

Disclosure tips for 2013

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The proxy and annual reporting season has begun, with relatively few changes in reporting requirements from last year. Here are some tips to take you through the season and prepare for changes to come.

1. *Consider the readability of your disclosure documents, particularly the proxy statement.* While it is tempting just to mark up last year's proxy statement, it is always better to take a fresh look for content and style. Make sure your company's current strategies are reflected in the overall organization of the disclosure. Consider adding an executive summary to the proxy statement and links throughout the document to take the reader from one section to another.
2. *Make sure your company's website and social media strategies are consistent with its disclosure.* The message conveyed on your company's website and in its social media postings may not be the one you want to present to investors, and (in a worst case scenario) there could be some leakage of material trend information before it is otherwise disclosed. Make sure that the message is consistent and that there is sufficient oversight and review of social media postings.
3. *Beware of electronic "spiders" that pick up website postings before they have been made public.* Another source of inadvertent disclosure are "spiders," programs that scour the Internet in Google-bot fashion, looking to uncover corporate information. These bots often search selected urls and may discover unpublished but unsecured webpages of corporate web sites that contain information material to investors. Companies large and small have been victim to such data mining, including Disney and Microsoft. Review the status of your company's cyber security measures and consider whether you have adequately disclosed any cyber security risks.
4. *For smaller reporting companies newly subject to "say on pay" requirements, consider adding additional disclosure similar to the "CD&A" required of larger companies.* Smaller reporting companies are subject to "say on pay" and "say on frequency of pay" voting requirements for the first time in 2013, yet they are not required to include in their proxy statement a "Compensation Discussion and Analysis," where larger companies often make their case for why their executive compensation programs should be approved. Smaller reporting companies may want to add a short section similar to a CD&A to explain their policies and programs.
5. *Make sure to gather the required information concerning compensation consultant independence.* Some of the information required by new Rule 10C-1(b)(4) can be elicited by asking directors and officers if they are aware of any business or personal relationships between the compensation consultant's firm (or the individual consultant) and any member of the compensation committee or any executive officer. These questions can be posed in the annual directors' and officers' questionnaire. Other information, such as the ownership of company stock by the consultant, must be gathered directly from the consultant. Consider creating a questionnaire for compensation consultants and other advisors to the compensation committee.
6. *Consider adopting a policy on pledging and hedging company stock.* The SEC has not yet proposed rules requiring companies to disclose whether employees or directors are permitted to hedge company stock, as mandated by Section 955 of Dodd Frank. In a change from prior years, however, the 2013 Policy Guidelines of ISS deem hedging or "significant" pledging of company

stock by executive officers or directors as a failure of risk oversight, which could lead to a negative voting recommendation by ISS. While companies may choose a number of different approaches, from an outright ban to a preclearance policy or permission under specified circumstances, it is advisable to develop a policy and place it on the board agenda for adoption.

7. *Review your policies on corporate political spending.* Corporate political spending remains a hot issue among shareholder activists and, on January 3, 2013, a new version of the DISCLOSE Act, requiring public companies to disclose political contributions, was introduced in the U.S. House of Representatives.
8. *Make sure to audit your operations to ensure compliance with the SEC's new conflict minerals standard.* Issuers must comply with the new rule this calendar year, with the first reports due on May 31, 2014. This means that companies need to act now to determine if conflict minerals are necessary to the functionality or production of a product and if so, to begin the due diligence on the conflict minerals' source and chain of custody, which must include the engagement of an independent private sector auditor. Note that the conflict minerals rules apply to foreign private issuers as well as U.S. companies.
9. *Consider whether the Iran Threat Reduction and Syria Human Rights Act applies to your company.* The act, signed into law on August 10, 2012 by President Obama, greatly expands the scope of sanctions previously in place and provides for tighter restrictions on American companies that indirectly transact business with Iran through foreign subsidiaries. Additionally, it imposes disclosure obligations on public companies that violate Iran sanctions. These expanded reporting provisions will take effect with respect to reports required to be filed after February 6, 2013. Note that, again, these disclosure obligations apply to foreign private issuers as well as U.S. companies.

About the Author

Bonnie J Roe is a partner in the Corporate Group of Cohen & Gresser LLP, where she represents publicly and privately held companies and investment funds. Ms. Roe has thirty years of experience advising public companies on disclosure, securities law compliance and corporate governance. She has served as counsel for issuers, underwriters and placement agents in connection with public and private offerings, including PIPE transactions and cross-border offerings. Ms. Roe was named as one of New York's *Super Lawyers* for Securities & Corporate Finance in 2011 and 2012 and is mentioned in *Who's Who in America* and *Who's Who in American Law*.

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