

MORE HOT TOPICS FOR 2024 REPORTING SEASON

Dec 12, 2023

As companies prepare for the upcoming proxy and annual report season, the following supplements the list of key items to consider contained in our [October 2, 2023 post](#):

Prepare for 8-K reporting of cybersecurity incidents: starts December 18

As discussed in our [July 27, 2023 post](#), all companies – except for smaller reporting companies – must begin reporting material cybersecurity incidents in Form 8-Ks or 6-Ks on December 18, 2023. Accordingly, companies should review and address the [recommended actions](#) in our earlier post. SRCs will have an additional 180 days, with compliance required beginning on June 15, 2014.

These reports supplement the [requirement for disclosure](#) in annual reports of cybersecurity risk management, strategy and governance.

Implement cybersecurity controls and procedures

As discussed in our [November 1, 2023 post](#) on the SEC's landmark cybersecurity disclosure lawsuit, companies should review their controls and procedures, as well as their culture, public statements and documentation regarding cybersecurity matters.

Update D&O questionnaires

Companies should review our [December 5, 2023 post](#) for potential topics to address in their D&O questionnaires.

Nasdaq board diversity rules upheld -- but under appeal

As discussed in [November 20, 2023 post](#), the Fifth Circuit recently upheld the Nasdaq's board diversity rules; however, one of the petitioners has filed a petition for *en banc* review.

Uncertainties regarding new stock repurchase disclosure rules

As discussed in our [November 27, 2023 post](#), the Fifth Circuit denied the SEC's request for additional time to substantiate the new stock repurchase disclosure rules. As a result, it is expected that the court will formally vacate the rules and the SEC will need to consider whether to appeal or

propose a set of revised rules that address the deficiencies in its justification for the rules. Meanwhile, companies should comply with the existing rules consistent with last year.

New SEC guidance

- **Filing preliminary proxy statements and other matters.** In mid-November, the SEC released several new interpretations relating to proxy materials:
 - [How to count days for purposes of the 10-day filing requirement for preliminary proxy statements](#)
 - [Legend requirements under Rule 14a-12 for solicitations before furnishing proxy statements](#)
 - [Use of discretionary authority with respect to under- or over-votes on universal proxy cards](#)
- **New SEC guidance on pay-versus performance.** In late November, the SEC staff posted eight new CDIs (128D.23 - 128D.30) and two revised CDIs (128D.07 and 128D.18) on pay-versus-performance disclosures. These supplement earlier interpretations, as discussed in our [October 2, 2023 post](#) and [February 22, 2023 post](#). Several are consistent with recent SEC staff comment letters, as summarized in our [October 16, 2023 post](#).
- **New SEC guidance on hyperlinking exhibits filed in XBRL.** The SEC staff posted new CDI [146.18](#) to clarify that exhibits filed in Inline XBRL must be hyperlinked in an exhibit index, unlike those filed in XBRL only. This is because XBRL-only exhibits are filed in unconverted code, whereas Inline XBRL is not.

Glass Lewis releases updates for 2024 annual meetings

Glass Lewis released updates to its [U.S. benchmark policy guidelines](#) for 2024 annual meetings. Key changes include:

- ***Material Weaknesses.*** When a material weakness is reported and the company has not disclosed a remediation plan, or when a material weakness has been ongoing for more than one year and the company has not disclosed an updated remediation plan that clearly outlines the company's progress toward remediating the material weakness, GL will consider recommending that shareholders vote against all members of the audit committee who served during the time when the material weakness was identified.
- ***Cybersecurity Risk Oversight.*** If a company has been materially affected by a cyber-attack, GL may recommend against appropriate directors if it finds the board's oversight, response or disclosures to be insufficient or are not provided to shareholders. GL believes that companies should provide periodic updates addressing progress towards remediating a material cyber-attack, without revealing details that could compromise the company or assist threat-actors.

- **Board Oversight of Environmental and Social Issues.** GL will examine committee charters and governing documents to determine if the company has codified a meaningful level of oversight of and accountability for a company's material environmental and social impacts.
- **Board Accountability for Climate-Related Issues.** GL is expanding the application of its policy from only the largest, most significant emitters to companies in the S&P 500 index operating in industries where:
 - The Sustainability Accounting Standards Board (SASB) has determined that the companies' GHG emissions represent a financially material risk, or
 - GL believes emissions or climate impacts, or stakeholder scrutiny thereof, represent an outsized, financially material risk.

GL will consider whether to recommend against responsible directors based on whether such companies have: (1) produced disclosures in line with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) and (2) disclosed explicit and clearly defined board-level oversight responsibilities for climate-related issues.

- **Clawback Provisions.** GL believes that compliance with listing requirements is not enough, and that clawback policies should provide companies with the power to recoup incentive compensation from an executive when there is evidence of problematic decisions or actions, such as material misconduct, a material reputational failure, material risk management failure, or a material operational failure, the consequences of which have not already been reflected in incentive payments and where recovery is warranted. Such power to recoup should be provided regardless of whether the employment of the executive officer was terminated with or without cause. In these circumstances, rationale should be provided if the company determines ultimately to refrain from recouping compensation as well as disclosure of alternative measures that are instead pursued, such as the exercise of negative discretion on future payments.
- **Executive Ownership Guidelines.** GL believes that companies should adopt and enforce minimum share ownership rules for NEOs. Companies should provide clear disclosure in CD&A of the requirements and how various outstanding equity awards are treated when determining levels of ownership. GL views counting unearned performance-based full value awards and/or unexercised stock options as inappropriate. Companies should provide a cogent rationale should they count these awards towards shares held by an executive.
- **Proposals for Equity Awards for Shareholders.** GL will view positively the inclusion of provisions that require a non-vote or vote of abstention from a shareholder who is the recipient

of a proposed grant – as a way to address potential conflicts of interest and provide disinterested shareholders with more meaningful say over the proposal.

- ***Net Operating Loss (NOL) Pills.*** GL believes the inclusion of “acting in concert” provisions in an NOL pill may raise concerns as to the true objective of the pill. In considering whether to recommend votes against a management proposed NOL pill, GL will now also consider the inclusion of such a provision and whether the pill is implemented following a 13D filing or there is evidence of hostile activity or shareholder activism.
- ***Control Share Statutes.*** GL will generally recommend voting for proposals to opt-out of control share acquisition statutes, unless doing so would allow the completion of a takeover that is not in the best interests of shareholders; and voting against proposals to amend the charter to include control share acquisition provisions.
- GL also sets out a list of clarifying changes to certain existing policies.

ISS updates for 2024 annual meetings expected soon

ISS is expected to announced proxy voting policy updates later this month.

New FASB segment disclosure guidance beginning in 10-Ks for fiscal 2024

FASB recently [announced](#) changes to its accounting standards for segments that “enhance[] disclosures about significant segment expenses.” The changes apply to annual periods that begin after December 15, 2023. As a result, calendar year companies will need to comply with the new guidance in 10-Ks filed in 2025 for fiscal 2024. However, according to this [Bloomberg article](#), SEC staff have “urged companies to take the unusual step of checking with the regulator before they follow a part of new segment accounting rules designed to help businesses convey a clearer picture of profits and losses in their business unit” – referring to guidance allowing disclosure of an additional profit measure, including unofficial accounting measures. Accordingly, companies should discuss with their auditors appropriate steps to take before including additional or non-GAAP profit measures in their segment disclosures.

Other reminders

[Furnish "glossy" annual reports to the SEC in PDF](#)

[Nuts and Bolts of Electronic Signatures](#)

MEET THE TEAM



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