

TIME TO GET READY FOR THE 2025 REPORTING SEASON

PREPARE FOR EDGAR NEXT

Oct 17, 2024

As companies prepare for the upcoming proxy and annual report season, the following lists some of the key items to consider:

UPDATES TO RISK FACTORS

Consider whether any material updates to risk factors are appropriate, such as:

- **Use or impact of artificial intelligence**, including AI-washing, as discussed [here](#) and [here](#).
- **Cybersecurity risks**, as illustrated by our [November 1, 2023 post](#) regarding the SEC's enforcement action against SolarWinds alleging deficiencies in the company's disclosures. Companies should also consider relevant 8-K events, as discussed in our [July 27, 2023 post](#), as well as consistency, or alignment, with 10-K disclosures of risk management and governance.
- **Climate change and extreme weather events**, including, physical, financial and regulatory risks, taking into account regulatory developments in the European Union, California and the SEC, subject to legal challenges, as noted below.
- **Supreme Court administrative law decisions**, which create uncertainties for federal agency regulations and interpretations, as discussed in our [August 16, 2024 post](#).
- **Continuing effect of the international conflicts**, including the Ukraine war, the Israel-Hamas conflict, tensions between China and Taiwan, among others, including any direct or indirect effects on a company's business. As illustrated in the SEC's staff's [sample comment letter regarding the invasion of Ukraine](#), companies should consider, among other things, direct and indirect exposures through their operations, employee base, investments, sanctions or legal or regulatory uncertainties as well as actual or potential disruptions in supply chains, commodity or resource prices. business relationships or assets.

- **Developments in China**, including its economic slowdown, tariff challenges and changing U.S. relations, including supply chain implications.
- **Exposure to commercial real estate**, for companies with large portfolios of loans or participations, in light of heightened vacancy rates, elevated interest rates, extended loan maturities, and increased loan delinquencies, as discussed by Eric Gerding, Director of CorpFin, in his [remarks last summer](#).

REVIEW REASONABLENESS AND SUPPORT FOR CLAIMS

Companies should carefully evaluate the accuracy and completeness of key company disclosures, as illustrated by recent SEC enforcement settlements with:

- A [biotech company](#) regarding disclosures about its prospects which the SEC viewed as “unsupported hype”.
- [Keurig](#) regarding statements about the recyclability of its popular K-cup pods.

Similarly, as discussed in our [November 1, 2023 post](#), the SEC filed charges against SolarWinds Corp. and its chief information security office regarding various disclosure failures. As discussed in our [July 26, 2024 post](#), the S.D.N.Y. dismissed most of the allegations. However, as set forth in that post, public companies should, among other things, take care to review and document any public claims about cybersecurity and exercise caution in their internal communications.

TEMPER DISCLOSURES ABOUT ARTIFICIAL INTELLIGENCE

Director Eric Gerding explained in his [remarks last summer](#), that companies should:

- Clearly define what they mean by artificial intelligence and how the technology could improve the company’s results of operations, financial condition, and future prospects.
- Provide tailored, rather than boilerplate, disclosures, commensurate with its materiality to the company, about material risks and the impact the technology is reasonably likely to have on its business and financial results.
- Focus on the company’s current or proposed use of artificial intelligence technology rather than generic buzz not relating to its business.
- Have a reasonable basis for claims when discussing artificial intelligence prospects.

CYBERSECURITY COMMENTS FROM SEC

The SEC staff has only issued a few comments on cybersecurity disclosures recently required by the SEC. However, companies should note these areas of focus evidenced by the comments:

- Inconsistent statements regarding use of third parties:
 - the company does not engage third parties to support, manage or supplement cybersecurity processes; and
 - the audit committee receives updates from management and third parties regarding cybersecurity threat risk management.

In this regard, the SEC requested clarification whether companies engage assessors, consultants, auditors or other third parties in connection with their processes for assessing, identifying and managing material risks from cybersecurity threats as required by S-K Item 106(b)(1)(ii).

- Inadequate disclosure regarding the relevant expertise of such persons or members in such detail as is necessary to fully describe the nature of the expertise as required by S-K Item 106(c)(2)(i).

We reviewed the new disclosure rules and related SEC and DOJ guidance in our [July 27, 2023 post](#), our [May 29, 2024 post](#), our [June 24, 2024 post](#) and [July 9, 2024 post](#).

ANNUAL INSIDER TRADING POLICY EXHIBIT FILING AND DISCLOSURES

Beginning in 2025 for calendar year companies, as discussed in our [December 15, 2022 post](#), Form 10-Ks must:

- **Disclose** whether or not (and if not, why not) the company has adopted insider trading policies and procedures and (2) if adopted, such trading policies and procedures.
- **File** their insider trading policies and procedures as exhibits to the 10-K.

As discussed in our [June 12, 2024 post](#), companies should:

- Review their policies in light of DOJ shadow trading prosecutions as well consider whether any adjustments would be appropriate in anticipation of their public visibility.
- Consider if any updates are desirable to address the new Rule 10b5-1 Plan requirements (if plans are discussed in policies with any specificity), and whether gifts of securities should be subject to greater restriction under policies, given the SEC's recent focus on gifts.

NEW EQUITY GRANT POLICY DISCLOSURES

Beginning in 2025 for calendar year companies, as discussed in our [December 15, 2022 post](#), Form 10-Ks and proxy/ information statements will need to disclose grant policies and practices for options, SARs and similar instruments. Additionally, if, during the last fiscal year, the company has

made grants to NEOs within four business days before or one business day after the release of material non-public information – such as the filing of a periodic report or the filing or furnishing of a current report on Form 8-K that contains material nonpublic information – the company must disclose specified details about those grants in tabular format, including the percentage change in the market value of the securities underlying the award between those dates. The disclosed information is required to be tagged in inline XBRL.

- The compliance dates vary depending on the company’s fiscal year end and filer status. As discussed by the SEC staff in [CDI 120.26](#), for companies other than smaller reporting companies (“SRCs”):
 - December 31 fiscal year-end – Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended December 31, 2024.
 - June 30 fiscal year-end – Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended June 30, 2024.
- For smaller reporting companies (SRCs), the following dates apply:
 - December 31 fiscal year-end– Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended December 31, 2024.
 - June 30 fiscal year-end – Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended June 30, 2025.
- Similarly, [CDI 120.27](#) explains that the new disclosures for proxy or information statements is required for annual meetings after completion of the first full fiscal year beginning on or after April 1, 2023 (or October 1, 2023 in the case of SRCs).

CONTINUE TO ADDRESS D&O 10B5-1 OR NON-10B5-1 TRADING ARRANGEMENTS

Calendar fiscal year end filers other than SRCs have been required to provide quarterly disclosure about Rule 10b5-1 or non-Rule 10b5-1 (as defined in Reg. S-K Item 408(c)) trading arrangements since the second quarter of 2023, as discussed in our [December 15, 2022 post](#). For SRCs, [CDI 120.26](#) sets forth a delayed schedule, requiring disclosure of plan adoptions, modifications or terminations that occur on or after October 1, 2023 and provide disclosure beginning with the quarter ending December 31, 2023.

LEGAL PROCEEDING DISCLOSURES

As discussed in our [August 7, 2023 post](#), companies should think twice before describing a lawsuit as “without merit” in light of the denial of motions to dismiss by a public company and its CEO related to disclosures about a competitor’s trade secrets lawsuit. The claims were filed shortly after a \$2 billion trade secrets verdict awarded to one of the company’s competitors arising out of a corporate espionage campaign.

As noted in our [August 16, 2024 post](#), the reversal of the judgment on appeal did not affect the lessons of the case regarding disclosure controls and procedures in litigation cases and exercising caution when characterizing those cases in public disclosures and drafting codes of conduct.

KEEP TRACK OF RELATED PARTY TRANSACTIONS

As discussed in our [July 7, 2023 post](#), the SEC enforcement division has shown heightened focus on perquisites and related person transactions. Earlier this year another company [settled charges](#) for failing to disclose payments to family members of executives. According to [the SEC order](#), the company failed to disclose:

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

Companies should remind insiders of the scope of relevant disclosure obligations and take steps to refresh their controls and policies to identify and track those items.

REVIEW D&O QUESTIONNAIRES FOR HOT TOPICS

Although SEC and US stock exchange rules don’t require significant adjustments from last year, companies should review their D&O questionnaires to evaluate whether to:

- In the section on director independence, expand the list of examples of material relationships to include close friendships or other close social ties with management, in light of the SEC settlement with a public company director, as discussed in our [October 7, 2024 post](#).
- In the section on director expertise, collect information sufficient to assess the board’s skills cybersecurity expertise, even though the new rules do not require discussion of board-level expertise in this area.
- In the section on beneficial ownership, highlight or clarify the need to disclose margin loans or other form of pledges of issuer securities, in light of Carl Icahn’s settlement with the SEC, as

discussed in our [August 20, 2024 post](#). In addition, companies may wish to request confirmation that insiders have either not entered into, or terminated, any 10b5-1 or non-10b5-1 trading arrangements (as defined in Reg. S-K Item 408(c)) during the preceding fiscal year.

- In the section on Forms 4 and 5, remind insiders of the importance of reporting late or missed transactions, as well as the need to timely notify the company of changes in beneficial ownership, in light of the recent SEC enforcement sweep, as discussed in our [October 3, 2024 post](#).
- In the undertakings:
 - include the consent of the director for the disclosure regarding diversity for purposes of the Nasdaq diversity matrix or other disclosure a company may wish to make on this topic (and consider identifying any state law disclosure requirements, if applicable); and
 - include the consent of the director or nominee to be included in the company's proxy materials, as well as a nominee in a dissident's proxy materials, should that become applicable, in light of universal proxy card rules.

NASDAQ RULE CHANGES FOR INDEPENDENT DIRECTOR AND CORP GOV PHASE-IN

The SEC recently [approved](#) Nasdaq rule changes to clarify and modify phase-in schedules and cure periods for certain independent director and board committee corporate governance requirements. The changes generally align the Nasdaq phase-in timeline with the NYSE's. The updated Nasdaq rules can be found [here](#).

FILING STATUS AND PUBLIC FLOAT DAY

The filing status of a public company for 2025 10-Ks and 10-Qs is determined in part based on its public float as of the last business day of its most recent second fiscal quarter (June 30, 2024 for calendar year companies). Any change in accelerated filer status takes effect on the last day the fiscal year. Loss of EGC status also takes effect then.

The second quarter public float test also affects SRC status, which may also be based on total revenues. Companies becoming SRCs can start using scaled SRC disclosures immediately, while those exiting SRC status must stop using scaled SRC disclosures beginning with the Form 10-Q for the first quarter of the subsequent fiscal year.

PREPARE NOW FOR EDGAR NEXT

Recently, the SEC [announced](#) new security requirements for Edgar filers. The compliance date is September 15, 2025.

The changes will require individual account credentials to log into Edgar, allowing identification of the person making each submission, and multifactor authentication. Filers will also be required to authorize individuals to manage their Edgar accounts on a dashboard.

Additionally, optional Application Programming Interfaces (APIs) will be added to allow filers to make submissions, retrieve information, and perform account management tasks on a machine-to-machine basis. The SEC believes the optional APIs will enhance the efficiency and speed when using Edgar.

Each filer must authorize at least two individuals as account administrators (one is permitted if the filer is an individual or single-member company) to:

- Manage the filer's account.
- Confirm annually on Edgar that all individuals and entities reflected on the dashboard for its Edgar account are authorized by the filer to act on its behalf, and that all information about the filer on the dashboard is accurate.
- Maintain accurate and current information on Edgar concerning the filer's account, including but not limited to accurate corporate information and contact information.
- Securely maintain information relevant to the ability to access the filer's Edgar account, including but not limited to access through any Edgar APIs.

Opportunity for Beta testing. Beginning September 30, 2024 through at least December 15, 2024, the SEC will operate a beta software environment for filer testing and feedback reflecting the adopted rule and form amendments and the related technical changes, as discussed in the [SEC fact sheet](#). Companies should consider whether to participate and get familiar with the platform. Login.gov account credentials will be needed.

March 24, 2025 effective date for authorization. Existing filers will obtain access by enrolling on the dashboard. New filers (and existing filers unable to enroll) must complete amended Form ID, the application for access to Edgar, which will reflect the Edgar Next changes and will be modernized to make the form more user friendly. Filers who have enrolled or been granted Edgar access on amended Form ID will be able to file and take other actions on Edgar through the optional APIs.

September 15, 2025 deadline for compliance with Edgar Next. Beginning September 15, 2025, compliance with Edgar Next is required to file. Thereafter, existing filers may continue to enroll until December 19, 2025, but enrollment will be a prerequisite to filing.

December 22, 2025 deadline for other filers. Beginning December 22, 2025, existing filers who have not enrolled or been granted access on amended Form ID will be required to submit the amended Form ID to request access to file and take other actions on their accounts.

Webinars, Q&A Sessions and Video Instructions. The SEC has posted a [webpage with instructions](#) regarding transitioning to Edgar Next and how to participate in Beta testing. The webpage also details several forms of filer support for the transition, including links to upcoming webinars (including YouTube videos), Q&A sessions, instructional videos on the SEC's YouTube channel and instructions for filer testing on the dashboard.

RELATED PRACTICE AREAS

- Securities & Corporate Governance

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