January 1, 2013

Resolution 2013: A Year to Optimize Your Brand Online

the SEC reminded companies of its approach to disclosure of financial measures and nonfinancial measures in the MD&A.

- If the measure is not a financial measure, the company should refer to SEC Interpretive Release No. 33-8350 (Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations (Dec. 19, 2003)) for disclosures relating to nonfinancial measures, such as industry metrics or value metrics.
- If the measure is a financial measure, the company should next determine whether the measure falls within the scope of requirements for non-GAAP financial measures, and if it does, the company would need to follow Item 10(e) of Regulation S-K and SEC Release No. 33-8176 (Conditions for Use of Non-GAAP Financial Measures (Jan. 22, 2003)) governing the inclusion of non-GAAP financial measures in filings with the SEC.

In either event, any ratio or measure should be accompanied by a clear explanation of the calculation methodology. Additionally, a company would need to consider its reasons for presenting the particular financial measure and should include disclosure clearly stating why the measure is useful to understanding its financial condition.

Finally, with respect to the contractual obligations tabular disclosure, such disclosure should be prepared with the goal of presenting a meaningful snapshot of cash requirements arising from contractual payment obligations. Companies should develop a presentation method that is clear, understandable and appropriately reflects the categories of obligations that are meaningful in light of their capital structure and business, and should prepare the contractual obligations table with the goal of:

- providing aggregated information about contractual obligations as well as contingent liabilities and commitments in a single location so as to improve the transparency of its short-term and long-term liquidity and capital resources needs; and
- providing context for investors to assess the relative role of off-balance sheet arrangements.

Footnotes should be used to provide information necessary for an understanding of the timing and amount of the specified contractual obligations or, where necessary to promote understanding of the tabular data, additional narrative discussion outside the table should be considered.

Proposed Rules on Short-Term Indebtedness

The SEC has also proposed new short-term indebtedness disclosure rules,[4] with the comment period expiring at the end of November. The proposed rules would require all public companies to disclose more details about their short-term borrowings in their MD&A. Although "financial companies" will have the most requirements to meet, any public company that uses commercial paper, repurchase agreements, letters of credit, promissory notes or factoring arrangements to meet its liquidity needs will be required to disclose additional information in its filings. The final rules may not be available for the upcoming annual report season, but companies should be watchful concerning this possible disclosure area.

Climate Change

On February 8, 2010, the SEC issued interpretive guidance regarding climate change[5] with the aim of clarifying the scope of, and promoting consistency in, disclosures by public companies of material risks related to climate change. While many public companies have been voluntarily reporting climate change-related risks, all public companies will need to reexamine the disclosures they have (or have not) been providing regarding climate change in light of this interpretive guidance.

The SEC highlights the following four areas where climate change may trigger disclosure obligations:

- Impact of legislation and regulation
- Impact of international accords
- Indirect consequences of regulation or business trends
- Physical impacts of climate change

For more information on this topic, see Day Pitney alert titled "SEC Issues Guidance on Climate Change Risk Disclosures" dated February 8, 2010 [click here].

Foreclosure

In October 2010, the SEC's Division of Corporation Finance sent an illustrative letter to certain public companies as a reminder of the disclosure obligations they should consider in light of continued concerns about potential risks and costs associated with mortgage and foreclosure-related activities or exposures. Such disclosure obligations are not limited to financial institutions that sold or securitized mortgages or mortgage-backed securities. Companies that engage in mortgage servicing, title insurance, mortgage insurance and other activities relating to residential mortgages should also consider the disclosure obligations. A copy of the illustrative letter can be found here [click here].

XBRL

In November 2010, the SEC's Division of Risk, Strategy, and Financial Innovation posted observations from its review of filings with eXtensible Business Reporting Language ("XBRL") exhibits submitted from June through August of 2010.[6] Starting in June 2010, large accelerated filers were required to use XBRL, and by June 2011, all public companies will need to report financial statement information to the SEC using XBRL. Companies should note the issues identified by the SEC Staff in its report and should seek to address such issues in their filings. Issues noted by the SEC Staff include incorrectly entering negative values; extending an element where an existing U.S. GAAP Taxonomy element is appropriate; extending because of relatively minor additions to or deletions from the U.S. GAAP taxonomy standard definition; extending because of the context of an element; and extending elements, axis, domains or members to ensure that the XBRL renders in a particular fashion.

Proxy Plumbing

On July 14, 2010, the SEC issued a concept release on the proxy voting system, seeking public comment on the proxy system and proxy mechanics.[7] The comment period for the concept release officially ended on October 20, 2010.

The release focuses on three primary topics:

- the accuracy, transparency and efficiency of the proxy voting process;
- shareholder-issuer communication and participation; and
- the relationship between voting power and economic interest.

With over 200 comment letters received in response to the concept release, the SEC Staff is looking through comments received with a view to moving forward with proposals on discrete issues. Although it is unclear whether any changes will affect the 2011 proxy season, it is important to be aware of the potential changes in this area.

Dodd-Frank Provisions Awaiting SEC Rule-Making

The SEC has provided a timetable [click here] for implementing the Dodd-Frank Act. There are a number of corporate governance and executive compensation items that the SEC will be addressing in the near future.

Compensation Committees, Consultants and Advisors

Compensation Committee Independence:

The Dodd-Frank Act requires the SEC to issue rules directing the national security exchanges to mandate fully independent compensation committees based on new heightened standards that exceed current requirements under both NYSE and NASDAQ rules. Such rules are expected to be similar to the current standards of independence required of audit committee members. Relevant factors in determining a member's independence include:

(i) each board member's compensation, including any consulting or advisory fees or other fees; and

(ii) whether the member is affiliated with the issuer, its subsidiaries or an affiliate of a subsidiary of the issuer.

Compensation Consultants and Other Advisors:

Additionally, the Dodd-Frank Act requires that compensation committees have the authority and funding to retain independent compensation consultants, counsel and other advisors. Compensation committee members would be responsible for the selection and oversight of these advisors. Compensation committees must consider the independence of the compensation consultants, counsel and other advisors in rules to be promulgated by the SEC, which will include:

(i) the provision of other services to the company;

(ii) the amount of fees as a percentage of the compensation consultant's, legal counsel's or advisor's total revenues;

(iii) the compensation consultant's, legal counsel's or advisor's policies and procedures regarding conflicts of interest;

(iv) the compensation consultant's, legal counsel's or advisor's business and personal relationships with the compensation committee; and

(v) any stock ownership by the compensation consultant, legal counsel or advisor.

In addition, companies will be required to disclose in their annual proxy statement:

(i) whether the compensation committee retained a compensation consultant; and

(ii) if any conflicts of interests were raised, how those conflicts were addressed.

Effective Date:

The SEC must issue rules in this area within 360 days of enactment of the Dodd-Frank Act. The SEC has indicated that proposed rules will be issued in 2010 with final rules to be adopted between April and July 2011, the deadline being July 16, 2011. Although the final rules will not affect 2011 proxy disclosure, companies may want to revise their D&O questionnaires and