KEY DISCLOSURE CONSIDERATIONS FOR YOUR UPCOMING FORM 10-K AND PROXY STATEMENT

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US Corporate Alert

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Public companies should be aware of new disclosure requirements for their upcoming Form 10-K filings for the fiscal year ended 31 December 2024 (2024 Form 10-K) and for their upcoming Proxy Statements to be filed in 2025 (2025 Proxy Statement). Companies should also consider additional disclosure developments and evolving best practices when preparing their 2024 Form 10-Ks and 2025 Proxy Statements.

The following alert summarizes these new disclosure requirements and additional considerations for 2024 Form 10-Ks and 2025 Proxy Statements.

NEW DISCLOSURE REQUIREMENTS FOR 2024 FORM 10-KS AND 2025 PROXY STATEMENTS

Insider Trading Policies

Disclosure of Insider Trading Policies

Item 408(b)(1) of Regulation S-K (Item 408(b)(1)) requires companies to disclose whether they have adopted insider trading policies and procedures governing the purchase, sale, and/or other dispositions of their securities by directors, officers, and employees, or a company itself, that are reasonably designed to promote compliance with insider trading laws, rules and regulations, and any applicable listing standards. Disclosure provided pursuant to Item 408(b)(1) must be provided in interactive XBRL.

If a company has not adopted such insider trading policies and procedures, it must explain why it has not done so.

While Item 408(b)(1) disclosures are required in the 2024 Form 10-K, they may be incorporated by reference from a proxy statement involving the election of directors if filed within 120 days after a company's fiscal year end.

Filing of Insider Trading Policies

Items 408(b)(2) and 601(b)(19) of Regulation S-K require that any company that has adopted insider trading policies and procedures must file such policies and procedures as Exhibit 19 to the 2024 Form 10-K. This requirement can also be satisfied if all of a company's insider trading policies and procedures are included in its code of ethics (as defined in Item 406(b) of Regulation S-K) and the code of ethics is filed as Exhibit 14 to its 2024 Form 10-K. The company would then only need to add a reference to Exhibit 14 for Exhibit 19 in the exhibit index to the 2024 Form 10-K.

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Disclosure of Stock Option and Stock Appreciation Right Grant Practices in Close Proximity to Disclosure of Material Nonpublic Information

Item 402(x) of Regulation S-K (Item 402(x)) requires narrative and tabular disclosure related to certain equity awards granted in proximity to a company's release of material nonpublic information (MNPI). Companies are to provide narrative disclosure discussing their policies and practices related to the timing of awards of stock options, stock appreciation rights, and similar option-like instruments in relation to the disclosure of MNPI by a company, including how a company's board of directors determines when to grant such awards (for example, whether such award is granted on a predetermined schedule), whether a company's board of directors or compensation committee takes MNPI into account when determining the timing and terms of such award, and whether a company has timed the disclosure of MNPI for the purpose of affecting the value of executive compensation.

Additionally, if during the last completed fiscal year any stock options, stock appreciation rights, or similar option-like instruments were awarded to a named executive officer within a period starting four business days before and ending one business day after the filing of a Form 10-K or Form 10-Q, or a Form 8-K that discloses MNPI, the company must provide the following information for each award in a table:

- The name of the named executive officer;
- The grant date of the applicable award;
- The number of securities underlying the award;
- The per-share exercise price of the award;
- The grant-date fair value of the award computed using the same methodology as used for a company's financial statements under GAAP; and
- The percentage change in the market price of the underlying securities between the closing market price of the security one trading day prior to and the trading day beginning immediately following the disclosure of MNPI.

The discussion and table required by Item 402(x) must be provided in interactive XBRL.

While Item 402(x) disclosures are required in the 2024 Form 10-K, they may be incorporated by reference from a proxy statement involving the election of directors if filed within 120 days after a company's fiscal year end.

Companies should review their current insider trading policies and procedures, and policies and practices related to the timing of awards of stock options, stock appreciation rights, and similar option-like instruments in relation to the disclosure of MNPI, to ensure such policies and procedures align with a company's objectives and these new disclosure requirements. If a company does not have such policies or procedures currently in place, then they should consider establishing such policies or procedures prior to the filing of the 2024 Form 10-K.

ADDITIONAL DISCLOSURE CONSIDERATIONS FOR 2025 PROXY STATEMENTS

Pay Versus Performance (PVP) Disclosure Updates

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In late 2022, the US Securities and Exchange Commission (SEC) adopted rules requiring companies to disclose the relationship between the executive compensation actually paid to a company's named executive officers and the company's financial performance.

The disclosure is required to be included in proxy statements, including the 2025 Proxy Statement.

The rules have three main components (with scaled-back disclosures for smaller reporting companies):

- PVP table;
- Description of the relationship between pay and performance; and
- Tabular list of important financial measures.

Recent SEC comment letters have revealed the following common mistakes in early PVP disclosures:

- Failing to describe the relationship between pay and performance;
- Failing to provide GAAP reconciliation for non-GAAP financial measures;
- Using incorrect peer groups;
- Failing to include in the analysis all named executive officers who served each year; and
- Using partial-year compensation.

Proxy Advisor Recommendations Related to Severance Paid Upon Voluntary Terminations

Institutional Shareholder Services (ISS) continues to focus on disclosures regarding severance payments in connection with executive terminations, directing companies to disclose both the type of termination occurring and the applicable employment agreement provision triggering severance.

ISS has indicated that severance paid when the termination is voluntary (for example, a retirement or a “mutual separation”) is a problematic practice “most likely to result in an adverse recommendation”.

ADDITIONAL DISCLOSURE CONSIDERATIONS FOR 2024 FORM 10-KS

Risk Factors

Since risk factor disclosures are often updated just once a year when preparing a Form 10-K filing, companies should review their risk factors with fresh eyes and consider whether there have been any internal or external changes or updates that warrant new risk factors or revisions to the current risk factors. The SEC may flag when disclosure in other parts of the 10-K includes updates that are not reflected in the risk factors.

With respect to the risk factors, a company should also consider the following:

- Review the risk factors of peer companies to help it assess current and emerging risks facing similarly situated companies;

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- Determine if any of the following areas of SEC focus are applicable (however, companies should be aware that these areas of focus may change in light of the new administration and should be conscious of any shifts in SEC policy):
  - Framing disclosure of a risk as hypothetical when it has already occurred;
  - Artificial intelligence and the potential risks to a company of its increased adoption;
  - Geopolitical risks;
  - Inflation and interest rate risks;
  - Climate-related and other environmental, social, and governance related risks; and
- Review the structure and organization of the risk factor disclosures, including a summary of the risk factors if the risk factor disclosure is over 15 pages.

Comment Letter Trends

SEC's Top Areas of Comment and Projected Areas of Comment

- Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A);
- Revenue recognition;
- Financial statement presentation;
- Financial reporting topics:
  - Segment reporting, including compliance with new US GAAP disclosures effective in annual periods beginning after 15 December 2023;
  - Compliance with non-GAAP regulations and rules;
  - Critical accounting estimates disclosure in MD&A; and
  - Disclosures related to supplier finance programs in the notes to the financial statements and any related information in MD&A;
- China-related matters;
- Inflation;
- Interest rate risk and liquidity risk;
- Disclosure requirements for newly adopted rules, including regarding clawbacks and cybersecurity; and
- Artificial intelligence.

During the preparation of the 2024 Form 10-K, a company should keep the aforementioned areas of comment in mind. If any of these areas impact the business of a company, then it should discuss the particularized risks and impacts to it and not revert to boilerplate disclosures.

Nasdaq's Board Diversity Rules Vacated

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In December 2024, the US Court of Appeals for the Fifth Circuit vacated the SEC's approval of Nasdaq's board diversity disclosure rules. Nasdaq announced that it does not intend to appeal the ruling, and the SEC has stated it will review whether to challenge the ruling. If appealed, the case would be reviewed by the US Supreme Court. In light of the upcoming change in presidential administrations and the current composition of the US Supreme Court, we believe that any such appeal is unlikely. This decision means that companies listed on Nasdaq are not required to comply with Nasdaq's board diversity rules. However, a company may still choose to disclose board diversity data voluntarily for a number of reasons, particularly in light of policies adopted by large institutional investors regarding diversity and the influence of proxy advisory firms. Therefore, regardless of the Fifth Circuit's decision, companies should consult with their legal and financial advisors about including publicly available information about director skill sets and backgrounds, including in relation to diversity.

REMINDERS REGARDING PRIOR DISCLOSURE REQUIREMENTS FOR FORM 10-KS AND PROXY STATEMENTS FILED IN 2024

It was a prolific year of rulemaking for the SEC in 2023, and companies were required to provide a number of new disclosures in their Form 10-K filings for the fiscal year ended 31 December 2023 relating to cybersecurity, clawbacks, and insider trading. Companies should ensure they are complying with these requirements.

Cybersecurity

Cybersecurity Risk Management and Strategy

Item 106(b) of Regulation S-K requires a company to describe its processes for assessing, identifying, and managing material risks from cybersecurity threats, including:

- Whether and how such processes have been integrated into a company's overall risk management system or processes;
- Whether a company engages third parties in connection with such processes; and
- Whether a company has processes to oversee and identify risks from cybersecurity threats associated with its use of third-party service providers.

A company must also describe whether and how any risks from cybersecurity threats have materially affected or are reasonably likely to materially affect it, including its business strategy, results of operations, or financial condition.

Cybersecurity Governance

Item 106(c) of Regulation S-K (Item 106(c)) requires a description of the board of directors' oversight of risks from cybersecurity threats (including identification of any board committee or subcommittee responsible for such risk oversight) and a description of the processes by which the board or such committee or subcommittee is informed of such risks. Item 106(c) also requires a description of management's role in assessing and managing material risks from cybersecurity threats, including:

- Whether and which management positions or committees are responsible for assessing and managing such risks and the relevant expertise of such persons or members;

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- The processes by which such persons or committees are informed about or monitor the prevention, detection, mitigation, and remediation of cybersecurity incidents; and
- Whether such persons or committees report information about such risks to the board of directors or a committee or subcommittee thereof.

Clawbacks

Disclosures Related to Clawback Policies

The New York Stock Exchange and Nasdaq established no-fault clawback listing standards that took effect late in 2023. Companies are subject to delisting for noncompliance and clawback policies must be filed as an exhibit to a company's Form 10-K.

Clawback of Erroneously Awarded Compensation

Item 402(w) of Regulation S-K (Item 402(w)) requires a company to disclose certain information if, at any time during or after its last completed fiscal year, it was required to prepare an accounting restatement that required recovery of erroneously awarded compensation pursuant to its clawback policy or if there was an outstanding balance of erroneously awarded compensation to be recovered. A clawback is triggered by both a “Big R” restatement, which corrects errors that are material to previously issued financial statements, and a “Little r” restatement, which corrects errors that are not material to previously issued financial statements but would result in a material misstatement if the error was recognized or left uncorrected in the current period. The disclosure must include for each restatement:

- The date a company became required to make such accounting restatement;
- The aggregate dollar amount of the erroneously awarded compensation attributable to such accounting restatement, including how it was calculated;
- If the reporting measure underlying the erroneously awarded compensation related to stock price or a total shareholder return metric, the estimates used in determining the erroneously awarded compensation attributable to such accounting restatement, and the methodology used for such estimates;
- The aggregate dollar amount of erroneously awarded compensation that remains outstanding at the end of the last completed fiscal year; and
- If the aggregate dollar amount of such erroneously awarded compensation has not yet been determined, the disclosure of this fact and an explanation of the reason.

If a company deems recovery to be impracticable, it must disclose, for each current and former named executive officer and all other current and former executive officers as a group, why it did not pursue recovery and the amount of recovery forgone.

The information must appear with, and in the same format as, the rest of the disclosure required to be provided by Item 402 of Regulation S-K.

While Item 402(w) disclosures are required in the Form 10-K, they may be incorporated by reference from a proxy statement involving the election of directors if filed within 120 days after a company's fiscal year end.

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Exhibit Index

Clawback policies adopted in accordance with New York Stock Exchange or Nasdaq requirements must be filed as Exhibit 97 to Form 10-K.

Cover Page

The Form 10-K cover page includes two checkboxes that a company must now check if:

- It is including financial statements that reflect the correction of an error to previously issued financial statements; and
- Any of those corrections are restatements that required a recovery analysis of incentive-based compensation.

Insider Trading Disclosures

Officer and Director Trading Arrangements

Item 408(a) of Regulation S-K requires disclosure of Rule 10b5-1 trading arrangements and non-Rule 10b5-1 trading arrangements adopted or terminated by a director or Section 16 officer during the fourth quarter of the fiscal year. The expiration of a trading plan pursuant to its terms is not required to be disclosed. If disclosure is required, a company must identify the officer or director and describe the material terms of such arrangement, including its date, duration, and total amount of securities to be sold or purchased, but excluding any pricing terms.

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