

Checklist: Form 10-K and Proxy Statement Key Changes and Considerations for 2020 Filing Season

Introduction

Below is a checklist of key changes and considerations that public companies should be aware of when preparing their Forms 10-K and proxy statements for the upcoming filing season. For ease of reference, we have divided the list into three sections: (i) changes pertaining to the Form 10-K; (ii) changes pertaining to the proxy statement; and (iii) changes that may affect both filings.

In addition to the items summarized below, the SEC has adopted numerous other changes that are not discussed herein, including changes to Securities Act forms. We also have generally focused this checklist on changes likely to affect calendar-year U.S. public companies; impacts on investment companies and foreign private issuers may differ, as may the timing for compliance for non-calendar-year companies.

FORM 10-K

Topic and Effective Date

General Description of Rule Change

Cover Page Changes

Add Trading Symbol
(Effective May 2, 2019)

Companies must disclose the stock exchange trading symbol for each class of listed securities on the cover page of each report, including Form 10-K. The Form 10-K cover page has been modified to accommodate the addition of such trading symbol(s).

*Eliminate Section 16
Checkbox*
(Effective May 2, 2019)

The statement and checkbox on the cover page of Form 10-K relating to whether the company is disclosing or expects to disclose Section 16 reporting delinquencies has been eliminated.

Inline XBRL Tagging
(Phased in over three-year
period - for large accelerated
filers, effective for fiscal years
ending on or after June 15, 2019)

Cover pages of Exchange Act reports, including Form 10-K, must be tagged using Inline XBRL and companies must file with each specified form a Cover Page Interactive Data File containing the data to be tagged. The requirements to tag data on the cover pages of these filings are subject to a three-year phase-in, beginning with fiscal periods ending on or after: June 15, 2019 for large accelerated filers; June 15, 2020 for accelerated filers; and June 15, 2021 for all other filers.

Executive Officer Disclosure
(Effective May 2, 2019)

The SEC has clarified that any executive officer disclosure required by Item 401 generally (such as the “bad boy” provisions of Item 401(f)) may be included in Part I of Form 10-K without requiring repetition in the proxy statement by making former Instruction 3 to Item 401(b) a general Instruction to Item 401. The Instruction has also been amended to require that such disclosure, if included in Part I, be captioned “Information about our Executive Officers.”

Review of Risk Factors
(Recommended for Forms
10-K covering 2019)

In light of two SEC enforcement cases in 2019, companies should review their risk factor disclosures to ensure that the disclosures do not speak about events hypothetically if the event occurred or is ongoing. The SEC stated that disclosures must be “accurate in all material respects, including not continuing to describe a risk as hypothetical when it has in fact happened.” In addition, the SEC has identified a few areas in which it expects to see disclosure of risks if material to the company, including risks related to intellectual property and technology associated with foreign operations, environmental social and governance (ESG) matters, data privacy, LIBOR transition, international trade, Brexit, and cybersecurity. Companies should also be mindful of industry specific risks which may arise from circumstances such as international events, political developments, regulatory changes, international trade, tariffs, commodity prices or competitive dynamics.

Property Disclosure
(Effective May 2, 2019)

Item 102 of Regulation S-K was amended to emphasize the materiality threshold and now requires disclosure of physical properties only to the extent material to the company. Instead of requiring companies to state the location and general character of their “principal plants and other materially important physical properties,” the rule now requires companies, “to the extent material,” to “disclose the location and general character of the registrant’s principal physical properties.”

Notwithstanding the amendments, companies in the oil and gas, mining and real estate industries – industries in which physical properties are particularly significant – will continue to be required to comply with the instructions to Item 102 that are specific to those industries.

**Management’s Discussion
& Analysis**
(Effective May 2, 2019)

Companies that provide financial statements for three years in their Form 10-K may now omit the year-over-year comparison related to the earliest year if that comparison was included in any prior SEC filing (e.g. the prior year Form 10-K), on the condition that the company identify the location in the prior filing where the omitted discussion may be found. The instruction does not require a hyperlink to or incorporation by reference to the disclosure in the prior filing.

For example, if a company files a Form 10-K with financial statements covering fiscal years 2017, 2018, and 2019, the company may omit from its MD&A the discussion comparing its results of operations for fiscal years 2017 and 2018, and refer the reader to the MD&A in the 2018 Form 10-K where the 2017 to 2018 comparative discussion may be found.

Companies should remain mindful of general principles of materiality applicable to MD&A disclosure, including the obligation to disclose known trends, and of any disclosure requirements with respect to changes in segments or other presentation since the earliest year, when eliminating this disclosure.

When considering whether to take advantage of this rule change, it is important to first confirm whether any of the discussion of the earliest year financial statements remains material and therefore still should be included in the MD&A.

**Cross-References in and
Incorporation by Reference
into Financial Statements**
(Effective May 2, 2019)

The new rules expressly prohibit inclusion in financial statements of cross-references to and incorporation by reference from disclosure outside of the financial statements except where specifically permitted by SEC rules or applicable accounting standards. The rationale behind this change is to eliminate the possibility of confusion about the scope of an auditor’s responsibilities and which financial information has been audited or reviewed by the independent auditor.

Critical Audit Matters (“CAMs”) in Auditors’ Reports
(Phased in over two-year period - for large accelerated filers, effective for fiscal years ending on or after June 30, 2019)

Pursuant to the new PCAOB Auditing Standard 3101, the auditors’ report in the Form 10-K must include a discussion of CAMs or include a statement that there were no CAMs. A CAM is any matter arising from the audit of the financial statements that was communicated or required to be communicated to the audit committee and that: (i) relates to accounts or disclosures that are material to the financial statements; and (ii) involved especially challenging, subjective, or complex auditor judgment.

The CAM requirement applies to audits of all public companies, except for (i) emerging growth companies (“EGCs”) and (ii) registered investment companies other than business development companies. CAMs are also not required for audits of (i) brokers and dealers or (ii) employee stock purchase, savings, and similar plans. The CAM requirement will apply to audits of large accelerated filers for fiscal years ending on or after June 30, 2019, and to audits of all other companies to which the requirements apply for fiscal years ending on or after December 15, 2020.

Exhibits

(Effective May 2, 2019, except as specified)

Material Contracts No Longer Required If Fully Performed

Material contracts are to be filed only if they are to be performed in whole or part at or after the filing of the report. This accommodation is not available for IPOs and other newly public companies. This change should allow more deletions from the exhibit index because companies will no longer need to determine whether a recently terminated contract must still be filed (or incorporated by reference).

Omission of Schedules

All exhibits filed with Form 10-K may omit immaterial schedules or attachments.

Omission of Personally Identifiable Information

Companies may omit personally identifiable information such as bank account numbers, social security numbers and home addresses from their exhibits.

Omission of Confidential Information
(Effective April 2, 2019)

Companies may omit confidential information from plans of acquisition, reorganization, etc. and material contracts filed with Form 10-K without the need to submit a confidential treatment request if the information is not material and would cause competitive harm if publicly disclosed. The exhibit index and the first page of the exhibit should indicate that the exhibit omits certain confidential information.

Description of Securities Exhibit

Companies are now required to file as an exhibit to Form 10-K the description of their securities registered under Section 12 of the Exchange Act. The description must conform to the requirements of Item 202 of Regulation S-K. This may cover classes of registered securities such as capital stock, debt securities, warrants and rights and other securities, as well as American Depositary Receipts.

Cover Page Interactive Data Exhibit

(Phased in over three-year period - for large accelerated filers, effective for fiscal years ending on or after June 15, 2019)

Companies that are required to tag the cover pages of their Exchange Act reports in Inline XBRL must also identify the cover page interactive data file containing the XBRL as Exhibit 104. However, because EDGAR’s filing software does not accept Exhibit 104, the XBRL will be in the XBRL document set with Exhibit 101. A parenthetical should indicate that the file is contained in Exhibit 101. (Note: Exhibit 101 must include the word “Inline,” and Exhibit 104 must include the word “Inline” and cross-reference to the Interactive Data File submitted under Exhibit 101.)

These requirements are subject to the same three-year phase-in as the Inline XBRL requirement for cover pages, beginning with fiscal periods ending on or after: June 15, 2019 for large accelerated filers; June 15, 2020 for accelerated filers; and June 15, 2021 for all other filers.

Proxy Statement

Topic and Effective Date

General Description of Rule Change

Hedging Disclosures

(Phased in over two-year period – for proxy statements relating to director elections other than for EGCs and smaller reporting companies, effective for fiscal years beginning on or after July 1, 2019)

Proxy statements will be required to include a summary of any practices or policies regarding the ability of employees and directors to engage in certain hedging transactions described in Item 407(i) of Regulation S-K with respect to a company's equity securities. Alternatively, companies may disclose their practices or policies in full. If a company does not have any such practices or policies, the company must disclose that fact or state that hedging transactions are generally permitted.

The new Item 407(i) tracks the language in the SEC's proposed and final rule releases, and therefore some companies have previously amended their policies to cover the types of hedging described in Item 407(i). Item 407(i) requires companies to disclose whether their policies apply to "financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds), or otherwise engage in transactions, that hedge or offset, or are designed to hedge or offset, any decrease in the market value of registrant equity securities."

Companies should review their hedging policies to ensure that the specific types of transactions identified in Item 407(i) are covered. If necessary, companies may wish to consider amending their policies to include this language or affirmatively interpreting their policies to cover the transactions listed in Item 407(i).

This requirement will apply to proxy statements that relate to the election of directors during fiscal years that begin on or after July 1, 2019 (July 1, 2020 for EGCs or smaller reporting companies).

Section 16 Compliance Disclosure (Effective May 2, 2019)

The heading required by Item 405 of Regulation S-K has been revised from "Section 16(a) Beneficial Ownership Reporting Compliance" to "Delinquent Section 16(a) Reports." A new instruction encourages omission of this heading and any corresponding "negative disclosure" where there are no delinquent reports to disclose.

Simplified PCAOB Reference in Audit Committee Report (Effective May 2, 2019)

The PCAOB rule reference in Item 407(d)(3)(i)(B) was amended such that it now simply refers to "the matters required to be discussed by the applicable requirements of the PCAOB" when referencing the matters that the audit committee discussed with the auditors.

Compensation Committee Reports (EGCs Only) (Effective May 2, 2019)

Item 407 of Regulation S-K has been amended to explicitly exclude EGCs from the requirement to include in the compensation committee report a statement whether the compensation committee recommended inclusion of compensation discussion and analysis ("CD&A") in the Form 10-K or proxy statement, because EGCs are not required to include CD&A in their Forms 10-K or proxy statements.

Exchange Act Reports Generally

Topic and Effective Date

General Description of Rule Change

Incorporation by Reference (Effective May 2, 2019)

Hyperlinks

Companies must now add hyperlinks to any documents incorporated by reference from other filings (even outside of exhibit indices) into any registration statement or report.

Precision and Location

When incorporating by reference information within another filing, companies must specifically identify the location of the information being incorporated within the original document. The statement must be made at the particular place where the information is required, if applicable.

Filing Incorporated Information as Exhibits

Companies no longer need to file as exhibits copies of any information incorporated by reference into an Exchange Act filing, given that the filings with which this information would have been originally filed are generally available on EDGAR.

Elimination of Five-Year Limitation

The SEC eliminated the restriction in Item 10(d) of Regulation S-K on incorporating by reference documents that have been on file with the SEC for more than five years if they do not fall within a specific exception.

Key contacts



C. Alex Bahn

Partner, Washington, D.C., Philadelphia
T +1 202 637 6832
T +1 267 675 4619,
alex.bahn@hoganlovells.com



John B. Beckman

Partner, Washington, D.C.
T +1 202 637 5464
john.beckman@hoganlovells.com



Alan L. Dye

Partner, Washington, D.C.
T +1 202 637 5737
alan.dye@hoganlovells.com



Richard J. Parrino

Partner, Washington, D.C.
T +1 202 637 5530
richard.parrino@hoganlovells.com



Lillian Tsu

Partner, New York
T +1 212 918 3599
lillian.tsu@hoganlovells.com

Alicante
Amsterdam
Baltimore
Beijing
Birmingham
Boston
Brussels
Budapest*
Colorado Springs
Denver
Dubai
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta*
Johannesburg
London
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Madrid
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Milan
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Northern Virginia
Paris
Perth
Philadelphia
Riyadh*
Rome
San Francisco
São Paulo
Shanghai
Shanghai FTZ*
Silicon Valley
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Ulaanbaatar*
Warsaw
Washington, D.C.
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Associated offices*

Legal Services Center: Berlin

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