disclosure information could be misleading
- Unlike the guidance which is already in effect, these proposed amendments are subject to a 60-day comment period before the SEC finalizes any rule changes
- Proposal contemplates 1-year transition period following publication of final amendments

Investment Advisers Proxy Voting Guidance

- SEC issued guidance on proxy voting responsibilities of investment advisers on August 21, 2019
  - Commission level guidance
  - Technically a policy
- Investment advisers are fiduciaries that owe each of their clients duties of care and loyalty for proxy voting services
- Specific obligations depend on the scope of voting authority assumed by the adviser

Investment Advisers Proxy Voting Guidance (cont'd)

- To satisfy its fiduciary duty, investment adviser must make voting determination in the best interest of the client
- If assuming the authority to vote, investment adviser
  - Must have a reasonable understanding of its client's objectives, and
  - Must make voting determinations that are in the best interest of the client
- SEC provided a number of examples of the types of steps investment advisers can take in this area

Proposed Amendments under Investment Advisers Act of 1940 Rules

- On November 4, 2019, the SEC proposed amendments to rules under Investment Advisers Act addressing
  - Investment adviser advertisements
    - Principles-based approach
  - Investment adviser payments to solicitors
    - Involving all forms of compensation
- Proposed amendments are subject to a 60-day comment period before the SEC finalizes any rule changes

Sustainability/Environmental, Social, and Governance (ESG) Disclosures

- Institutional investors and investor groups and various ESG ratings groups are continuing to emphasize the need for more disclosure of ESG policies
- ESG policies might be communicated in the proxy statement, although, depending on the industry, companies may consider producing a separate ESG report or addressing such matters on their websites or on a dedicated site
- ESG disclosure continues to mean different things to different constituencies
  - For some, the focus remains on climate change and how companies in particular industries address their greenhouse gas emissions
  - The SEC had issued guidance on climate change reporting in 2010 (SEC Release 33-9106)

Sustainability/Environmental, Social, and Governance (ESG) Disclosures (cont'd)

- Following the 2010 guidance, a rulemaking petition was filed in 2018 seeking a standardized framework for ESG reporting by public companies
- Another advocacy group, the Energy and Environmental Legal Institute, filed a petition in 2019 requesting that the SEC issue new climate guidance, and subsequently, filed a supplement requesting the SEC take action to prohibit registrants from making misleading statements and claims relating to climate change matters
- Corp Fin Director Hinman commented in March 2019 on the importance of principles-based sustainability disclosure; however, Director Hinman also reiterated the SEC's 2010 climate change guidance and emphasized the need to disclose the board's risk management role in this context
- Legislation has been proposed that would require enhanced disclosure of various ESG metrics by public companies, including climate change related information

Sustainability/Environmental, Social, and Governance (ESG) Disclosures (cont'd)

- Proxy advisory firms have, to some extent, codified their approach to reviewing board oversight of ESG issues. Proxy advisory firms consider whether the company's governance policies and practices address ESG matters, whether a board committee has been tasked with oversight of ESG matters
  - As a result, in connection with proxy season, companies may want to consider addressing ESG oversight in the discussion of board committees
  - Depending on the company's industry, ESG matters may also be addressed in annual reports on Form 10-K
- To the extent ESG reports are developed, these should undergo a review process, including review by a disclosure committee as well as by the board committee tasked with ESG oversight

Human Capital Management Disclosure

- The SEC's Investor Advisory Committee has made certain recommendations to the SEC regarding additional information on human capital
- This followed rulemaking petitions from various investor-focused groups, including the Human Capital Management Coalition, as well as projects undertaken by the Sustainability Accounting Standards Board
- The premise is that SEC disclosures currently focus principally on human capital and human capital management as "expenses" and fail to solicit information regarding how companies evaluate their investment in, and their strategies regarding, human capital management
- The IAC recommended additional disclosure requirements to be incorporated into Regulation S-K, including disclosures regarding: part-time and contingent workers; training of the workforce; diversity data; turnover data; and broader discussions regarding compensation plans and incentives

Human Capital Management Disclosure (cont'd)

- The August 2019 SEC proposed changes to the Business section requirements of Regulation S-K in Item 101 also contemplate a discussion of human capital, including how management addresses recruitment, development and retention of personnel

Business Roundtable Statement and Corporate Purpose

- This year, the dialogue regarding corporate purpose remained a focal point for boards as large institutional investors and investor groups called on boards to focus on long-term objectives, consider "sustainable long-term value" creation, consider company culture, and enhance company commitment to employees and their communities
- In an August 2019 publication, the Business Roundtable published its Statement on the Purpose of a Corporation
  - Signatories commit to deliver value to customers, invest in employees, deal ethically and fairly with suppliers, support their communities, and generate long-term shareholder value
- Does this change the duties of directors? Is it inconsistent with maximizing shareholder value?

Board Diversity

- The pressure on boards to focus on diversity continues
- Institutional investors have announced voting policies that include voting against nominating committees with a lack of diversity, or have indicated their expectations regarding the inclusion of women directors on boards
- Likewise ISS and Glass Lewis have adopted voting policies to recommend against the nominating & governance committee chair in the case of a lack of board gender diversity
- Various bills have been introduced in Congress that would require that the SEC adopt requirements that companies disclose data regarding racial, ethnic and gender diversity on boards of public companies

Board Diversity (cont'd)

- In advance of proxy season, the nominating & governance committee should review board composition as well as the effectiveness of self-assessments or board self-evaluations
- Proxy disclosures should take into account the SEC's expectations regarding the consideration given to self-identified diversity characteristics of directors and director nominees (C&DIs published in February 2019: 116.11 and 133.13)
- To solicit this information, in advance of the annual report and proxy season, it may be appropriate to revise the form D&O questionnaire used in order to request this type of self-identifying information as well as the consent to use the information

Board Diversity – Illinois-Headquartered Companies

- Publicly traded companies that are headquartered in Illinois must disclose certain information in their state filings including:
  - Racial, ethnic, and gender diversity of the directors;
  - Consideration given to demographic diversity in considering and appointing director nominees and executive officers; and
  - Policies and practices for promoting diversity, equity and inclusion among the boards and executive officers
- The disclosures may be required by spring of 2020
- But is such a measure open to challenge?

Board Diversity—California law

- In 2018, California became the first state to require that public companies headquartered in the state include female directors
- A corporation subject to the law must have at least one female director by the end of 2019; by the end of 2021, a corporation with five board members must have at least two female directors, while those with six or more board members must have at least three female directors
- The law has been recently challenged in a "taxpayer suit"

Section 16 Beneficial Ownership Reporting

- The SEC has made certain changes to Item 405 of Regulation S-K:
- Cover page change for Form 10-K: the SEC eliminated the check box on the Form 10-K cover page that required the issuer to indicate whether the 10-K contained any disclosure of delinquent filers or whether to the issuer's knowledge any such disclosure would be contained in the proxy statement
- Caption: the caption for disclosing delinquent Section 16 filings has been renamed and is now titled: "Delinquent Section 16(a) Reports"; the heading/section can be omitted if there are no delinquencies
- Copies of Section 16 filings: reporting companies can now rely on EDGAR filings to determine whether there are delinquent Section 16 filings

Overboarding

- Proxy advisers have announced voting policies against named executive officers and/or non-executive directors who are members of more than a specified number of boards
- For example, for ISS and Glass Lewis, independent directors should not sit on more than five boards, while the CEO should not sit on more than three boards (including his own), and a named executive officer other than a CEO should not sit on more than five boards
- Various institutional investors have adopted policies that are more restrictive than those announced by ISS and Glass Lewis

Overboarding (cont'd)

- In advance of proxy season, it may be prudent to review corporate governance guidelines and consider whether to adopt a specific policy with respect to overboarding, as well as evaluate in connection with the nominating and governance committee assessment of director nominees a nominee's board commitments
- To the extent a company chooses to address overboarding, consideration should be given to whether a director is employed full-time, the director serves as chair of any committees, limiting audit committee service

Critical Audit Matters

- Critical audit matters (CAMs) are intended to provide readers with an understanding of matters that relate to accounts or disclosures that are material to the financial statements and that involve subjective or complex auditor judgment
- CAMs are required by PCAOB standard AS 3101 and are effective for audits of large accelerated filers for fiscal years ending on or after June 30, 2019 and for all other companies for fiscal years ending on or after December 15, 2020
- CAMs requirements are not applicable to emerging growth companies
- The CAMs section of the audit report includes certain introductory language and then, for each CAM, the auditor must: identify the CAM, describe why the matter is considered a CAM, explain how the CAM was addressed, and refer to the financial statement disclosures relating to the CAM

Critical Audit Matters (cont'd)

- A company's critical accounting estimates may overlap with CAMs but are not the same
- Examples of CAMs include: goodwill impairment; intangible asset impairment; certain questions relating to revenue recognition; income taxes; loss contingencies; hard-to-fair value financial instruments
- Generally, it is expected that the auditor would share draft CAMs with the audit committee and the draft would be discussed—what should the audit committee ask? Should management anticipate that the CAMs identification and disclosure may prompt changes to disclosures in the company's MD&A?

Annual Report Disclosure Considerations

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Risk Factors

- **Annual Report Risk Factors**:
  - Requirement has moved from Item 503(c) of Reg S-K to Item 105.
  - Risk factor examples previously enumerated have been eliminated to encourage registrants to focus on their own risk identification process.
  - In August 2019 (with comment period ending Oct. 22nd), SEC proposed:
    - summary risk factor disclosure if the risk factor section exceeds 15 pages;
    - replacing the disclosure standard from the "most significant" factors to the "material" factors; and
    - requiring risk factors to be organized under relevant headings.

Risk Factors

- **Annual Report Trending Risk Factors**:
  - LIBOR
    - Risk factor disclosure may span several reporting periods. Consider disclosing the status of company efforts to date.
    - Consider sharing information used by management and board in assessing transition from LIBOR to alternative reference rate.
  - Brexit
    - Importance of Brexit disclosure has been emphasized by the SEC and Companies should assess whether impact of Brexit has been adequately disclosed.
    - SEC seeking tailored disclosure of Brexit risks, not general statements.

Risk Factors

- **Annual Report Trending Risk Factors**:
  - Cybersecurity
    - In February 2018, the SEC published guidance to assist public companies in preparing disclosures about cybersecurity risks and incidents.
    - Consider disclosing occurrence of prior cybersecurity incidents, probability and magnitude of a future occurrence, aspects of the company's business that might give rise to such risks.
  - Trade Issues
    - Consider whether to update risk factors to reflect developments relating to tariffs or sanctions.
    - If company relies on foreign employees or consultants, consider discussing travel and immigration policies in risk factors to the extent those policies make it more difficult and more expensive to hire the employees needed to conduct and grow the business.

Risk Factors

- **Annual Report Trending Risk Factors**:
  - Suggestions
    - Tailor risks to the issues affecting the company at the time of filing of the annual report.
    - Consider grouping risk factors into appropriately captioned subcategories (such as “Operational Risks,” “Financial Risks” and “Regulatory Risks”).
    - Remove risk factors that generally apply to other companies.
    - Consider ordering risk factors from greatest to least risk exposure.

Amendments to Form 10-K Disclosure Requirements

- **Disclosure Update & Simplification (Effective Nov. 2018)**
  - In August 2018, the SEC amended certain disclosure requirements that it determined to be redundant or duplicative in light of other SEC disclosure requirements or US GAAP.
  - These amendments became effective in November 2018 and companies should have experience with those rule changes.

Amendments to Form 10-K Disclosure Requirements

- **Disclosure Update & Simplification (Effective May 2019)**
  - Additional MD&A Changes (Reg. S-K Item 303(a))
    - Registrant may use any presentation that in its judgment enhances a reader's understanding of its financial condition and no particular mode of presentation is recommended.
    - Need to discuss earliest year in a filing covering 3 years has been eliminated.
    - Requirement to discuss 5-year selected financial data for trend information has been eliminated.
  - Property (Reg. S-K Item 102)
    - Disclosure of principal physical properties need only be provided *to the extent material* to the registrant.

Amendments to Form 10-K Disclosure Requirements

- **Disclosure Update & Simplification (Effective May 2019)**
  - Exhibits (Reg. S-K Item 601)
    - Item 601(b)(4) amended to require filing of additional exhibit to Form 10-K containing description required by Item 202(a) through (d) and (f).
    - Item 601(b)(10) amended to permit omission of confidential information from material contracts filed as exhibits without submitting a confidential treatment request (CTR) to the SEC if such information is both not material and would likely cause competitive harm if disclosed.
    - Item 601(b)(2) amended to allow redaction of immaterial provisions or terms in agreements relating to acquisitions, reorganizations, arrangements, liquidations or successions that would likely cause competitive harm if publicly disclosed.
    - New paragraph (a)(6) allows registrants to omit personally identifiable information from exhibits without submitting a CTR.

Amendments to Form 10-K Disclosure Requirements

- **Disclosure Update & Simplification (Effective May 2019)**
  - Cover page of Form 10-K
    - Must include the trading symbol for each class of the registrant's listed securities.
    - Once a company is required to use XBRL, information on the cover page of Form 10-K, as well as on the cover pages of Forms 10-Q, 8-K, 20-F and 40-F, is required to be tagged in Inline XBRL.
  - Hyperlink to information incorporated by reference

Inline XBRL

- In September 2018, the SEC adopted amendments to its rules to require use of Inline eXtensible Business Reporting Language (XBRL) format for the submission of financial statement information over a phased-in compliance period, although earlier compliance has been permitted.
- Inline XBRL allows filers to embed XBRL data directly into the document filed on EDGAR and makes the interactive data both human-readable and machine-readable as part of the main document.

Inline XBRL

- The Inline XBRL requirements will be phased in for operating companies based on filer status as follows:

Operating Companies	Compliance Date
Large accelerated filers that prepare financial statements in accordance with U.S. GAAP	Fiscal periods ending on or after June 15, 2019 (for calendar year-end filers, the Form 10-Q report for the quarter ending June 30, 2019)
Accelerated filers that prepare financial statements in accordance with U.S. GAAP	Fiscal periods ending on or after June 15, 2020 (for calendar year-end filers, the Form 10-Q report for the quarter ending June 30, 2020)
All other filers (including foreign private issuers)	Fiscal periods ending on or after June 15, 2021 (for calendar year-end filers, the Form 10-Q report for the quarter ended June 30, 2021)

Inline XBRL

- **Website Posting Requirement**: The Inline XBRL rules eliminate the requirement that companies post XBRL information on their websites. This change is already in effect.
- **Cover Page Tagging**
  - Once companies are required to use Inline XBRL, they will also need to tag certain data on the cover pages of Forms 10-K, 10-Q, 8-K, 20-F and 40-F, as applicable. With respect to current reports on Form 8-K, this adds an XBRL tagging requirement for cover page data, even if the Form 8-K does not contain any financial data.

Inline XBRL

- **Impact of Transition to Inline XBRL on Exhibit Index**
  - Instruction 1 to paragraphs (b)(101)(i) and (ii) of Reg. S-K Item 601, relating to interactive data files that are submitted using Inline XBRL, requires that the exhibit index include the word "Inline" within the title description for any XBRL-related exhibit.
  - Exhibit 104 has been added to the exhibit requirements set forth in Item 601 of Regulation S-K for the Cover Page Interactive Data File.
    - **Exception**: If the only exhibit listed in a Form 8-K exhibit index would be the Exhibit 104 Cover Page Interactive Data File, C&DI 101.04 specifies that "the staff will not object if the registrant does not add an exhibit index to the Form 8-K solely for the purpose of identifying the Cover Page Interactive Data File as an exhibit under Item 9.01 of Form 8-K."

Inline XBRL

- **Practical Considerations**
  - Although there is a phase-in period for companies to switch to the Inline XBRL format, amendments to the cover pages of the various SEC forms are already in effect. Therefore, all companies should be revising the cover pages of forms that were revised as part of the XBRL amendments.

    Indicate by check mark whether the registrant has submitted electronically ~~and posted on its corporate Web site, if any,~~ every Interactive Data File required to be submitted ~~and posted~~ pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit ~~and post~~ such files).

  - Companies should determine well in advance of their phase-in date how they will implement Inline XBRL. Companies are permitted to use Inline XBRL in advance of their phase-in date, so consider whether it would be helpful to become an early adopter.

THANK YOU!

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