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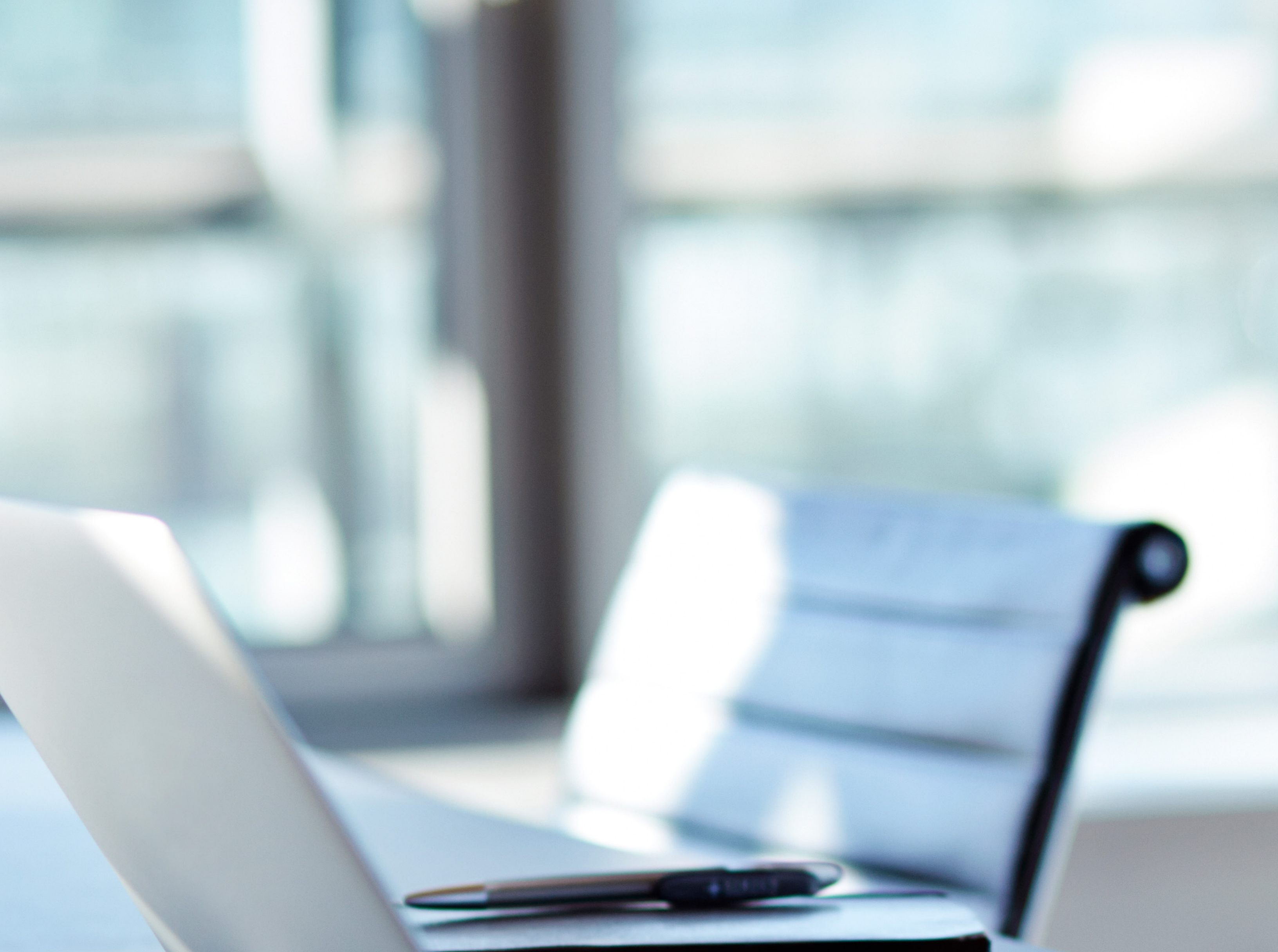


SIX HOT TOPICS & ONE REMINDER:

DEVELOPMENTS IN GOVERNANCE AND DISCLOSURE FOR MLPS

FALL 2017

1 PAY RATIO IMPLEMENTATION: UPDATE FOR THE BOARD AND COMPENSATION COMMITTEE.

The 2018 annual report season will be the first time many companies[1] are required to comply with the SEC's pay ratio rule, which was adopted by the Commission in 2015 pursuant to the Dodd-Frank Act. The pay ratio rule requires companies to disclose (i) the annual total compensation of the median employee, (ii) the annual total compensation of the CEO and (iii) the ratio of those two amounts. The rule is draconian and highly detailed, and involves the interplay between the over 300 pages released by the SEC on the rule and the traditional Item 402 and Form 8-K rules.

Earlier this year, many hoped that either Congress or the SEC would act to either repeal or delay implementation, but it is now clear that most companies will have to comply with the rule in their 2018 disclosure. In addition to the final rule the SEC issued in 2015, the Division of Corporation Finance issued guidance on the rule in October 2016 and September 2017. Several of the compliance and disclosure interpretations issued by the Division substantively change the scope of the rule, therefore a thorough knowledge of both the final rule and the Division's guidance is critical for implementation.

In considering implementation, companies should begin by assessing their employee population and payroll systems. Each company will then need to determine its approach for evaluating its employee population's pay, which will include picking a pay measurement methodology or methodologies. For many companies, completing these initial tasks will represent the majority of the work involved in implementing the rule. Depending on the complexity of a company's employee population (e.g., number of jurisdictions, payroll systems), it may take a company several months to obtain the relevant data.

Note on Other Dodd-Frank Executive Compensation Provisions. In mid-July 2017, the SEC issued an updated Agency Rule List which removed several executive compensation-related proposed rules from the "proposed rule state" list to the "long-term actions" list. The items moved to the "long-term actions" list include the pay-for-performance, clawbacks, and hedging proposed rules. The SEC also moved universal proxy to the "long-term actions" list.

[1] Applicable to all registrants required to provide disclosure under Item 402 of Regulation S-K; therefore, the only companies specifically carved out are smaller reporting companies, foreign private issuers and MJDS filers; in addition, emerging growth companies were specifically carved out by the JOBS Act. Transition periods are provided for companies that cease to be smaller reporting companies or emerging growth companies.

2 PCAOB AUDITOR REPORT REQUIREMENTS: UPDATE FOR THE AUDIT COMMITTEE.

On June 1, 2017, the PCAOB adopted new requirements for auditor reports that, if adopted by the SEC, would significantly modify the auditor's reporting model. On October 23, 2017, the SEC approved the PCAOB's proposed Auditing Standard 3101. The new rules will require auditors to include new disclosures in their reports regarding "critical audit matters."[2] "Critical audit matters" or "CAMs," a new concept in audit reporting, is defined as "any matter arising from the audit of the financial statements that was communicated or required to be communicated to the audit committee and that (1) relates to accounts or disclosures that are material to the financial statements and (2) involved especially challenging, subjective, or complex auditor judgment." It is not currently clear to what degree this new concept will influence other aspects of the audit process, such as the relationships between the audit committee, internal audit, auditors and management. The PCAOB's new requirements also include disclosures regarding the auditor's tenure and independence.

3 NEW ACCOUNTING STANDARDS DISCLOSURE: UPDATE FOR THE AUDIT COMMITTEE.

In May 2014 the Financial Accounting Standards Board ("FASB") issued ASU No. 2014-09, *Revenue from Contracts with Customers*. Since then, several additional ASUs have been issued to clarify various elements of the guidance and to extend the date of implementation. Now adoption is around the corner—adoption is effective for reporting periods beginning after December 15, 2017 for calendar-year companies, and early implementation is permitted. SEC staff has urged companies to raise questions regarding implementation sooner rather than later, and has indicated that it expects implementation to have a material impact on most companies' disclosures. In addition to a company's disclosure, implementation is likely to require changes in a company's internal control procedures. Implementation may also have unexpected consequences, for example, companies planning to file a new Form S-3 or a post-effective amendment to a Form S-3 may want to consider doing so prior to implementation to avoid having to revise 2015 financial statements as well (although this requirement would not apply in every instance). Many companies are also in the process of assessing the impact of or implementing other ASUs, including ASUs regarding measuring inventory, the presentation of tax assets and liabilities, accounting for share-based payment transactions, and recognition of certain assets and liabilities related to leases.

[2] The PCAOB's standard specifies that CAMs will not have to be disclosed in audit reports issued in connection with audits of emerging growth companies; brokers and dealers; investment companies other than business development companies; or employee stock purchase, savings and similar plans.

4

UPDATE ON ENVIRONMENTAL AND SUSTAINABILITY MATTERS: UPDATE FOR THE BOARD AND OTHER RELEVANT COMMITTEES.

On August 31, 2017, Vanguard released its annual ***Investment Stewardship Report***, which greatly expanded on prior years' reports, along with **an open letter** to directors of public companies from Chairman and CEO Bill McNabb. In its Report, Vanguard expressed concern regarding the "absence of clear disclosure and informed board oversight" over climate change risk, and indicated that it will be paying closer attention to corporate disclosures on climate change risk. On August 14, 2017, State Street Global Advisors issued new climate change disclosure guidance targeting U.S. and international public companies primarily in the oil and gas, utilities and mining sectors. The new guidance, entitled ***Perspectives on Effective Climate Change Disclosure***, identifies "best practices" in climate-related disclosure (primarily referencing European companies) and prescribes detailed disclosure methods in areas it deems pertinent to investors. This guidance follows State Street's ***Global Proxy Voting and Engagement Principles***, published in March 2016 and its **January 2017 letter to corporate directors**, both of which made clear that State Street was engaging directly with companies on enhancing environmental disclosures. In June 2017, the **Task Force on Climate-related Disclosures**, sponsored by the Group of 20, which has called for new disclosures by companies in all sectors, similarly urged companies to assess the viability of their short- and long-term business models in relation to hypothetical, near-future scenarios in which demand for carbon assets is significantly lower and the price of carbon assets has changed significantly.

Despite the early June 2017 announcement of the President's decision to withdraw the U.S. from the Paris climate agreement, a number of U.S. cities, states and companies have launched various efforts and expressed commitments to pursue the goals of the Paris agreement. In anticipation of President Trump's announcement, on May 10, 2017, the CEOs of 30 large U.S. companies **publicly reinforced their commitment** to continuing their climate change mitigation efforts. Days after President Trump announced that the U.S. would be withdrawing from the global climate agreement, more than 1,200 business leaders, mayors, governors and college presidents promised in **an open letter** to "continue to support climate action to meet the Paris Agreement." Given recent developments, we expect the 2 degree scenario to be of particular focus during the upcoming 2018 annual report season. Although these developments are most immediately meaningful for companies that hold annual meetings, we expect that companies in the energy and related sectors will see a rise in investor interest in these matters, even if those companies do not hold annual meetings.

5 BOARD DIVERSITY: UPDATE FOR THE BOARD.

Board diversity has been a matter of increasing interest among investors and investor-related groups in the U.S. While various European countries have either required or recommended gender quotas for boards of directors over the past few years, there has been less appetite in the U.S. for limitations in this area. Recently, however, a number of influential players in the U.S. investment world have made statements regarding the importance of board diversity, signaling that boardroom diversity may become a more serious issue for more investors when they evaluate company performance. For the 2017 meetings, State Street voted against the re-election of directors at 400 companies — over 10% of all U.S. public companies — for failure to take steps to add women to their boards in adherence with State Street's board diversity initiative. In its March 2017 top engagement priorities, BlackRock indicated that it plans to look at how companies are working to increase boardroom diversity in assessing company performance/ responsiveness. Vanguard's Investment Stewardship Report, in addition to discussing Vanguard's views on climate change-related disclosures and proposals, also focuses on gender diversity on boards and indicates that Vanguard will consider whether companies are making meaningful progress in this area in their future voting decisions. Although these developments are most immediately meaningful for companies that hold annual meetings, investor interest in this topic is likely to bleed into the marketplace more generally, and even companies that are closely held and/or do not hold annual elections may face some investor pressure.

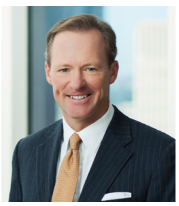
6 INLINE XBRL: UPDATE FOR THE BOARD.

On March 1, 2017, the SEC proposed rules to require the use of the Inline eXtensible Business Reporting Language (XBRL) format for the submission of operating company financial statement information and certain mutual fund information.[3] Inline XBRL allows XBRL data to be embedded directly into an HTML document. With Inline XBRL, filers need to tag the required disclosures using the applicable taxonomy, and the tagging would be performed within the HTML document instead of a separate XBRL exhibit. The proposed amendments would also eliminate the requirement for filers to post Interactive Data Files on their websites.

[3] The proposed Inline XBRL requirements for financial statement information would apply to all operating company filers, including smaller reporting companies, emerging growth companies, and foreign private issuers that are currently required to submit financial statement information in XBRL. The proposed Inline XBRL requirements would be phased in based on the category of filer.

CONTACTS

For more information, visit our Corporate Governance page at:
http://www.velaw.com/What-We-Do/Corporate-Governance/.



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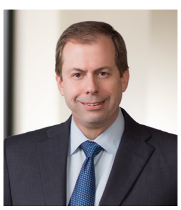

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A REMINDER: CHECK YOUR DISCLOSURE ON KNOWN TRENDS AND UNCERTAINTIES.

On June 15, 2017, the SEC entered an order instituting cease-and-desist proceedings against the former CEO and CFO of UTi Worldwide. The CEO and CFO each agreed to pay a civil money penalty of $40,000 to settle the proceeding, which alleged that they caused the company to violate Section 13(a) of the Securities Exchange Act of 1934 by failing to comply with the requirement of Regulation S-K Item 303 that it disclose "any known trends or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way." The U.S. Supreme Court recently granted *certiorari* in *Leidos, Inc. v. Indiana Public Retirement System*, No. 16-581, which presents the question of whether non-disclosure of "known trends or uncertainties" under Item 303 may give rise to private liability for securities fraud under Section 10(b) of the Exchange Act.

The analysis and disclosure of known trends and uncertainties is a central part of a company's MD&A, and the SEC's Division of Corporation Finance regularly issues comments on this aspect of MD&A. One reason for the frequency of comments is that companies may update financial and operational information, but may fail to step back and assess whether new trends are emerging. Known trends and uncertainties may include matters that may not otherwise be the subject of required disclosure if those matters may impact the company's liquidity, capital resources, or results of operations.