



Preparing for the 2020 SEC Reporting Season

December 12, 2019

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Preparing for the 2020 SEC Reporting Season

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AGENDA



- **10-K In Brief**
 - FAST Act Amendments
 - Risk Factors and MD&A
 - Critical Audit Matters
 - SEC Comment Letter Trends
- **Proxy Statement In Brief**
 - Hedging Policy Disclosure
 - CEO Pay Ratio in Year Three
 - ISS 2019 Voting Policies
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 - Director Election Trends
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- **Stock Exchange Update**
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 - Shareholder Proposals
 - Principles-Based Disclosure
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10-K in Brief



FAST Act Amendments

Changes relevant to upcoming proxy statements and 10-Ks include:

- **Revised 10-K Cover Page:** Add securities and exchange data, use Inline XBRL tagging and delete Section 16 checkbox. See <https://www.sec.gov/files/form10-k.pdf>.
- **Flexible Periods for the MD&A:** Discuss two vs three years of financial results, if earliest year is included in prior filings and it is not material to the current discussion.
- **Updated Headings:**
 - “Executive Officers of the Registrant” is changed to “Information About Our Executive Officers.”
 - Section on “Delinquent Section 16(a) Reports” may be deleted if there are no late reports.
- **Streamlined Confidential Treatment Process:** Omit confidential information from material contracts without filing a confidential treatment request, so long as the information is (i) not material and (ii) would likely cause competitive harm to the company if publicly disclosed, which is the same standard as previously used.
- **New 10-K Exhibit for Description of Securities:** Description of securities required by Item 202(a)-(d) and (f) is an exhibit to Form 10-K, rather than disclosure in registration statements.
- **Fewer Material Contracts as 10-K Exhibits:** For companies other than new reporters, only material contracts that are to be performed in whole or in part at or after filing need to be filed as exhibits.

See Appendix for a more complete summary of changes.

FAST Act Amendments

Cover pages should be tagged using Inline XBRL:

- Applies to 10-K, 10-Q, 8-K, 20-F and 40-F cover pages
- Adds a new Exhibit 104 (Cover Page Interactive Data File) to capture any cover page information that is not embedded – for example:

104 Cover Page Interactive Data File (formatted in Inline XBRL and contained in Exhibit 101)

The SEC updated C&DI guidance on interactive data exhibits in August:

- Include the word “Inline” in description of Exhibits 101 and 104
- Cover page exhibit should cross-reference to the Interactive Data Files submitted under Exhibit 101
- Do not need to add an exhibit index to Form 8-K solely for the purpose of identifying an Exhibit 104, but include Exhibit 104 if there are other exhibits



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Inline XBRL Compliance Deadlines

Operating Companies (includes SRCs, EGCs and FPIs)	Compliance Date (temporary hardship exemptions available)
Large accelerated filers that prepare their financial statements in accordance with U.S. GAAP	Fiscal periods ending on or after June 15, 2019
Accelerated filers that prepare their financial statements in accordance with U.S. GAAP	Fiscal periods ending on or after June 15, 2020
All other filers (including foreign private issuers that prepare their financial statements in accordance with IFRS)	Fiscal periods ending on or after June 15, 2021



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Risk Factors and MD&A

Trending Issues Across Industries:

- Trade Policy: China Trade War and Brexit
- Data Privacy: Compliance with European Union's General Data Protection Regulation and the California Consumer Privacy Act
- Environmental/Regulatory: Costs of Regulatory Compliance and the Impact of Natural Disasters such as Wildfires
- Government Policy: Immigration
- LIBOR Transition

Drafting Tips:

- Use descriptive captions for the risk and its impact.
- Review peer risk factors, but tailor the risks to the company.
- Consider probability and severity of risk.
- Limit discussion to risk (vs mitigation).
- Organize risks (industry/company/investment) and list from most to least significant.
- An abstract discussion may not be enough if a specific risk has materialized (cybersecurity).
- Disclose risk when in doubt (subject to "cautionary language" safe harbor), but be prepared for questions.



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Critical Audit Matters

PCAOB adopted enhancements to the auditor's report:

- Communications of **critical audit matters (CAMs)** will take effect for audits for fiscal years ending on or after **June 30, 2019** for large accelerated filers and for audits for fiscal years ending on or after **December 15, 2020** for all other companies to which the requirements apply.
- The PCAOB expects that most audits (to which the CAM requirements apply) will identify at least one CAM.
- While the requirements only apply to the current audit period, the auditor may identify a CAM in a prior period if appropriate.
- Management should consider whether the existence of a CAM should result in additional disclosure in other areas of the 10-K, such as the MD&A.



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Critical Audit Matters

CAMs are any matters arising from the audit of the financial statements communicated, or required to be communicated, to the audit committee and that:

- Relate to accounts or disclosures that are material to the financial statements, and
- Involve especially challenging, subjective, or complex auditor judgment.

Audit Committees of large accelerated filers may have already conducted “dry runs” with their external auditor regarding potential CAMs and how they should be drafted.

Audit Committees of other categories of filers should discuss with their external auditor the benefit and timing of conducting such “dry runs.”

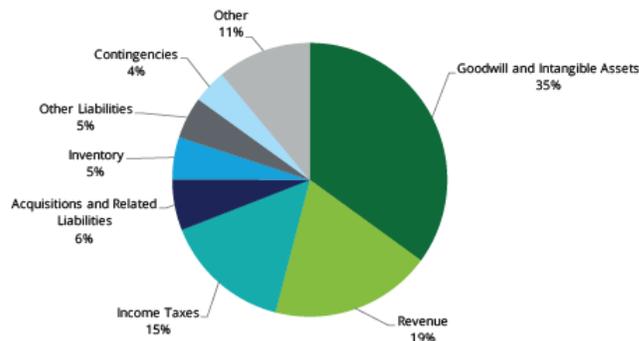


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Critical Audit Matters

CAMs by Account/Disclosure
All Large Accelerated Filers With Fiscal Years Ending June 30, 2019



Information is based on CAMs included in the auditors' reports of 52 large accelerated filers with fiscal years ending June 30, 2019, filed as of August 29, 2019.

Critical Audit Matters Make Their Debut!, Deloitte



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Critical Audit Matters

The auditor's report will be required to:

- Identify the CAM;
- Describe the principal considerations that led the auditor to determine the matter is a CAM;
- Describe how it was addressed in the audit; and
- Make reference to the relevant financial statement accounts and disclosures.

If the auditor determines there are no CAMs, the auditor must make that statement in the auditor's report.



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SEC Comment Letter Trends

- The Sarbanes-Oxley Act requires the SEC to review each registrant at least once every three years, though registrants may be reviewed more frequently, but not receive letters.
- In fiscal 2018, the SEC staff reviewed 57% of registrants, though it typically targets one-third of registrants.

SEC Fiscal 2018 Annual Performance Report

- SEC comment letters on periodic reports continued to decline, from 5,352 in 2013 to 1,378 in 2019 – with a 30% decline last year.
- 10-K comments to non-accelerated filers dropped from 28% (2015) to 14% (2019).
- 10-K comments to large accelerated filers increased from 55% (2015) to 65% (2019)
- Next year, the SEC staff is expected to focus on accounting under new accounting standards (leases and credit impairment), disclosures about Brexit and LIBOR phase out.

*SEC Reporting Update - Highlights of Trends in 2019
SEC Comment Letters (June 2018-June 2019), EY*



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SEC Comment Letter Trends

The following chart summarizes the top 10 most frequent comment areas in the current and previous years.

Comment area	Ranking 12 months ended 30 June		Comments as % of total registrants that received comment letters*
	2019	2018	
Revenue recognition	1	5	23%
Non-GAAP financial measures	2	2	35%
MD&A**	3	1	33%
Fair value measurements***	4	3	14%
Intangible assets and goodwill	5	6	10%
Income taxes	6	8	10%
State sponsors of terrorism	7	7	11%
Segment reporting	8	4	11%
Acquisitions and business combinations	9	9	7%
Signatures/exhibits/agreements	10	****	5%

- * These rankings are based on topics assigned by research firm Audit Analytics for SEC comment letters issued to registrants about Forms 10-K from 1 July 2017 through 30 June 2019. In some cases, individual SEC staff comments are assigned to multiple topics if the same comment covers multiple accounting or disclosure areas.
- ** This category includes comments on MD&A topics, in order of frequency: (1) results of operations (20%), (2) critical accounting policies and estimates (10%), (3) liquidity matters (8%), (4) business overview (6%) and (5) contractual obligations (2%). Many companies received MD&A comments in more than one category.
- *** This category includes SEC staff comments on fair value measurements under ASC 820 as well as fair value estimates, such as those related to revenue recognition, stock compensation and goodwill impairment analyses.
- **** This topic was not among the top 10 in 2018.

SEC Reporting Update - Highlights of Trends in 2019
SEC Comment Letters (June 2018-June 2019), EY



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Proxy Statement in Brief



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Hedging Policy Disclosure

Companies Subject to Hedging Policy Disclosure:

- All companies with securities registered under Exchange Act, Section 12
- Smaller reporting companies and emerging growth companies
- Does not apply to foreign private issuers or listed closed-end investment companies

Compliance Deadlines:

- Hedging policy disclosure is required in proxy and information statements which include a proposal for the election of directors during fiscal years beginning on or after July 1, 2019.
- Smaller reporting companies and emerging growth companies, the new disclosure requirements applicable for fiscal years beginning on or after July 1, 2020.



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Hedging Policy Disclosure

- **Disclosure Obligations:**
 - Companies are required either to (i) provide a fair and accurate summary of any practices or policies that apply, including the categories of persons covered and any categories of hedging transactions that are specifically permitted or disallowed or (ii) disclose their practices or policies in full.
 - If a company does not have any practices or policies regarding hedging, it must disclose that fact or state that hedging transactions are generally permitted.
- **Covered Transactions:**
 - The SEC does not define the term “hedge,” but instead indicates that the term should be applied as a broad principle. Companies will have to evaluate their practices and policies in the context of the activities, if any, that are intended to be covered by such practices and policies.

Item 401(h) of Regulation S-K



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CEO Pay Ratio in Year Three

- **Identify a median employee once every three years, unless there are significant changes to:**
 - The employee population or employee compensation arrangements that the company reasonably believes would result in a significant change in its pay ratio disclosure; or
 - The original median employee's circumstances so that the company reasonably believes its pay ratio disclosure would significantly change (and then sub in another employee whose compensation is substantially similar).
- **If the same median employee is used, briefly disclose the basis for the reasonable belief that no change occurred that would significantly impact the pay ratio disclosure.**



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CEO Pay Ratio in Year Three

- **Some considerations before using the same median employee from year two:**
 - For the median employee:
 - Has the employee changed roles, eg, because of a promotion?
 - Has the employee's compensation materially changed, eg, because of a change from hourly to salaried status or because of eligibility for a different bonus structure?
 - For the employee base as a whole:
 - Have there been any acquisitions or layoffs that must be accounted for in the employee base?
 - Have any compensation structures of different divisions or functions been modified?



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ISS 2020 Voting Policies

ISS released its 2020 Proxy Voting Guidelines for meetings on or after February 1, 2020:

- **Clarified ISS position on “new nominees” in uncontested elections**
- **ISS may recommend against directors for:**
 - **Absence of Board Gender Diversity (previously announced policy, now effective):**
 - Recommend “against” or a “withhold” vote for the chair of a company’s nominating committee if there are no women on the company’s board, absent a firm commitment in 2020 to achieve gender diversity within a year
 - **Poor Board Meeting Attendance (clarification of policy):**
 - Except with respect to nominees that only served during part of the fiscal year
 - **Newly Public Companies with Problematic Governance Structures (clarification of policy):**
 - Supermajority vote requirements to amend the bylaws or charter
 - A classified board structure
 - Other egregious provisions
 - **Newly Public Companies with Problematic Capital Structure (clarification of policy):** Multi-class capital structure with unequal voting rights that do not have a reasonable time-based sunset
 - **Undue Restrictions on Shareholders’ Ability to Amend Bylaws (clarification of policy)**



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ISS 2020 Voting Policies

- **Independent Board Chair (codification of existing policy):**
 - Codifies existing factors that will be given substantial weight in whether ISS supports a proposal for an independent board chair
- **Share Repurchase Programs (codification of existing policy):**
 - Recommend a vote “for” management proposals to institute open-market share repurchase plans in which all shareholders may participate on equal terms, or to grant the board authority to conduct open-market repurchases, in the absence of company-specific concerns
 - Vote case-by-case on proposals to repurchase shares directly from specified shareholders, balancing the stated rationale against the possibility for the repurchase authority to be misused, such as to repurchase shares from insiders at a premium to market price
- **Equity-Based and Other Incentive Plans – Evergreen Provisions (update to policy):**
 - Recommend a vote “against” equity based and other incentive plans with “evergreen” provisions
- **Diversity Gender Pay Gap (update to policy):**
 - Include race or ethnicity pay gaps in voting policy



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Glass Lewis 2020 Voting Policies

Glass Lewis released its 2020 proxy voting policy guidelines effective January 1, 2020:

- **Audit Committee:**
 - Recommend against the audit committee chair when fees paid to external auditor are not disclosed
- **Compensation Committee:**
 - Recommend against all members of the compensation committee chair when the board adopts a say-on-pay frequency other than the one approved by a plurality of the shareholders
- **Contractual Payments and Arrangements:**
 - Disfavor agreements (including the extension or renewal of such agreements) excessively in favor of the executive, including excessive severance payments, new or renewed single-trigger change-in-control arrangements, excise tax gross ups and multi-year guaranteed awards



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Glass Lewis 2020 Voting Policies

- **Nominating and Governance Committee:**
 - Recommend against the governance committee chair when:
 - Directors' records for board and committee meeting attendance are not disclosed; or
 - Disclosure of attendance of less than 75% of board and committee meetings for a director, but vague disclosure makes it impossible to determine which director had poor attendance.
 - Recommend against the members of the governance committee when:
 - A company excludes a shareholder proposal after the SEC declines to state a view on the no-action request; or
 - A company excludes a shareholder proposal and provides no disclosure of the SEC's oral response to the no-action request.



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Glass Lewis 2020 Voting Policies

- **Supermajority Vote Requirements:**
 - Generally recommend against shareholder proposals submitted at controlled companies that seek to eliminate supermajority voting provisions
- **Gender Pay Equity:**
 - Review on a case-by-case basis proposals relating to disclosure of median gender pay ratios (as opposed to proposals asking that such information be adjusted based on factors such as job title, tenure, and geography)
 - Generally recommend against proposals where companies have disclosed sufficient information concerning their diversity initiatives as well as information concerning how they are ensuring that women and men are paid equally for equal work



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Glass Lewis 2020 Voting Policies

- **Company Responsiveness:**
 - Recommend against compensation committee members in the event of a significant negative vote on a say-on-pay proposal (20% or greater), unless the board demonstrates engagement and responsiveness to the shareholder concerns including engaging with large shareholders to identify their concerns, and, where reasonable, implementing changes that directly address those concerns within the company's compensation program
- **Etiquette Issues:**
 - Last year, Glass Lewis piloted the Report Feedback Statement, which permits issuers and shareholder proposal proponents to submit feedback about the Glass Lewis analysis which is distributed to Glass Lewis investor clients.
 - Glass Lewis published an etiquette guide regarding these statements:
 - Must comply with Regulation FD and be based on publicly available information
 - Good faith effort to ensure all statements are accurate
 - Exercise the “appropriate level of decorum and civility”



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Glass Lewis 2020 Voting Policies

- **Additional Clarifications:**

- Board adoption of an exclusive forum provision without shareholder approval typically triggers a recommendation against the governance committee chair, but now Glass Lewis clarifies that exceptions may be made where the provisions of a forum selection clause are narrowly crafted to suit the unique circumstances facing the company.
- Glass Lewis will report on post-fiscal year end compensation decisions particularly where the changes touch upon issues that are material to its recommendations.
- Where a company has applied upward discretion to increase short-term incentive payments, including lowering goals mid-year or increasing calculated payouts, Glass Lewis expects a robust discussion of why the decision was necessary.
- Glass Lewis enhanced its discussion of excessively broad definitions of “change in control” in employment agreements.



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Director Election Trends

The percentage of directors receiving higher levels of votes against their candidacy was small but continued to rise in 2019.

DIRECTORS RECEIVING < 50% SUPPORT

Chart omitted

ICR, Inc./ISS data through September 2019



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Director Election Trends

In addition to say-on-pay and board diversity, investors are adopting over-boarding policies which now cover NEOs and can be more restrictive than those of proxy advisory firms

Chart omitted

Morrow Sodali's 2019 Proxy Season Review



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No Action Letter Process

- In September, the Division of Corporation Finance announced that the Staff may respond orally instead of in writing to some shareholder proposal no-action requests, beginning with the 2019-2020 proxy season.
- Furthermore, the Staff may now more frequently decline to state a view on the no-action request, whereas in the past, it had typically concurred or disagreed with a company's asserted basis for exclusion.
- The Staff still intends to issue a response letter where it believes doing so would provide value, such as more broadly applicable guidance about complying with Rule 14a-8.



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No Action Letter Process

- In November, the Division of Corporation Finance officially began its new shareholder proposal response procedure.

Company that submitted the reasons for excluding the proposal.	Shareholder that submitted the proposal to the company.	Date of company's initial submission.	Regulatory bases asserted by company to exclude the proposal.	Staff's response to the company's request.	Date of staff's response.	Did the staff respond by letter?
Oshkosh Corporation	John Chevedden	9/27/2019	Rule 14a-8(i)(2) Rule 14a-8(i)(6)	Concur that Rule 14a-8(i)(2) provides a basis to exclude	11/21/2019	Yes
QUALCOMM Inc.	J. Michael Schaefer	10/1/2019	Rule 14a-8(b)/(f)	Concur that Rule 14a-8(b)/(f) provides a basis to exclude	11/21/2019	No

- The chart has links to all correspondence related to the no-action request.
- If the staff concurs that the proposal may be excluded, the staff will cite the bases for its decision and will not address the other bases cited by the company.
- If the staff denies a company's request for exclusion, where multiple bases are asserted, the staff will not concur with any of them.



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No Action Letter Process

In October, the SEC Division of Corporation Finance issued Staff Legal Bulletin No. 14K (SLB 14K) on the ordinary business basis for exclusion.

The staff reminds us of the analytical framework of Rule 14a-8(i)(7). The policy underlying the "ordinary business" exception rests on two central considerations.

The proposal's subject matter

- Is it so fundamental to management's ability to run a company on a day-to-day basis that it could not, as a practical matter, be subject to direct shareholder oversight?
- However, proposals relating to day-to-day matters but focusing on a significant policy issue are not excludable.
- When a proposal raises a policy issue that appears to be significant, a company's no-action request should focus on the significance of the issue to that company.

The degree to which the proposal "micromanages" the company



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No Action Letter Process

SLB 14K: When is a board analysis useful?

- When it's not clear whether the issue is significant to the company.
- SLB 14K provides guidance on two substantive factors (among several examples listed in SLB 14J) that boards have addressed on significance:
 - Delta between shareholder proposal and prior company action: Clearly identify the differences between the manner in which the company has addressed an issue and the manner in which a proposal seeks to address the issue and explain in detail why those differences do not represent a significant policy issue to the company.
 - Prior votes: Describe how the company's view on significance is informed by shareholder engagements as well as any actions the company may have taken to address concerns expressed in the proposal.



No Action Letter Process

SLB 14K: What is the proposal asking for, and is that micromanagement?

YES

- The proposal seeks intricate detail or imposes a specific strategy, method, action, outcome or timeline for addressing an issue, thereby supplanting the judgment of management and the board.
- Analyze how the proposal may unduly limit the ability of management and the board to manage complex matters with a level of flexibility necessary to fulfill their fiduciary duties to shareholders.

NO

- A proposal framed as a request that the company consider, discuss the feasibility of, or evaluate the potential for a particular issue generally would not be viewed as micromanaging matters of a complex nature.
- Complexity of the proposal and a significant investment in time does not necessarily equate to micromanagement.



No Action Letter Process

SLB 14K: On proof of ownership letters, don't be too technical.

Companies should not seek to exclude a shareholder proposal based on drafting variances in the proof of ownership letter if the language used in such letter is clear and sufficiently evidences the requisite minimum ownership requirements.



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NY CLE Code



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Stock Exchange Update



Nasdaq Update

Nasdaq's initial listing criteria was revised to address liquidity concerns.

Nasdaq revised its rules to exclude securities subject to resale restrictions for any reason from:

- The calculation of publicly held shares,
- Market value of publicly held shares, and
- Round lot shareholders.

The purpose behind these changes was Nasdaq's concerns that illiquid securities could lead to market prices that do not accurately reflect market value.

Nasdaq Update

- A Nasdaq rule proposed in November would require listed companies to provide the exchange with the number of non-affiliate shares that are subject to trading restrictions, if Nasdaq observes unusual trading activity that implies limited liquidity.
- Nasdaq could also halt trading in connection with the request and could require companies with inadequate “unrestricted public float” to adopt a plan to increase the number of unrestricted shares.
- This proposal extends an initial listing concept to continued listing rules.



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NYSE Update

NYSE Proposed Rules to Expand Direct Listings:

- Relaxed market value test for direct listing eligibility:
 - The company sells at least \$250 million in market value of shares in the opening auction on the first day of trading; or
 - The aggregate market value of shares sold by the company in the opening auction, plus the market value of publicly held shares demonstrated by the company immediately prior to the time of initial listing, is at least \$350 million.
- Delays 400 round lot holder requirement for 90 days

SEC rejects proposal, but expect additional proposals!



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Looking Ahead



Proxy Advisory Firms

Background:

- Ahead of the 2019 proxy season, the SEC staff withdrew two no action letters that provided comfort to investment advisers in relying on proxy advisory firm recommendations:
 - In *Egan-Jones Proxy Services (May 27, 2004)*, the staff had confirmed that by voting based on the recommendations of an independent proxy advisory firm, an investment adviser could “cleanse” its vote, demonstrate the absence of a conflict of interest, and the fulfillment of fiduciary duties.
 - In *Institutional Shareholder Services, Inc. (September 15, 2004)*, the staff had confirmed that investment advisers should evaluate the independence of proxy advisory firms based on the facts and circumstances.

Proxy Advisory Firms

Background:

- In two related releases issued on August 21, 2019, the SEC:
 - Provided guidance to investment advisors about the steps they should take in order to fulfill their fiduciary duties when they utilize proxy advisory firms (Release Nos. 1A-5325; IC-33605) and
 - Made it clear that voting recommendations provided by proxy advisory firms are “solicitations” subject to the federal proxy rules, including the antifraud provisions (Release No. 34-86721).
- Response to concern that proxy advisory firms exercise substantial influence over shareholder votes, even though unregulated, may have conflicting interests and may sometimes issue recommendations that contain factual or analytical inaccuracies



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Proxy Advisory Firms

Proposed Rules:

- Proxy voting advisors typically rely upon the exemptions from the filing and information requirements of the proxy rules.
- On November 6, 2019, the SEC proposed amendments requiring compliance with additional disclosure and procedural requirements in order to rely on those exemptions.
- **Conflicts of Interest:**
 - Requires proxy voting advisors to include disclosure in voting advice regarding:
 - material interests in the matter or parties concerning which it is providing the advice
 - any material transaction or relationship between the proxy voting advice business and the registrant or a shareholder proponent in connection with the matter covered by the proxy voting advice
 - any other information that is material to assessing the objectivity of the proxy voting advice
 - any policies and procedures used to identify, as well as the steps taken to address, any such conflicts of interest arising



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Proxy Advisory Firms

- **Review of Proxy Voting Advice by Registrants and Other Soliciting Persons:**
 - Requires one standardized opportunity for review and feedback by registrants of proxy voting advice before its dissemination:
 - Proxy statement filed more than 45 days prior to the meeting date – 5 business days
 - Proxy statement filed between 25 and 45 days prior to the meeting date – 3 business days
 - Proxy statement filed less than 25 days prior to the meeting date – no right to review
- **Final Notice of Advice:**
 - Requires proxy advisory firms to provide registrants and certain other soliciting persons with a final notice of voting advice, including a copy of the proxy voting advice that will be disseminated to the advisor's clients
 - Must provide at least 2 business days advance notice prior to dissemination



Proxy Advisory Firms

- **Company Feedback:**
 - Proxy voting advice business must, upon request, include in its proxy voting advice and in any electronic medium used to deliver the advice, a hyperlink that leads to the registrant's statement about the proxy advisor's voting advice.
- **Amendment to Rule 14a-9:**
 - Rule 14a-9 prohibits any proxy solicitation from containing false or misleading statements with respect to any material fact at the time and in the light of the circumstances under which the statements are made.
 - This rule is proposed to be amended to include the failure to disclose information such as (i) the proxy voting advice business's methodology, (ii) sources of information, (iii) conflicts of interest and (iv) the use of standards or requirements that materially differ from relevant standards or requirements that the Commission sets or approves.



Shareholder Proposals

Background:

- On November 6, 2019, the SEC proposed amendments to modernize proxy solicitation and shareholder proxy access. The proposed rule would amend shareholder submission requirements under Rule 14a-8 by:
 - Updating the eligibility criteria that a shareholder must satisfy to have a shareholder proposal include in a company's proxy statement;
 - Providing that a single person may not submit multiple proposals at the same shareholders' meeting, whether as a shareholder or as a representative of a shareholder; and
 - Increasing the levels of required shareholder support a proposal must receive to be eligible for resubmission at the same company's future meetings.



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Shareholder Proposals

Shareholder Eligibility Requirements:

- Under the proposed amendments, a shareholder would be eligible to submit a Rule 14a-8 proposal for inclusion in a company's proxy materials if the shareholder satisfies one of the following three ownership requirements:
 - \$2,000 of the company's securities entitled to vote on the proposal for at least three years;
 - \$15,000 of the company's securities entitled to vote on the proposal for at least two years; or
 - \$25,000 of the company's securities entitled to vote on the proposal for at least one year.



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Shareholder Proposals

Proposal Limits:

- While currently Rule 14a-8(c) provides for a limitation of one proposal to each shareholder, the SEC has noted that some proponents “may attempt to evade the new limitations through various maneuvers, such as having other persons whose securities they control submit...proposals each in their own names.”
- In order to address potential evasions of this limit, the proposed rule would apply the one-proposal rule to “each person” rather than “each shareholder” who submits a proposal.



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Shareholder Proposals

Resubmission Threshold:

- Under current Rule 14a-8(i)(12), a company is not required to include a shareholder proposal in its proxy statement if substantially the same proposal was submitted to shareholders for action at a prior meeting and received support below a specified threshold.
- The proposed Rule would increase the current resubmission thresholds under Rule 14a-8(i)(12) by:
 - Increasing the current resubmission thresholds of 3% for matters voted on once, 6% for matters voted on twice and 10% for matters voted on three or more times in the last five years to 5%, 15% and 25%, respectively; and
 - Adding a provision that would allow companies to exclude proposals that have been submitted three or more times in the preceding five years if: (i) the proposal received more than 25% but less than 50% of the vote on its most recent submission, and (ii) support declined by more than 10% the last time substantially the same subject matter was voted on compared to the immediately preceding vote.



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Principles-Based Disclosure

Goals of principles-based disclosure requirements:

- Articulate an objective and look to management to exercise judgment in satisfying that objective by providing appropriate disclosure when necessary.
- Allow investors to see a company's results and prospects through the eyes of management in the MD&A.
- Result in concise and focused risk factors, explaining how each risk affects the company.
- Do not bury the reader in generic boilerplate or laundry lists of risks that might apply to any company.
- Are flexible and should result in disclosure that keeps pace with emerging issues, like Brexit or sustainability matters, without the need to for the Commission to continuously add to or update the underlying disclosure rules as new issues arise.

William Hinman, Applying a Principles-Based Approach to Disclosing Complex, Uncertain and Evolving Risks, March 15, 2019



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Principles-Based Disclosure

In August, the SEC proposed rule amendments to modernize the description of business, legal proceedings, and risk factor disclosures pursuant to Regulation S-K:

- **Description of the Business (Item 101):**
 - Provides a non-exclusive list of types of information to be disclosed only to the extent that they are material
 - Eliminates the prescribed timeframe for disclosure (currently five years)
 - Permits updates focused on material developments in the reporting period, with a hyperlink to the most recent filing that contains a full discussion of the business
 - Specifies human capital resources as a disclosure topic to the extent material



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Principles-Based Disclosure

- **Legal Proceedings (Item 103):**
 - May be provided by hyperlinks or cross-references to other parts of the document
 - Revises \$100,000 threshold for disclosure of environmental proceedings to \$300,000 to adjust for inflation
- **Risk Factors (Item 105):**
 - Requires summary if the section exceeds 15 pages
 - Changes disclosure standard from the “most significant” factors to the “material” factors required to be disclosed
 - Requires organization under relevant headings, with any risk factors that may generally apply to investment in securities disclosed at the end under a separate caption



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SEC's RegFlex Agenda

The SEC recently released its latest agenda under the Regulatory Flexibility Act (the RegFlex Agenda). The near-term agenda includes:

- Auditor independence (April 2020)
- Accelerated Filer definition (April 2020)
- Amendments to Rule 701/Form S-8 (April 2020)
- Clawbacks (September 2020)
- Earnings releases/quarterly reports (September 2020)
- Accredited investor definition (September 2020)



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Thank You and Happy Holidays!



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Meet the Panel



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Kimberley has over 20 years of experience helping clients finance their business through strategic public and private offerings of equity and debt securities and advance their strategic goals through mergers, acquisitions and divestitures. She guides clients through complex and ever-changing SEC requirements and listing standards on the NYSE, NASDAQ and NYSE American and the evolving best practices in corporate governance, compliance and disclosure, allowing clients to focus on moving their business forward with confidence. Kimberley has extensive experience in Canadian cross-border transactions and particular depth in the oil and gas, clean energy, mining and natural resources, manufacturing and technology industries. Kimberley is a frequent speaker and author on corporate compliance, SEC disclosure, and other securities law topics, and currently serves as co-editor of Dorsey's corporate governance and compliance blog, [Governance & Compliance Insider](#). Kimberley has served in various leadership roles at Dorsey for the past several years, including currently serving as Co-Chair of the Capital Markets & Corporate Compliance Practice Group, and previously on the firm's Management Committee.



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Meet the Panel



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Anthony's practice focuses on corporate governance, securities transactions, and mergers and acquisitions. Anthony's corporate governance experience includes advising public companies with U.S. Exchange Act reporting and compliance, U.S. Securities Act matters and compliance with the rules and regulations of state securities commissions and self-regulatory organizations. His complex securities transaction experience includes public and private offerings, at-the-market transactions, underwritten public offerings, bought deal offerings and PIPE offerings. Anthony also advises clients on mergers and acquisitions, including representing both buyers and sellers in a variety of transactions, including joint ventures. Anthony has extensive experience in counseling clients engaged in cross-border capital markets transactions using the Multijurisdictional Disclosure System (MJDS), Rule 144A, Regulation S. Anthony also provides clients with general broker-dealer regulatory advice relating to the rules and regulations of the Securities and Exchange Commission and the Financial Industry Regulatory Authority ("FINRA").



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Meet the Panel



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Cam helps clients with corporate matters including governance and SEC compliance, securities offerings, and mergers and acquisitions. Prior to her return to Dorsey, Cam was Senior Counsel and Assistant Secretary at General Mills, Inc., where she helped the company achieve its corporate governance and SEC compliance objectives, worked on securities offerings and M&A transactions, risk management, foundation governance, and general corporate and commercial matters.

Before joining General Mills in 2005, Cam was an associate for five years in the Dorsey Corporate Group in Minneapolis. Cam is a co-editor of Dorsey's corporate governance and compliance blog, <http://governancecomplianceinsider.com/>. In 2017, she was named a Partner of the Year.



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Appendix: FAST Act Amendments

Rules/Forms Amended	Nature of Amendment
Cover Pages of Periodic and Current Reports Form 10-K, 10-Q, 8-K, 20-F and 40-F; Rule 11 and 406 of Regulation S-T; and Item 601(b)(104) of Regulation S-K	<ul style="list-style-type: none"> Adds disclosure of the national exchange or principal U.S. market for the company's securities, the trading symbol and title of each class of securities. Tags all cover page data in Inline XBRL. Eliminates checkbox on the cover page of Form 10-K where the company indicates that there is no disclosure of delinquent Section 16 filers.
Incorporation by Reference and Cross-Referencing in Reports and Registration Statements Exchange Act Item 10(d)	<ul style="list-style-type: none"> Removes general prohibition on incorporation by reference of documents filed more than five years ago.
Securities Act Rule 411(b)(4); Exchange Act Rules 12b-23(a)(3) and 12b-32; Item 601(b)(13) of Regulation S-K; and Regulation S-T Rules 102 and 105	<ul style="list-style-type: none"> Requires hyperlinks to EDGAR documents incorporated by reference, instead of attaching them as exhibits. Amendments are not required solely to correct an inaccurate hyperlink, unless that hyperlink was included in a pre-effective registration statement. However, the location of the information incorporated by reference should be included.
Securities Act Rule 411; Exchange Act Rule 12b-23; and Forms S-1, S-3, S-11 and F-1	<ul style="list-style-type: none"> Prohibits incorporation by reference of financial statements from other filings or cross-referencing from other parts of a filing into financial statements, except as otherwise specifically permitted by SEC rules.



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Appendix: FAST Act Amendments

Rules/Forms Amended	Nature of Amendment
MD&A Item 303 of Regulation S-K and Form 20-F	<ul style="list-style-type: none"> Increases flexibility in discussing two vs three years of financial results in the MD&A, allowing companies to exclude the earliest of the three years if the MD&A from any prior EDGAR filing includes a discussion of that year. Materiality, as always, remains the primary consideration. While Instruction 1 of Item 303 will now eliminate the reference to trends in five-year selected financial data, the materiality analysis remains the same. While Instruction 1 of Item 303 will now clarify that companies may use any basis of presentation, the SEC anticipates that many companies will continue to provide year-to-year comparisons. Companies eliminating the earliest year must identify the location in the prior filing where the omitted discussion may be found.
Risk Factors Item 105 and 503(c) of Regulation S-K	<ul style="list-style-type: none"> Relocates Item 503(c) to a new Item 105, recognizing that risk factors are business-related and not just offering-related. Eliminates specific examples of risk factors.



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Appendix: FAST Act Amendments

Rules/Forms Amended	Nature of Amendment
Description of Properties Item 102 or Regulation S-K	<ul style="list-style-type: none"> Clarifies that disclosure need only be provided about a physical property to the extent that it is material to the company.
Governance Provisions Items 401, 405 and 407 of Regulation S-K; and Exchange Act Rule 16a-3(e)	<ul style="list-style-type: none"> Changes caption from "Executive Officers of the Registrant" to "Information About Our Executive Officers." Changes caption from "Section 16(a) Beneficial Ownership Reporting Compliance" to "Delinquent Section 16(a) Reports" and eliminate requirement that officers provide copies of Section 16 reports; allows exclusion of this caption if there are no delinquent reports to disclose. Updates audit committee report reference, from "matters required by AU section 380, <i>Communication with Audit Committees</i>" to refer more broadly to "the applicable requirements of the Public Company Accounting Oversight Board ("PCAOB") and the Commission." Exempts EGCs from compensation committee report requirement.

Appendix: FAST Act Amendments

Rules/Forms Amended	Nature of Amendment
Prospectus Cover Page Item 501 of Regulation S-K	<ul style="list-style-type: none"> Explicitly allows companies to include a clear statement on the cover page, when applicable, that the offering price will be determined by a particular method or formula that is more fully explained in the prospectus, instead of on the cover page. Discloses on the cover page the principal United States market or markets for the securities being offered (even if they are not national securities exchanges) and the corresponding trading symbols; OTC markets are not required to be disclosed. Shortens the "subject to completion" legend required under Item 501(b)(10) for preliminary prospectuses, by permitting companies to delete, as appropriate, the statement that the prospectus is not an offer to sell or a solicitation of an offer to buy securities in any state where the offer or sale is not permitted.
Prospectus Plan of Distribution Item 508 of Regulation S-K	<ul style="list-style-type: none"> Adds definition of "sub-underwriter."
Undertakings in Registration Statements Item 512 of Regulation S-K	<ul style="list-style-type: none"> Eliminates undertakings in paragraphs 512(c), (d), (e) and (f), as unnecessary or duplicative.

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Appendix: FAST Act Amendments

Rules/Forms Amended	Nature of Amendment
Confidential Treatment of Material Contracts and Certain Other Exhibits Item 601(b)(10) and (b)(2) of Regulation S-K; Form 20-F	<ul style="list-style-type: none"> Allows omission of confidential information from material contracts and agreements related to material plans of acquisition, reorganization, arrangement, liquidation or succession, without filing a confidential treatment request, so long as the information is (i) not material and (ii) would likely cause competitive harm to the company if publicly disclosed, which is the same standard as previously used. No expiration date for confidential treatment vs a prior limit of 10 years (in the absence of an extension). See the process outlined below this table. The SEC and its staff retain a prerogative to review the appropriateness of omissions. Comparable amendments will be made to Form 20-F and Item 1.01 of Form 8-K, to the extent material contracts are filed as exhibits.
Other Amendments to Exhibits Item 601(a)(6) of Regulation S-K; Item 1016 of Regulation M-A; Form 20-F	<ul style="list-style-type: none"> Allows companies to omit personally-identifiable information (PII) from required exhibits without submitting a confidential treatment request, if disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. No analysis supporting the redactions is required at time of filing.

Appendix: FAST Act Amendments

Rules/Forms Amended	Nature of Amendment
Other Amendments to Exhibits Item 601(b)(4)(vi) of Regulation S-K; Form 20-F	<ul style="list-style-type: none"> Adds a new exhibit under Item 601(b)(4)(vi) that includes the description of securities required by Item 202(a)-(d) and (f) as an exhibit to Form 10-K, rather than limiting this disclosure to registration statements. Incorporation by reference from an earlier exhibit filed under Item 601(b)(4)(vi) will be allowed, so long as the information has not changed. Non-material changes to the rights and privileges of securities will not require separate disclosure on Form 8-K. However, if any changes are made, whether material or non-material, new Item 601(b)(4)(vi) will require companies to update the description of securities in the exhibit filed with their Form 10-K.
Item 601(b)(10)(i) of Regulation S-K and related Instruction 1; Form 20-F	<ul style="list-style-type: none"> Only "newly reporting registrants" will be required to file material contracts that were entered within two years of the applicable registration statement or report; for all reporting companies, material contracts that are to be performed in whole or in part at or after the filing of the registration statement or report will still need to be filed.

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Appendix: FAST Act Amendments

Rules/Forms Amended	Nature of Amendment
<p>Other Amendments to Exhibits Item 601(a)(5) and (b)(2) of Regulation S-K; Item 1016 of Regulation M-A; Form 20-F</p>	<ul style="list-style-type: none"> Permits companies to omit entire schedules and similar attachments to <u>all</u> required exhibits, provided: (i) the schedules and similar attachments did not contain material information and (ii) were not otherwise disclosed in the exhibit or the disclosure document. The filed exhibit must still contain a list briefly identifying the contents of any omitted schedules and attachments, but will no longer need to include an explicit agreement to furnish a supplemental copy of any omitted schedule to the Commission upon request. Nonetheless, companies may be required to provide a copy of any omitted schedule to the Commission staff upon request.

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