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Things to Keep in Mind For Your Annual Report on Form 10-K and Proxy Statement

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This update summarizes new disclosure requirements and other things to keep in mind as you prepare your 10-K and 2025 annual meeting proxy statement.

New Disclosure Requirements

Equity Award Grant Practices

Under Reg. S-K Item 402(x), a company must provide:

- *narrative* disclosure regarding its policies and practices with respect to the timing of grants of certain equity awards (stock options, stock appreciation rights and similar awards) as it relates to the release of material non-public information, including how the board determines when to grant awards and whether and how MNPI is taken into account; and
- *tabular* disclosure of each such equity award granted to an NEO during the period beginning four business days before, and ending one business day after, the filing of an 8-K that discloses MNPI or a 10-Q or 10-K (the required disclosure includes the award's grant date, the number of shares subject to the award, the exercise price, the grant date fair value and percentage change in the market price of the underlying shares between one trading day before and one trading day following the disclosure of MNPI).

The disclosure is required in Part III of the 10-K (but can be incorporated therein from the proxy statement) and must be tagged in Inline XBRL.

The final rules were adopted in December 2022 and are available *here*.

Some companies are revisiting their equity award grant practices to determine if disclosure would be triggered by the new rules and, if so, considering timing grants to avoid such disclosure (e.g., scheduling regular grants for a day that is more than one business day after the filing of its 10-Q/10-K and scheduling all new hire grants for a preset date (e.g., on the last business day of each month)).

Insider Trading Policies

Under Reg. S-K Item 408(b), a company must disclose whether it has adopted policies and procedures governing the purchase, sale and/or other dispositions of its securities by directors, officers and employees or the company itself (e.g., share buybacks) that are reasonably designed to promote compliance with insider trading laws and applicable listing standards, and if not, why not. The disclosure is required in Part III of the 10-K (but can be incorporated therein from the proxy statement) and must be tagged in Inline XBRL.

In addition, the company's insider trading policies and procedures must be filed as Exhibit 19 to its 10-K.

The final rules were adopted in December 2022 and are available *here*.

If it has not already, a company should consider amending its insider trading policy to reflect updates and trends related to: (i) Rule 10b5-1 and plans adopted thereunder; (ii) the treatment of gifts; and (iii) the scope of trading restrictions in the securities of other companies in light of the SEC's victory in the *Panuwat* "shadow trading" case.

Somewhat New Disclosure Requirements	
Rule 10b5-1 Trading Plans	Although not new for the upcoming 10-K, Reg. S-K Item 408(b) requires disclosure relating to the adoption, modification or termination of Rule 10b5-1 and non-Rule 10b5-1 trading plans by directors and officers during the applicable quarter (i.e., the fourth quarter for the 10-K).
Clawback Policies	Although not new for the upcoming 10-K, exchange-listed companies were required to adopt clawback policies by December 1, 2023, and the policy was required to be filed as an Exhibit 97 to its 10-K. If your clawback policy has been amended since it was last filed as an exhibit, file the current version with the upcoming 10-K.
Clawback Recoveries	Under Reg. S-K Item 402(w), if, during or after the last completed fiscal year, a company had to prepare an accounting restatement that required a clawback or there was an outstanding balance of erroneously awarded compensation relating to a prior restatement, certain information must be disclosed in its proxy statement. If an accounting restatement was prepared during the prior fiscal year but the company determined that erroneously awarded compensation did not have to be recovered, the company must disclose why this determination was reached under its clawback policy. The disclosure is required in Part III of the 10-K (but can be incorporated therein from the proxy statement) and must be tagged in Inline XBRL.
Checkboxes on 10-K Facing Page	Last year's 10-K for the first time included checkboxes on the facing page requiring the company to indicate (i) whether its financial statements reflected a correction of an error to previously issued financial statements and (ii) whether any error correction resulted in a restatement requiring a clawback analysis of incentive-based compensation received by any of the company's executive officers.
Cybersecurity Risk Management Disclosure in Inline XBRL	Last year's 10-K for the first time required companies to disclose information regarding their cybersecurity risk management. For 10-Ks filed for fiscal years ending on or after December 15, 2024, this disclosure must be tagged in Inline XBRL. Similarly, as of December 18, 2024, cybersecurity incident disclosures under 8-K Item 1.05 must be tagged in Inline XBRL.
Hot Topics	
Artificial Intelligence	According to a February 2024 Bloomberg article, 41% of S&P 500 companies mentioned AI in their 2023 10-Ks, up from 35% in 2022 and 28% in 2021. According to the article, a majority of the disclosures focused on the risks of AI, while others focused on its benefit to the company's business. In an April 2024 speech, Gubrir S. Grewal, the former Director of the SEC's Division of Enforcement, provided guidance on preparing for, and addressing, potential AI-related risks, and reminded companies to avoid engaging in "AI-washing" in violation of federal securities laws (e.g., statements regarding a company's use of AI that are materially false or misleading). Grewal suggested that companies focus on the three general principles of "proactive compliance" – education, engagement, and execution. • Companies should educate themselves about emerging and heightened AI risk areas as they relate to their businesses by reading the SEC's AI-related enforcement actions, reviewing SEC Chair Gary Gensler's speech highlighting multiple ways a firm's AI use may heighten risk or implicate the federal securities laws, and staying abreast of how potential AI-related issues are impacting companies in the real world. • Companies should assess whether their public statements regarding their incorporation of AI into their operations are accurate (as compared to aspirational) and assess whether AI presents a material risk to their operations.

	• Companies should consider whether their policies and procedures and internal controls should be updated due to their use of AI, and if so, that they tailor their policies and procedures to their operations and take steps to put such policies and procedures into practice, noting that putting policies and procedures into practice is where many companies fall short. As to individual liability for a company's disclosure regarding security risks from AI, Grewal stated that the SEC will generally look at (i) what the person actually knew or should have known, (ii) what the person actually did or did not do, and (iii) how that measures up to the SEC's rules.
The State of Disclosure Review	In *The State of Disclosure Review* statement issued in June 2024, Erik Gerding, Director of the SEC's Division of Corporate Finance, highlighted AI as a disclosure priority, noting that an increasing number of companies mention AI in their periodic reports (in risk factors, business descriptions and MD&A). He flagged that disclosure may be warranted about how a company uses AI and the risks related thereto and about the board's role in risk oversight. Gerding noted that the SEC Staff will consider how companies are describing AI-related opportunities and risks, including, to the extent material, whether or not the company: • clearly defines what it means by AI and how AI could improve the company's results of operations, financial condition, and prospects; • provides tailored, rather than boilerplate, disclosures, commensurate with AIs materiality to the company, about material risks and the impact AI is reasonably likely to have on its business and financial results; • focuses on its current or proposed use of AI, rather than generic buzz not relating to its business; and • has a reasonable basis for its claims when discussing AI prospects. Gerding also noted that the SEC Staff will review filings to assess compliance with recently adopted rules regarding: • disclosure of material cybersecurity incidents in 8-K Item 1.05; • disclosure of cybersecurity risk management, strategy, and governance matters in the 10-K; • the filing of clawback policies with the 10-K; • disclosure when a clawback recovery analysis is triggered; • pay versus performance disclosure; • the use of universal proxy cards in contested director elections; and • beneficial ownership reporting under the new, accelerated filing deadlines.
Earnings Calls and MD&A Disclosure	In comment letters issued in connection with 10-K reviews in 2024, the SEC staff asked about why a particular statement a company made on an earnings call was not also disclosed in MD&A (e.g., why a strategy mentioned on an earnings call was not discussed in MD&A, and whether metrics mentioned on an earnings call should be disclosed in MD&A). In light of the above, companies should consider whether their MD&A and other disclosure in periodic reports reflects all material information that will be discussed on their earnings call.

Relevant SEC Enforcement Actions	
Related Party Transactions Disclosure	In March 2024, the *SEC issued an order* instituting cease-and-desist proceedings against a company for violating Exchange Act Sections 13(a) and 14(a) (and related rules) by failing to disclose related person transactions in its proxy statements. According to the order, from 2019 through 2022, the company failed to disclose (i) its employment of two relatives of executives (a sibling-in-law of an executive and a sibling of a different executive), each of whom received more than $120,000 in compensation as non-executive employees, (ii) a consulting relationship with a person who shared a household with one of its executives, and (iii) that two of its executives owed more than $120,000 to the company for personal expenses that were paid by the company and not reimbursed by the executives. This order serves as a reminder to conduct a careful analysis when a potential related party transaction arises and the importance of disclosure controls to track payments, including compensation and reimbursements, between the company and its directors and executive officers and their family members or others with relationships with directors and executive officers.
Pledge Disclosure	In August 2024, the *SEC announced charges* against a company and its controlling stockholder for failing to disclose information relating to the stockholder's pledges of company securities as collateral for personal margin loans worth billions of dollars under agreements with various lenders. The SEC claimed that such disclosure was required in the company's 10-K under Reg. S-K Item 403(b) and in the stockholder's Schedule 13D.
Director Independence Determination	In September 2024, the *SEC announced settled charges* against a former director of a company for causing the company's proxy statements to contain materially misleading statements regarding his status as an independent director. According to the SEC's complaint, the former director concealed his relationship with an executive of the company (which involved frequent vacations together, where the former director often paid for expenses exceeding $100,000, and the sharing of confidential details regarding the company's executive succession process) and he encouraged the executive to conceal the relationship as well. As a result, the company's board was unaware of their personal relationship, and the company's proxy statements incorrectly categorized the former director as an independent director. The Associate Director of the SEC's Division of Enforcement stated: "Shareholders expect independent directors to exercise autonomous judgment in their decision making, free from undisclosed conflicts. By concealing his relationship with a company executive, [the former director] undermined the board's director independence process and compromised the company's disclosures." Although the company's D&O questionnaire itself was not the issue in this instance (the SEC alleged that the director concealed the relationship and knew, or should have known, that the relationship was relevant and significant to the company's independence determination), companies should confirm their D&O questionnaire is appropriately designed to solicit information to help with director independence determinations, including regarding friendships and other relationships among directors and executives that may impact independence. Although not all friendships or other relationships will impact independence, soliciting relevant information through the D&O questionnaire can help the company and its legal counsel in assessing relationships for this purpose.

Inaccurate ESG Statements	In September 2024, the *SEC announced settled charges* against a company for making inaccurate statements regarding the recyclability of its single use beverage pods in violation of Exchange Act Section 13(a) and Rule 13a-1. In its 2019 and 2020 annual reports, the company stated that extensive testing with recycling facilities validated that the pods can be "effectively recycled." However, the company did not disclose that two of the largest recycling companies expressed significant concerns to the company regarding the commercial feasibility of curbside recycling of the pods and indicated that they did not intend to accept them for recycling. The SEC determined that this omission rendered the company's claim that its pods could be "effectively recycled" incomplete and inaccurate, and that the company withheld information necessary for investors to make educated investment decisions. Although this enforcement action involves a unique set of facts, it serves as a reminder that whenever a company speaks on a topic in a positive manner, it should confirm that it has disclosed all material relevant information. According to the former Director of the SEC's Division of Enforcement, investor focus on trending topics (e.g., ESG, AI, etc.) can create incentives for companies to exaggerate perceived positive activities or products and to "downplay or omit disclosures about negative information."
Social Media and Reg. FD	In September 2024, the *SEC announced settled charges* with a company for violating Reg. FD by selectively disclosing MNPI through the CEO's personal social media accounts. On July 27, 2023, following the end of the company's fiscal quarter on June 30, 2023, the company's public relations firm published a post on the CEO's X account stating: "There's massive potential for growth in new markets—but we're still seeing really strong growth in existing states. Our 2018-2019 state vintage grew over 80% on the revenue basis year-over-year in Q1. With those numbers, we expect robust growth even without new states opening." A similar post was made on the CEO's LinkedIn account. The company realized the posts should not have been made and they were deleted within a half hour. The SEC found that (i) the posts were selective disclosures because neither of the social media accounts were an official source of company information and both were followed by some company stockholders, (ii) the posts had MNPI because the information about growth during the quarter was not generally known or available to the public when the posts were made, and (iii) the company did not promptly disclose the same information to the general public as required by Reg. FD (the first disclosure to the general public was when the company released its quarterly earnings on August 3, 2023).
Perks Disclosure	In December 2024, the SEC *announced settled charges* against a company for failing to disclose in its proxy statements over the course of three years nearly $1 million in perks and personal benefits provided to its CEO. According to the SEC, the system the company used for identifying, tracking, and calculating perks incorrectly applied a standard whereby a business purpose would be enough to determine that the item was not a perk or personal benefit requiring disclosure under Reg. S-K Item 402. In the order, the SEC referenced the language from its 2006 adopting rule release requiring disclosure of perks and personal benefits provided to NEOs, noting that an item is not a reportable perk or personal benefit "if it is integrally and directly related to the performance of the executive's duties," and that otherwise, "an item that confers a direct or indirect benefit that has a personal aspect, without regard to whether it may be provided for some business reason or for the convenience of the company must be reported, unless it is generally available on a non-discriminatory basis to all employees." This action serves as a reminder of the importance of appropriate disclosure controls and careful analysis when determining if an item is a perk or personal benefit. The SEC underscored that the concept of a benefit that is integrally and directly related to job performance (i.e., the item is required for the executive to do their job), and therefore not reportable, is a narrow one, and that a determination that an expense is an ordinary or necessary business expense for tax or other purposes, or that an expense is for the benefit or convenience of the company, are not the appropriate tests for determining whether the expense is for a perk or other personal benefit for Item 402 disclosure purposes.

Other Things to Keep in Mind	
Nasdaq's Board Diversity Disclosure Rule	In December 2024, the Fifth Circuit vacated the SEC's order approving Nasdaq's board diversity disclosure rules, and therefore companies are no longer required to provide the disclosure required by those rules. Because of interests in board diversity information by certain investors, proxy advisory firms and other stakeholders, board diversity disclosure has become common practice among companies (including those not listed on Nasdaq). Notwithstanding the Fifth Circuit's ruling, we expect companies will continue to provide some level of board diversity information. Now that the Nasdaq rules are no longer applicable, Nasdaq-listed companies can deviate from the board diversity matrix previously required by the Nasdaq rules and have flexibility in terms of how they define diversity and where and how often they provide the information.
Description of Securities – Exhibit 4 to 10-K	Although not new for the upcoming 10-K, companies should revisit the exhibit filed with their 10-K that provides the information required by Reg. S-K Item 202(a) through (d) and (f) for each registered class of securities to confirm it is accurate. A company may have amended its charter or bylaws in a way that requires the disclosure in this exhibit to be updated.
PEO/PFO Certifications – Exhibit 31 to 10-K	Keep in mind that a newly public company filing its second 10-K will phase out of the transition period that allows for the omission of certain paragraphs in Exhibit 31 to the 10-K. In particular, the certificates will need to cover the PEO/PFO assessment of the company's internal control over financial reporting. Similarly, the disclosure in Item 9A, Part II of the 10-Ks will need to include management's report on ICFR and, if applicable, a statement regarding the outside auditor's attestation report.
Expiring Confidential Treatment Orders	Companies should review their exhibits to determine if any previously granted confidential treatment will expire in 2025, and if so, take steps to maintain the confidential treatment if necessary. There are two options, depending on when the confidential treatment was initially granted: request an extension or transition to the streamlined process created in 2019. The SEC provided *updated guidance in January 2024*.
Broken Links	In *June 2024, the SEC reminded* companies to confirm that the links (including links in exhibits) in their EDGAR filings are working properly before submitting their filings on EDGAR.
Beneficial Ownership Reporting	As mentioned above, statements by the SEC Staff during 2024 suggest that the SEC will continue to closely monitor compliance with Section 13 and 16 beneficial ownership reporting matters, and will use technology to assess compliance with the new, accelerated filing deadlines. In September 2024, the *SEC announced* settled charges against 23 entities and individuals for failures to timely report information about their holdings and transactions as required by Section 16(a) reports and Schedule 13D. Two companies were also charged for contributing to filing failures by their officers and directors and failing to report their insiders' filing delinquencies as required under Reg. S-K Item 405. While individual insiders are ultimately responsible for compliance with beneficial ownership reporting requirements, many companies prepare and file Section 16 reports on behalf of their officers and directors. In its order, the SEC stated that companies who voluntarily accept certain responsibilities and then act negligently in the performance of those tasks may be liable as a cause of Section 16(a) violations by insiders.
Powers of Attorney for Section 16 Reports	Companies should review the most recent powers of attorney filed with the Section 16 reports of their insiders to confirm that the individuals identified as an attorney-in-fact for the insider continues to be appropriate. One or more of the individuals identified as an attorney-in-fact may no longer be with the company, and a new power of attorney or a substitute power of attorney may be useful. It may be helpful to obtain signatures on such documents in connection with the D&O questionnaire process.

Changes Coming to EDGAR	In September 2024, the *SEC adopted rules* intended to improve the security and traceability of EDGAR filings. All parties who file documents with the SEC (e.g., companies and Section 16 officers and directors) need to take steps to enroll in the new EDGAR system, called EDGAR Next. Unlike under the current EDGAR system where any person who has a filer's EDGAR codes can file on behalf of that filer, only specifically authorized people will be able to file on behalf of a filer under EDGAR Next. Once authorized, administrators can manage the filer's account, including adding or removing other administrators and delegating authority to file. Filers will need to establish an account in the EDGAR Next system and designate who can file on their behalf. Existing filers can transition to EDGAR Next when it goes live on March 24, 2025. All filers will need to be enrolled by September 15, 2025 (EDGAR codes under the current EDGAR system will be deactivated on September 15, 2025). A beta platform for filer testing and feedback is open now. In anticipation of EDGAR Next, a company should (i) confirm that its and its Section 16 reporting persons' EDGAR codes are current, which are is needed to enroll in EDGAR Next, (ii) consider developing a process by which it and its Section 16 reporting persons authorize individuals to serve as their account administrators (e.g., via a power of attorney or an informal authorization); (iii) revisit onboarding processes for future Section 16 reporting persons to include designating an account administrator; (iv) determine when to enroll in EDGAR Next (for a company with a December 31 year-end, it may be preferable to enroll after the year-end reporting cycle is over); and (v) coordinate with its filing agent to ensure a smooth transition (the filing agent should be able to explain how they will manage the transition and what they will need to file on behalf of the company and its Section 16 reporting persons). Individuals who file on behalf of a company or its Section 16 reporting persons (e.g., a corporate secretary or members of a company's financial reporting team) are encouraged to obtain account credentials at Login.gov now.
Deadlines for Companies with a December 31 Fiscal Year-End	
10-K	*Large Accelerated Filer:* Monday, March 3, 2025 (60 days after FYE) *Accelerated Filer:* Monday, March 17, 2025 (75 days after FYE) *Non-Accelerated Filer:* Monday, March 31, 2025 (90 days after FYE)
Proxy Statement	*To incorporate by reference into your 10-K:* Wednesday, April 30, 2025 (120 days after FYE) When finalizing your annual meeting timeline, if any matter will be submitted to stockholders for a vote at the annual meeting that requires filing a preliminary proxy statement, take into account the 10 calendar days that must lapse before the definitive proxy statement can be filed, and, ideally, provide additional cushion in case the SEC comments on the preliminary proxy statement.
Form 5	Friday, February 14, 2025
Annual ISO/ESPP Reporting	*Annual information statements to employees who exercised incentive stock options or purchased shares under an employee stock purchase plan*: Friday, January 31, 2025 *Annual information returns (Forms 3921/3922) to IRS:* Friday, February 28, 2025 (or Monday, March 31, 2025, if filed electronically)

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