

Table of Contents

1. D&O Questionnaires
2. Form 10-K
3. Annual Report & 10-K Wrap (Rule 14a-3)
4. Preliminary Proxy Statements (Rule 14a-6(a))
5. Proxy Card/Voting Instruction Form (Rule 14a-4)
6. E-Proxy/Notice & Access (Rule 14a-16)
7. Management Proposals
8. Shareholder Proposals (Rule 14a-8)
9. Confidential Treatment Requests (Exchange Act Rule 24b-2/
Securities Act Rule 406/FOIA Rule 83)
10. SEC Comment Letter Process
11. Business Disclosure (Item 101 of Regulation S-K)
12. Properties Disclosure (Item 102 of Regulation S-K)
13. Legal Proceedings Disclosure (Item 103 of Regulation S-K)
14. Description of Securities Disclosure (Item 202 of Regulation S-K)
15. MD&A (Item 303 of Regulation S-K)
16. Accountant Changes & Disagreements Disclosure
(Item 304 of Regulation S-K/Item 4.01 of Form 8-K)
17. Internal Controls Disclosures (Rules 13a-14 & 13a-15/Item 308 of Regulation S-K)
18. D&O Biographical/Director Qualifications & Skills Disclosure
(Item 401(a)-(e) of Regulation S-K)
19. Director & Executive Officer’s Legal Proceedings Disclosure
(Item 401(f) of Regulation S-K)
20. Beneficial Ownership Table (Item 403 of Regulation S-K)
21. Related Party Transactions Disclosure (Item 404 of Regulation S-K)

22. Section 16 Delinquencies Disclosure (Item 405 of Regulation S-K)
23. Code of Ethics/Conduct Disclosure
(Item 406 of Regulation S-K/Item 5.05 of Form 8-K)
24. Board Meeting/Board Committee Disclosure (Item 407(b) of Regulation S-K)
25. Director Attendance at Annual Meetings Disclosure
(Item 407(b) of Regulation S-K)
26. Nominating Committee Process/Director Nominee Qualifications Disclosure
(Item 407(c) of Regulation S-K)
27. Audit Committee Disclosure (Item 407(d) of Regulation S-K)
28. Shareholder Communications with Directors Disclosure
(Item 407(f) of Regulation S-K)
29. Risk Factors Disclosure (Item 105 of Regulation S-K)
30. 10-K and 10-Q Exhibits (Item 601 of Regulation S-K)
31. CEO/CFO Certifications (Item 601(b)(31) & (32) of Regulation S-K/
Exchange Act Rules 13a-14/15d-14)
32. Voting Requirements & Results Disclosure
(Items 6 & 21 of Schedule 14A/Item 5.07 of Form 8-K)
33. Audit Fees & Pre-Approval of Non-Audit Services Disclosure/Auditor Ratification
(Item 9 of Schedule 14A/Item 14 in Part III of Form 10-K)

Detailed Table of Contents: Volume 1

Chapter 1—D&O Questionnaires

I.	Who Manages the D&O Questionnaire Process	1-3
	– What is the D&O Questionnaire?	1-3
	– Who Prepares (& Updates) the Questionnaire?	1-3
	– No Need for Director Involvement in Preparing Questionnaire Form	1-3
II.	What is the D&O Questionnaire Process Timeline	1-3
	– When are Questionnaires Typically Distributed?	1-3
	– Distribution of Last Year’s Responses to Insiders	1-4
	– When are Questionnaires Typically Returned?	1-4
	– Setting Up Interviews to Review Responses Not Realistic	1-4
	– Drafting Disclosures While Questionnaires Being Completed	1-5
	– How Should Questionnaire Responses Be Reviewed?	1-5
	– How to Handle Incomplete Questionnaires	1-5
	– How to Handle Non-Responsive Directors & Officers	1-6
	– Circulation of Certain Responses to Directors	1-6
III.	Who Receives D&O Questionnaires	1-6
	– Which Current Officers Receive Questionnaires?	1-6
	– Which Former Officers Receive Questionnaires?	1-7
	– Should New Executive Officers Receive a Questionnaire?	1-8
	– Which Current Directors or New Nominees Receive Questionnaires?	1-9
	– Should Potential Director Nominees Receive Questionnaires?	1-9
	– Should Former Directors & Current Directors Not Standing for Re-Election Receive Questionnaires?	1-10
	– Should 5% Shareholders Receive Questionnaires?	1-11
IV.	How to Send D&O Questionnaires—& Receive Responses	1-12
	– How Should Questionnaires Be Sent?	1-12
	– Should Questionnaires Be Sent to a Director’s Assistant?	1-12
	– Should Questionnaires Be Sent as Online Survey or iPad App?	1-13
	– No Need to Obtain Original Signature Pages	1-13
	– How Should Questionnaire Responses Be Returned?	1-13

V.	What Should Be Included in D&O Questionnaire Forms	1-14
	a. Questionnaire Philosophy	1-14
	– Making Questionnaire User-Friendly	1-14
	– Try to Minimize Non-Responses	1-14
	– Provide Ample Room to Respond to Questions	1-14
	– Whether to Pre-Populate D&O Questionnaires	1-15
	– Asking More Than Just Proxy Disclosure Items: Soft Relationships	1-15
	– Carefully Consider Any “Demographics” Questions	1-16
	– Keep Questionnaire Length Manageable	1-17
	b. Applicable to Executive Officers, Directors & New Director Nominees	1-17
	– Obtain Biographical Information	1-17
	– Obtain Legal Proceedings Information	1-18
	– Obtain Beneficial Ownership Information	1-18
	– Obtain Change-in-Control Information	1-18
	– Obtain Hedging Information	1-18
	– Obtain Section 16 Reporting Information	1-20
	– Obtain Related Person Transaction Information	1-20
	– Obtaining Related Person Transaction Information More Frequently	1-23
	– Obtain Related Person Information for Auditing Standard #18 Purposes	1-23
	– Auditing Standard #18: Auditors May Require Quarterly Information	1-24
	– Auditors Don’t Typically Review D&O Questionnaire	1-25
	– Consider Whether to Obtain Conflicts of Interest Information (Even Though Collected Throughout Year)	1-25
	– Obtain Compensation Committee Interlocks Information	1-26
	– Obtain Compensation Information	1-27
	– Obtain FCPA Information	1-28
	– Obtain Information About Iran-Related Business Activities	1-28
	– Whether to Obtain Competition-Related Information	1-29
	c. Applicable Only to Non-Executive Directors & New Director Nominees	1-30
	– Obtain Independence Information	1-30
	– Obtain Audit Committee Related Information	1-30
	– Obtain Compensation Committee Related Information	1-31
VI.	Whether to Conduct Diligence on D&O Questionnaire Responses	1-31
	– Diligence Beyond D&O Questionnaire Limited	1-31
	– Director Nominee Background Verification	1-32
	– Process for Vetting Officers Asked to Serve on Other Boards	1-32
VII.	What are Regulatory Consequences for Misleading D&O Questionnaire Responses	1-33
	– Companies Should Use Questionnaires as Part of Disclosure Controls & Procedures	1-33

– Directors & Officers Can Be Charged for Failure to Respond Accurately	1-33
VIII. Retention Periods for D&O Questionnaire Responses	1-34
Appendix A—Sample Annotated D&O Questionnaire	1-35

Chapter 2—Form 10-K

I. SEC Rules and Regulations	2-7
A. Rule as to Use of Form 10-K	2-7
B. Application of General Rules and Regulations	2-7
C. Preparation of Report	2-8
D. Signature and Filing of Report	2-8
E. Disclosure With Respect to Foreign Subsidiaries	2-8
F. Information as to Employee Stock Purchase, Savings and Similar Plans	2-9
G. Information to be Incorporated by Reference	2-9
H. Integrated Reports to Security Holders	2-10
I. Omission of Information by Certain Wholly-Owned Subsidiaries	2-10
J. Use of this Form by Asset-Backed Issuers	2-12
II. SEC Staff Guidance	2-13
A. Form 10-K CDIs	2-13
B. Regulation S-K CDIs	2-18
C. Interactive Data CDIs	2-20
III. How the Rules Work	2-21
a. Filer Categories & Deadlines	2-21
i. Filer Categories	2-21
– Definitions of “Accelerated” and “Large Accelerated” Filers	2-21
– Definition of “Affiliate”	2-22
– Definition of “Calendar Month”	2-22
– Measuring Date for Accelerated Filer and Large Accelerated Filer Status	2-22
– Exiting Accelerated Filer and Large Accelerated Filer Status	2-23
– New Filer Status Takes Effect at Fiscal Year-End	2-23
– Business Combination Impact on Filer Status	2-23
– Definition of “Smaller Reporting Company”	2-24
– Definition of “Emerging Growth Company”	2-25
– Abbreviated Form 10-K for Wholly-Owned Subsidiaries	2-26

ii.	Deadlines	2-27
–	Deadline If Due Date is Non-Business Day	2-27
–	First Form 10-K After Effectiveness of First Registration Statement	2-27
–	Special Reports on Form 10-K for Section 15 Companies	2-27
–	Prepare Time & Responsibility Schedule	2-27
iii.	Transition Issues for Companies Changing Filer Categories	2-28
–	Filing Deadlines	2-28
–	Simultaneous SRC & Accelerated Filer Status: Annual Report Due Sooner But Can Use Scaled Disclosure	2-28
–	Exiting SRC Status: Can Still Use Scaled Disclosure for First Annual Report	2-29
–	Exiting EGC Status	2-29
iv.	Transition Reports for Companies Changing Fiscal Years	2-29
–	Transition Period Six Months or More	2-30
–	Transition Period Less Than Six Months	2-30
–	Transition Period One Month or Less	2-30
–	Effect of Change of Fiscal Year on Accelerated Filer Status	2-30
b.	Rule 12b-25 Extensions	2-31
–	Only One Extension Permitted	2-31
–	Form 12b-25 Deadline When Due Date is Weekend or Holiday	2-31
–	File Form 12b-25 Regardless If Anticipate Filing Within Extension Period	2-32
c.	Incorporating Proxy Statement Information Into 10-K	2-32
–	Part III Information Can Be Incorporated from To-Be-Filed Proxy Statement	2-32
–	Incorporation by Reference Is Common Practice	2-32
–	Rule 12b-25 May Not Be Used to Extend 120-Day Deadline	2-33
–	Preliminary Proxy Filing Does Not Satisfy Requirement	2-33
–	Part III Information Must Be Filed By 120-Day Deadline Even If Company Acquired	2-33
–	Incorporate By Reference & Amend Later if Needed	2-33
d.	Incorporating Glossy Annual Report Into 10-K	2-33
e.	Amending 10-K	2-34
f.	Consequences of Late Filings	2-34
g.	Signature & CEO/CFO Certification Requirements; Filing Mechanics	2-35
–	Signature Requirements	2-35
–	How to Obtain Signature	2-35
–	Paper Filings No Longer Required	2-36
–	Include Cover Letter To Acknowledge Change in Accounting Principle	2-36

– CEO/CFO Certifications	2-36
– Different Dates for 10-K Signatures & CEO/CFO Certifications— and 10-K Filing Date	2-36
– Need to Retain Manual Signatures for Five Years	2-36
h. Annual Reports to Shareholders	2-37
– Annual Report Must Include Stock Performance Graph	2-37
– Delivery Alternatives	2-37
i. Typeface & Printing Requirements	2-37
j. Cover Page Requirements	2-38
– Provide Identifying Information	2-38
– “Principal Executive Office” Is Where Executives Are Located	2-38
– Exchange Act Registration & Trading Symbol	2-39
– Current Filer Status	2-39
– XBRL/Interactive Data Status	2-39
– Filer Status	2-39
– Emerging Growth Company’s Extended Transition	2-39
– Other Status Indicators	2-40
– Public Float	2-40
– Number of Outstanding Shares of Common Stock	2-40
– Incorporation By Reference	2-40
– XBRL Tagging Required	2-40
– Cover Page Tagging When Company Name Doesn’t Match Edgar Conventions	2-41
– Amended 10-K	2-41
k. Calculating “Public Float”	2-41
l. Audit Reports	2-44
m. Substantive Requirements for 10-K	2-44
– Item 1: Business	2-44
– Item 1A: Risk Factors	2-44
– Item 1B: Unresolved Staff Comments	2-44
– Item 2: Properties	2-45
– Item 3: Legal Proceedings	2-45
– Item 4: Mine Safety Disclosures	2-45
– Information About Executive Officers	2-45
– Item 5: Market for Registrant’s Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities	2-46
– Item 6: Selected Financial Data	2-47
– Item 7: Management’s Discussion and Analysis of Financial Condition and Results of Operations	2-47
– Item 7A: Quantitative and Qualitative Disclosures About Market Risk	2-47

– Item 8: Financial Statements and Supplementary Data	2-47
– Item 9: Changes In and Disagreements with Accountants on Accounting and Financial Disclosure	2-48
– Item 9A: Controls and Procedures	2-48
– Item 9B: Other Information	2-48
– Item 10: Directors, Executive Officers and Corporate Governance	2-49
– Item 11: Executive Compensation	2-49
– Item 12: Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters	2-49
– Item 13: Certain Relationships and Related Transactions and Director Independence	2-50
– Item 14: Principal Accounting Fees and Services	2-50
– Item 15: Exhibits and Financial Statement Schedules	2-50
– Item 16: Form 10-K Summary	2-50
n. Other Disclosure Requirements	2-50
– Iran-Related Business Activities	2-50
– Cybersecurity Risks & Cyber Incidents	2-51
– Tax Shelter Penalty Disclosure	2-51
o. Exhibits	2-51
IV. Common Questions & Our Analysis	2-51
a. Deadlines	2-51
– No “Time of Day” Practice for Filing 10-K	2-51
– Filer Status Transition: Smaller Reporting Company to Accelerated Filer	2-52
– Foreign Private Issuer Voluntarily Filing on 10-K Must Comply with All Form Requirements	2-52
– 10-K is Late If You Fail to File Incorporated Proxy Within 120 Days	2-53
– Change in Fiscal Year Likely Doesn’t Extend 120-Day Deadline	2-53
– Must File Part III Information Before Form 15	2-54
– Can File Incorporated Proxy Statement Prior to Record Date (But There Are Risks)	2-55
– Impact on 10-K of Omitting Required Proxy Proposal	2-55
– Bankruptcy & 10-Ks	2-56
– Must File 10-K for Year in Which Registration Statement Became Effective	2-56
– Must File 10-K for Year in Which Registration Statement Was Updated	2-57
b. Amendments	2-58
– Don’t Amend for Minor Typo	2-58
– Effect of Form 10-K/A on 10-K “Wrap”	2-58
– Updating 10-K/A with Items Disclosed in Intervening 8-K	2-58

– Auditor Consent Not Needed in 10-K/A Unless Amendment Includes Financials	2-59
– Amending Financial Schedules in 10-K/A	2-59
– 10-K Amendment After Printing Glossy Annual Report	2-60
– Amendment Must Set Forth Full Text of Each Item Being Amended	2-60
– No 10-K Requirement to Disclose Annual Meeting Date or Amend for New Date	2-61
– Amend Prior-Year 10-K to Disclose Omitted Related Party Transaction	2-61
c. Rule 12b-25 Deadline Extensions	2-62
– Form 12b-25 Can Be Filed Early	2-62
d. Difficult to Partially File MD&A or Financials	2-62
e. Annual Report to Shareholders	2-63
– Correct Minor Typos in 10-K Before Mailing	2-63
– Copies of Glossy Annual Reports to SEC & Stock Exchange	2-63
– No Board Approval Requirement for Annual Report	2-64
– Affidavit of Mailing	2-64
– Annual Meeting & Report Requirements If Meeting Missed/Delayed	2-65
– When to Include Undertaking to Provide Free Form 10-K	2-66
f. Cover Page	2-66
– Determination of “Affiliates”	2-66
– Non-Affiliate Holdings Calculation for 10-K Cover Page	2-67
– Unvested RSUs Not Considered Outstanding	2-68
– Non-Convertible Voting Preferred Stock Isn’t “Common Equity”	2-68
– Use Consolidated Financials to Calculate Public Float	2-69
– Shares Held in Escrow Considered Outstanding	2-69
– XBRL Box for First Annual Report	2-70
– Unvested Restricted Stock Considered Outstanding	2-70
– Shares in Rabbi Trust Likely Considered Outstanding	2-70
– Number of Shares Outstanding for Amended 10-K Cover Page	2-71
– Impact of Missed Form SD on 10-K Cover Page	2-71
– Voluntary Filers & Section 16 Box	2-72
– Foreign Private Issuer’s Agent for Service	2-72
– Incorrect Checking of “Accelerated Filer” Box	2-73
– Incorrect Checking of “WKSI” Box	2-73
– WKSI Determination Date for 10-K Cover Page	2-73
– Should Check Two Boxes If Both EGC & Smaller Reporting Company	2-74
– Can Check “SRC” Box for Year That Float First Exceeds \$250 Million	2-74
– No Transition Period When Exiting EGC Status	2-74
– Use Explanatory Notes on Cover Page If Necessary	2-75
– Not Worth Amending 10-K for New Corporate Phone Number	2-75

g.	Substantive Requirements for 10-K	2-75
	– Cut-Off Date for 10-K Disclosures	2-75
	– Include All 10-K Item Headings—Even If Inapplicable	2-76
	– Don’t Forget Item 16’s “Summary Page”	2-76
	– Include Cover Letter to Acknowledge Change in Accounting Principle	2-77
	– Consolidate Financials of Majority-Owned Entities	2-77
	– Combined Reporting but Separate Financial Statements Still Required	2-78
	– Going Concern & Financial Statements Issued Date	2-78
	– Include 701(f) Disclosure for 1st Quarter IPO	2-79
	– Include 701(f) Disclosure Even If “Use of Proceeds” Reported on 8-K	2-79
	– Auditor Attestation May be Omitted After Reverse Merger	2-79
	– Voluntary Disclosure: Reasons for Merger	2-80
	– Include 701(b) Information in 10-K If Not Previously Disclosed	2-80
	– Post-Closing 8-K Unnecessary If No Changes to Private Offering Disclosure	2-81
h.	Signature and Approval Requirements	2-81
	– Board Typically Sees Draft 10-K—And May Meet to Approve	2-81
	– Power of Attorney Can Be Signed Far In Advance	2-82
	– Power of Attorney for Future Filings Not Permitted	2-82
	– Specifically Identifying PFOs vs. PAOs	2-83
	– Retain One Set of Signature Pages	2-83
i.	Incorporation into Registration Statements	2-84
	– Form S-1 “Shelf” Requires Part III Information	2-84
V.	History	2-84
	– Deadlines	2-84
	– Substantive Requirements	2-85

Chapter 3—Annual Report & 10-K Wrap (Rule 14a-3)

I.	SEC Rules and Regulations	3-5
II.	SEC Staff Guidance	3-12
III.	How the Rules Work	3-15
	a. Understanding the Basics	3-15
	– What is a “Glossy Annual Report”?	3-15
	– Understanding “Filing” v. “Furnished”	3-15
	– Differs From Form 10-K	3-16
	– Often Printed on Glossy Paper	3-17

– Typeface & Printing Requirements	3-17
– Required When Directors Elected	3-17
– May Incorporate by Reference Into Form 10-K	3-17
– May Integrate with 10-K	3-17
– May Combine With Proxy Statement (But Rare)	3-18
– May Use “10-K Wrap” Instead	3-18
– May Use Summary Annual Report With 10-K	3-18
– Glossy Annual Reports Don’t Need CEO/CFO Certifications (But Some Disclosures Are Covered)	3-19
– Wrapped Form 10-Ks Need CEO/CFO Certifications	3-19
b. Information Required	3-19
– Rule 14a-3(b)’s Bare Minimum	3-19
– EGCs Provide Scaled Disclosure	3-20
– Financial/Financial-Related Information Required	3-20
– Need to Include Selected Financial Data	3-20
– Selected Financial Data Relief for Smaller Reporting Companies & EGCs	3-21
– Requirements for Financial Statements	3-21
– Requirements for Supplementary Financial Information	3-22
– MD&A Required	3-22
– Market Risk Disclosure Required	3-22
– Disclose Changes in—& Disagreements with—Accountants	3-23
– Regulation G Applies	3-23
– Business Disclosure Required	3-23
– Stock Information Required	3-23
– Stock Performance Graph Required	3-24
– Minimal Director & Executive Officer Disclosure Required	3-25
– Include Undertaking to Provide Form 10-K Upon Request	3-25
– Often Includes Other Information	3-25
c. Incorporation by Reference	3-26
– Incorporation Into Form 10-K Permitted	3-26
– Must File as Exhibit 13	3-26
– Printers Proof Can Be Filed as 10-K Exhibit	3-27
– Incorporation Into Proxy Statement Permitted (But Rare)	3-27
d. Delivery to Shareholders	3-27
– Delivery Required If Director Election Upcoming	3-27
– Must Deliver Annual Report Before (or With) Proxy Statement	3-28
– May Use Householding	3-28
– Can Be Delivered Electronically Under E-Proxy Rules	3-28
– Don’t Typically Need to Deliver to Preferred Stock/Convertible Holders	3-29

– Reports Not Available on SEC’s Website	3-29
e. Furnishing to the SEC & Exchanges	3-29
– Don’t Need to Furnish 7 Copies to Corp Fin (If Post Annual Report Online)	3-29
– May Furnish to SEC Via Edgar (If Don’t Post Them Online)	3-30
– “Furnished” for Information Purposes Only; Not “Filed” Except for Sections Incorporated or Integrated	3-31
– Forward-Looking Safe Harbor Applies	3-31
– NYSE Doesn’t Require Hard Copies (If All Proxy Materials Available on Edgar)	3-32
– Nasdaq Doesn’t Require Hard Copies	3-32
IV. Practice Tips	3-32
– Prepared Concurrently With 10-K & Proxy Statement	3-32
– IR Department Often “Owns” Annual Report	3-32
– Finance & Legal Departments Involved	3-33
– Outside Counsel Sometimes Involved	3-33
– Formatting Requirements Flexible	3-33
– Investors Like CEO Letters (But You Might Need to File Them)	3-34
– Can Use Entire 10-K In Lieu of Separate Annual Report	3-34
– Can Prepare 10-K Wrap	3-34
– Can Use Black & White to Reduce Costs	3-35
– Tips to Get Shareholders to Read Your Annual Report	3-35
– Most Provide Annual Reports In Both Print & Online Formats	3-35
– Trend Toward Posting Additional Content Online	3-36
– Investors Like Online Video Content If Not Duplicative	3-36
– How to Create Effective Video Annual Reports	3-37
V. Common Questions & Our Analysis	3-39
a. Delivery to SEC, Exchange & Shareholders	3-39
– Furnish Annual Report to SEC by Mail, Edgar or Posting to Corporate Website	3-39
– IR-Hosted Page Likely Counts as “Corporate Website” for Annual Report	3-39
– Filing Annual Report as 10-K Exhibit Doesn’t Eliminate Requirement to Furnish	3-40
– Using 10-K as Annual Report Doesn’t Eliminate Requirement to Furnish	3-40
– Deadline for Furnishing Tied to Proxy Filing & Mailing	3-40
– NYSE Doesn’t Require Hard Copies (If All Proxy Materials Available on Edgar)	3-41

- E-Mailed Reports Not Permitted for Furnishing 3-41
- Deadlines for Delivering Annual Meeting Materials 3-41
- Partial Mailing to Meet Deadline 3-42
- Affidavit of Mailing 3-43
- b. Substantive Requirements for Annual Reports 3-43
 - Performance Graph in 10-K Doesn’t Satisfy Annual Report Requirement . . . 3-43
 - May Also Include Performance Graph in Proxy Statement 3-44
 - Third Party Acquires a Peer Company: Two Ways to Handle 3-44
 - CEO/CFO Certifications Don’t Directly Cover Annual Report 3-45
 - Regulation G Applies to Annual Report 3-45
 - Regulation G Reconciliation Required Even If Previously Provided 3-45
 - No Board Approval Specifically Required for Annual Report 3-46
 - Correct Minor Typos in 10-K Before Mailing 3-46
 - No Need for Reverse Disclaimer About Incorporation By Reference 3-46
- c. Format of Annual Report & Form of Delivery 3-47
 - Including Other Materials in Mailing Permitted 3-47
 - Annual Report May Be Multiple Documents 3-47
 - “Super 8-K” Can Serve As Annual Report 3-48
 - Target Financials Not Required for Annual Report—Facts Determine
Whether to Include in Proxy Statement 3-48
 - Combined Proxy & Annual Report Permitted 3-49
 - ADA Formatting for Annual Report & Meeting 3-49
 - Signature Not Required on Notice of Annual Meeting 3-50
- d. 10-K Wraps 3-50
 - Exhibits Not Required To Be Delivered As Part of 10-K Wrap 3-50
 - No Need to Provide Undertaking to Provide 10-K If Use 10-K Wrap 3-51
 - Impact on 10-K Wrap When Fail to File Proxy Within 120 Days 3-51
 - Amend 10-K If Wrap Would Omit Intervening Required Disclosure 3-51
 - Annual Report’s Deficient When Restatement Pending 3-52
 - Handling List of Officers & Directors in 10-K Wrap 3-53
 - 10-K Wrap Cost Savings 3-53
 - Rules Don’t Require “Letter to Shareholders” or Other “Wrapped” Info . . . 3-54
 - File “Letter to Shareholders” With Proxy If “Soliciting Material” 3-54
 - Include Forward-Looking Statements Disclaimer in “Letter to
Shareholders” If Discussing Major Events 3-55
 - Difficult to Incorporate 8-K Into Proxy (But Not Vice Versa) 3-55
 - Identifying Directors in 10-K Wrap 3-56
- e. Annual Meeting Change or Delay 3-57
 - Annual Meeting & Report Requirements If Meeting Missed/Delayed 3-57
 - Changing Location of Annual Meeting 3-57
 - Last-Minute “Annual Meeting” Location Change: Reconvene Nearby 3-58

Chapter 4—Preliminary Proxy Statements (Rule 14a-6(a))

I.	SEC Rules and Regulations	4-4
II.	SEC Staff Guidance	4-6
III.	How the Rules Work	4-7
	a. When Are Preliminary Proxy Statements Required	4-7
	– Purpose of Preliminary Proxy Statements	4-7
	– When Are Preliminary Proxy Statements Required	4-7
	– Proxy Statements With Routine Matters Don’t Need to Be Filed in Preliminary Form	4-8
	– Say-on-Pay & Say-on-Frequency Don’t Trigger Preliminary Proxy Statement	4-8
	– Proxy Contests Trigger Preliminary Proxy (& Are Almost Always Reviewed)	4-8
	– Increase to Authorized Shares: Preliminary Proxy Should Discuss Planned Use	4-9
	– Preliminary Proxy Required Even If Article Amendments Are Shareholder Friendly	4-9
	– Most Compensation Plans Exempt from Preliminary Proxy Filings	4-9
	– Increase of Shares Under Equity Comp Plan Might Trigger Preliminary Proxy	4-10
	– Preliminary Required If Seeking Ratification or Approval of Awards	4-10
	– Preliminary Proxy Statements & ESPPs	4-10
	– Adjournment Box Doesn’t Trigger Preliminary Proxy Statement	4-11
	– NYSE Encourages Sending Them Copies; Nasdaq Does Not	4-11
	b. SEC Staff Screening & Review Process	4-11
	– 10-Day Waiting Period Once File Preliminary Proxy to See If Reviewed	4-11
	– Computation of 10-Day Waiting Period	4-11
	– 10-Day Clock Restarts for Fundamental Change or Added Proposal	4-12
	– Early Termination of 10-Day Waiting Period	4-12
	– SEC Staff Screening Process for Preliminary Proxy Statements	4-12
	– Different Screening Procedures Apply to Proxy Contests & Going Private Transactions	4-13
	– Staff May Call Your CEO/CFO About Preliminary Proxy Statement Review	4-13
	– No Need to Include Cover Letter to SEC (Nor Send Hard Copy to Staff)	4-13

- Staff Review of Preliminary Proxy Statements Includes Entire Proxy Statement 4-13
- Staff Review of Preliminary Proxy Statements May Take Few Days to Few Weeks 4-14
- If Staff Comments, Send Redlined Revisions to Accelerate Processing 4-14
- If Staff Clears Comments Before 10-Day Waiting Period Over, File Definitive Sooner 4-14
- Build Assumption of Staff Review Into Time & Responsibility Schedule 4-14
- Depending on Nature of Comments, May Need to File Revised Preliminary Proxy Statements 4-15
- If Don’t Hear From SEC Staff After Waiting Period, File Definitive Materials Without Calling Staff 4-15
- Don’t File Definitive Proxy Statement Until Staff “Clears” Comment Responses 4-15
- Staff Comments on 10-K Received Right After Preliminary Proxy Filed 4-15
- File Definitive Proxy Materials Once Waiting Period Passes or If Staff Closes Review 4-16
- Closing a ’34 Act Filing Review 4-16
- c. What Gets Filed 4-16
 - Who Cares What Gets Filed 4-16
 - What Can Be Omitted From Preliminary Proxy Statements 4-16
 - Use of Appendices 4-17
 - Using Redlined Plan as Appendix Permissible 4-17
 - Proxy Card Required to Be Filed With Preliminary Proxy Statement 4-17
 - Preliminary Proxy Filing With Additional Soliciting Materials 4-18
 - File Blacklined Version When File Definitive Proxy Materials 4-18
 - Proxy Statement Table of Contents 4-18
- d. Adding or Dropping Proposal After Filing Preliminary Proxy 4-18
 - Adding Proposal After Filing Preliminary Proxy 4-18
 - Dropping Proposal After Filing Preliminary Proxy That Triggered Preliminary Filing 4-18
 - Revised Preliminary Proxy Not Required If Director Resigns During Waiting Period 4-19
 - Change After Filing Preliminary Proxy Not Related to Trigger Proposal . . . 4-19
 - Definitive Proxy Fundamental Change Requires Preliminary/Amendment & 10-Day Wait 4-20
 - Uncertain When Preliminary Goes Stale 4-20

e.	Commencing Solicitation with Preliminary Proxy Materials	4-20
f.	Shareholder Proposal Issues	4-21
	– Preliminary Proxy Not Required for Shareholder Proposals (Even If Effectuating Proposal Would Amend Articles)	4-21
	– Omission of Statement in Opposition from Preliminary Proxy Permitted	4-21
	– Shareholder Complaint Over Statement in Opposition Not Likely to Delay Definitive Proxy Materials	4-22
	– Deciding Whether to Include Statement in Opposition & Shareholder Proposal in Preliminary Proxy If No-Action Pending	4-22
g.	E-Proxy Issues	4-23
	– No Need to File Preliminary E-Proxy Notice	4-23
	– E-Proxy Deadline Independent of Preliminary Proxy Deadline	4-23
	– Staff Review of Preliminary Proxy Might Prevent Use of E-Proxy	4-23
h.	Incorporation By Reference Issues	4-24
	– Can’t Incorporate Part III Information for 10-K from Preliminary Proxy Statement	4-24
	– Incorporation by Reference of Preliminary Proxy Statement Into Form S-3 Permitted	4-24
i.	Consequences for Deficient Preliminary Proxy Statement	4-24
	– No Liability for Filing “Deficient” Preliminary Proxy Statement	4-24
	– Risks of Not Filing Preliminary Proxy Statement When Required to Do So	4-24
IV.	History	4-24

Chapter 5—Proxy Card/Voting Instruction Form (Rule 14a-4)

I.	SEC Rules and Regulations	5-4
II.	SEC Staff Guidance	5-8
	– Exchange Act Rules	5-8
	– Exchange Act Rule 14a-4(a)(3)	5-8
	– Proxy Rules and Schedules 14A/14C	5-10
	– Exchange Act Rule 14a-4(a)(3)	5-12

III. How the Rules Work	5-16
a. Basics	5-16
– What is a “Proxy Card”?	5-16
– Why Are “Proxy Cards” Needed?	5-16
– What Rules Govern Proxy Cards & Proxy Solicitation Process?	5-16
– What is an “Annual Meeting Ballot”?	5-17
– What is a “Voting Instruction Form”?	5-17
– What is Difference Between “Record Holders” & “Beneficial Owners”?	5-17
– Differences Between Proxy Cards & Voting Instruction Forms	5-18
– Who Is Entitled to Vote at Annual Shareholders’ Meetings?	5-18
– What are “Broker Non-Votes”?	5-18
– What is an “E-Proxy Notice”?	5-18
– What is an “Admission Ticket”?	5-19
– What is a “Master Ballot”?	5-19
– What is a “Universal Ballot”?	5-19
b. What Should Be on Proxy Cards	5-20
– Instructions on How to Return Proxy Card	5-20
– Signatures on Proxy Card	5-21
– Bold Type Statement Identifies on Whose Behalf Proxy is Being Solicited	5-21
– Identify Proxies Who Have Authority to Vote Shares	5-21
– State That Proxy Will Be Voted As Instructed	5-22
– Blank Space for Dating Returned Proxy Card	5-22
– Proxies Must Be Dated Properly; No Post-Dated or Undated Proxies	5-23
– Clear & Impartial Description of Each Matter to Be Voted Upon	5-23
– Recommendations of Board for Each Matter to be Voted Upon	5-23
– Boxes Offering Voting Choices Required For Each Matter Other Than Director Elections	5-24
– Intent to Use Discretionary Authority for Boxes Not Checked	5-24
– Shareholder Proposals Wording on Proxy Card	5-24
– How to Distinguish Management vs. Shareholder Proposals	5-25
– Say-on-Pay Wording on Proxy Card	5-25
– Different Director Classes Isn’t Bundling	5-26
– Voting Choices: Director Elections	5-26
– Voting Choices: Director Elections With Pure Majority Vote Standard	5-27
– Allowing to Vote “For”—or “Abstain”—Director Nominees as Group	5-28
– Intent to Vote Shares Per Board Recommendation If Shareholder Fails to Withhold	5-30
– Proxy Card May Confer Discretionary Authority on Certain Matters in Entirety	5-30
– Rule 14a-4(c) May Include Discretionary Authority for Floor Proposals	5-31

– VIFs Need Voting Box for Discretionary Authority	5-31
– No Discretionary Authority to Adjourn Meeting to Solicit Additional Votes	5-32
– Adjourning Annual Meeting; Discretionary Proxy Authority Not Sufficient	5-33
– Postponing Annual Meeting: New Notice May Be Necessary	5-34
– Law Unclear About Using “Recess” to Delay Meeting	5-35
– Location Change Shouldn’t Require Proxy Card Change Provided Location Not Included	5-36
– Director Resignation Doesn’t Require Change to Proxy Card or Proxy Statement	5-36
– Use Practical Solutions for Last-Minute Location Changes	5-36
– Limitations of Authority Conferred by Proxy	5-37
– No Bundling of Matters Permitted on Proxy Card	5-37
– Check With Vote Tabulation Agent If Wish to Use Non-Traditional Proxy Card Format	5-38
c. What Should Be on Voter Instruction Forms	5-38
– Differences Between VIFs & Proxy Cards	5-38
– Broadridge’s Role with VIFs	5-38
– Regulation of Voting Instruction Forms	5-39
– VIFs Not Filed with SEC	5-39
d. How to File Proxy Cards With SEC	5-40
– File As Appendix at End of Proxy Statement; Not as Exhibit	5-40
– Proxy Card Must Be Searchable & Downloadable	5-40
– Inadvertently Omitting Proxy Card from Filing	5-40
– Proxy Card Required to Be Filed With Preliminary Proxy Statement	5-40
e. Voting by Means Other Than Paper	5-40
– Different Ways in Which Shareholders Can Vote	5-40
– Internet & Telephone Voting	5-42
– “For All/Against All” & “For All/Withhold All”	5-42
– E-Proxy Notice Sent Before Proxy Card	5-43
f. Shareholders Can Authorize Others to Vote Their Proxies and Can Revoke & Change Votes	5-43
– Shareholders Can Authorize Others to Vote Their Proxies	5-43
– Shareholders May Appoint Proxy to Attend & Vote at Meeting	5-44
– Companies That Own Stock Typically Appoint Officers as Proxies	5-44
– Problematic to Designate Company as Proxy for Own Shares	5-45
– Shareholders Permitted to Revoke or Change Votes	5-45
– Beneficial Owners Must Effect Changes & Revocations Through Their Nominees	5-46

- Challenges of Dealing With Multiple Executed Proxies
Containing Conflicting Voting Instructions 5-46
- g. Special Situations 5-46
 - Proxy Access & Proxy Cards 5-46
 - Proxy Card Mistakenly Returned to Company Instead of Where
Instructed 5-47

Chapter 6—E-Proxy/Notice & Access (Rule 14a-16)

- I. SEC Rules and Regulations 6-4**
- II. SEC Staff Guidance 6-10**
- III. How the Rules Work 6-10**
 - a. Understanding the Basics 6-10
 - What is “Notice & Access” or “E-Proxy”? 6-10
 - Designed to Reduce Costs and Expand Receipt & Delivery Alternatives . . . 6-10
 - Still Can Deliver Paper If Desired 6-11
 - “Mandatory” Means All Companies Must Use Certain Aspects
of E-Proxy 6-11
 - Not Available for Business Combinations & Other Specified
Circumstances 6-11
 - Limited M&A Situations Where E-Proxy Available
(Reorgs & Domicile Change) 6-12
 - Can Still Use Consents for E-Delivery in Business Combinations 6-12
 - Three Alternatives: Notice-Only, Full Set Delivery or Hybrid 6-12
 - Company’s Choice Dictates Delivery Alternatives for Intermediaries 6-13
 - Before Selecting Delivery Strategy, Check State Law 6-13
 - State Notice Requirements for Shareholder Meetings Still Apply 6-14
 - Combining E-Proxy & State Law Notices 6-14
 - E-Proxy Doesn’t Impact Other Proxy Material Requirements 6-14
 - How Broadridge’s Site Works 6-14
 - Dissidents Can Use E-Proxy 6-15
 - Newly Public Companies Can Choose Notice-Only Option 6-15
 - b. How “Notice-Only” Works 6-15
 - Separate Notice Required 6-15
 - Notice Must Contain Specified Items 6-16
 - Can’t Contain Additional Information Except Protective Warning 6-16
 - Can Be Combined With State Law-Required Notice 6-16
 - Must Use “Plain English” 6-16
 - May Include Pictures, Logos & Other Design Elements 6-17

– Must Provide Information to Intermediaries for Beneficial Owners	6-17
– 40-Day Deadline for Notice Delivery	6-18
– 45-Day Deadline for Broadridge	6-18
– Notice is Not a Proxy	6-19
– Notice Doesn’t Need to Conform with Proxy Card Rules	6-19
– No Supporting Statements Permitted	6-19
– Notice Must be Sent Separately—Not With Proxy Card	6-19
– Explanatory Materials Can Be Provided	6-19
– Company’s (But Not Intermediary’s) Notice Must Be Filed with SEC As Additional Soliciting Material	6-20
– Missed Filing May Result in S-3 Eligibility Loss	6-20
– Notice Must Be Searchable & Downloadable	6-21
– Proxy Card/VIF Can Only Be Sent 10 Days Later	6-21
– Shareholders Must Be Able to Execute Proxy When Notice Sent	6-21
– Shareholders Can Always Request Paper or Electronic Copies	6-22
– Can Solicit Shareholders Who Opt for Paper to Change Mind	6-22
– Notice Must Include Instructions to Request Copies	6-22
– Paper Copies Must Be Sent 3 Business Days from Request	6-23
– Shareholders Can Request Copies for One Year Post-Meeting	6-23
– Shareholders Can Make Permanent Election to Receive Paper or E-Mail	6-23
– Transfer Agent May Request Legal Opinion	6-24
c. Website Requirements	6-24
– Proxy Materials Must Be Posted on Specified Website	6-24
– Host Site Can Be Other Than Company’s (So Long As Cookie Rule Met)	6-24
– Additional Solicitation Materials May Need to Be Posted	6-24
– Intermediaries Also Required to Refer to Website	6-25
– Materials Must Be Posted in Readable, Printable Format	6-25
– Interactive Annual Reports Becoming More Common	6-26
– Materials Must Be Posted When Notice First Sent	6-26
– Website Must Ensure Shareholder Anonymity & Confidentiality	6-26
d. Full Set Delivery Option	6-27
– Can Continue Delivery of Paper (or E-Mail) Copies	6-27
– Must Still Post Materials & Provide Notice	6-27
– No Separate Notice Required	6-27
– Must File Separate Notice (But Not Intermediary’s Notice) with SEC	6-28
– Notice Must Contain Most Information Required Under Notice-Only	6-28
– Separate Notice Requires “Plain English”	6-28
– Don’t Need to Comply With 40-Day Notice Deadline	6-29
– Provide Notice Information to Intermediaries for Beneficial Owners	6-29

– No Need to Provide or Offer Copies Upon Request	6-29
– Can Send Follow-Up Proxy Card	6-29
e. Hybrid Option	6-30
IV. Common Questions & Our Analysis	6-30
a. General	6-30
– Don’t Need to Send Hard Copies of Annual Report to SEC (If Posted Online).	6-30
– Failure to File Notice as Additional Soliciting Material	6-31
– Implications for State Notice Requirements	6-32
– Interplay Between E-Proxy & Delaware Law	6-32
– Public Accessibility of Proxy Materials.	6-33
– Proxy Card/Voting Instructions Must Be Accessible on Website	6-33
– Must Use Same Medium for Proxy Statement & Annual Report	6-34
– California Allows E-Proxy.	6-34
– Can Post Proxy Materials Before Mail Notice	6-35
– Must Post Proxy Materials Until Meeting Concludes	6-35
– Archiving Practices for Annual Reports Depend on Circumstances	6-35
– Year-Round Enrollment for Electronic Communications	6-36
– Undeliverable Notices: Forward to Transfer Agent (& Take Extra Steps for Large Holders)	6-36
– Resuming Full Set Delivery After Trying Notice-Only	6-37
– Timeline for Notice & Access	6-37
– Notice & Access Card as Admission Ticket	6-38
– Notice & Access for Information Statements	6-38
– Additional Soliciting Material	6-38
– No Need to Link to Adobe Reader Page	6-39
b. Notice-Only	6-39
– Broadridge’s Deadlines for Notice-Only	6-39
– Some Companies Mail Earlier Than 40th Day	6-39
– Missed Deadline: Deliver Full Set.	6-40
– Preliminary Proxy Filing Doesn’t Trigger Notice Requirements	6-40
– No Need for Mailing Address on Notice	6-40
– Form of Notice for Follow-Up Mailings	6-41
– Follow-Up Solicitation Reminder Letters	6-41
– Telephone Calls After Mailing.	6-42
– Proxy Materials Filing Deadline	6-42
– Shareholder Proposal Deadlines Under E-Proxy	6-42
– Estimating Notice & Access Mailing Reduction	6-43
– ERISA Requirements for E-Distribution of Plan Materials.	6-44
– File Notice As Separate Submission Designated “DEFA14A”	6-45
c. Full Set Delivery	6-45

– Must Post Materials on Tracking-Free Website	6-45
– Notice Must be Filed with SEC	6-45
– No Need to Offer Copies for Future Meetings	6-46
– Incorporating Notice Information in Proxy Materials	6-46
d. Hybrid Approach	6-46
– Analyzing When Best to Stratify	6-46
– Treating Paper Requestors as Full Set Delivery Recipients for Deadlines	6-47
– Fix Errors in Notice Prior to Mailing When Possible	6-47
V. History	6-48

Chapter 7—Management Proposals

1. The Basics	7-2
2. Election of Directors	7-12
3. Say-on-Pay	7-16
4. Ratification of Auditor’s Appointment.	7-18
5. Approval of Equity Compensation Plan or Material Amendment.	7-20
6. Charter/Bylaw Amendments	7-22
7. Management Proposals as Bases for Excluding Shareholder Proposals	7-24
8. Proxy Statement Supplements & Amendments	7-27
9. Proxy Statement Distribution.	7-32

Chapter 8—Shareholder Proposals—(Rule 14a-8)

1. Overview of the Shareholder Proposal Rule	8-20
1.01 Introduction	8-20
1.02 Purpose of the Shareholder Proposal Rule.	8-20
1.03 The Shareholder Proposal Rule Process	8-20
1.04 How the Shareholder Proposal Rule is Used	8-21
1.05 Future of the Shareholder Proposal Rule	8-22

2. Proposal Submission & No-Action Processes	8-23
2.01 Submission of Proposal to Company	8-23
[A] Eligibility Requirements	8-23
[B] Deadline for Submitting Proposals	8-23
[1] How to Draft a Proposal	8-24
2.02 Submission of No-Action Request & Rebuttal to Staff	8-24
[A] Company Responses	8-25
[B] Deadline for No-Action Request	8-25
[C] What to Submit to the SEC Staff	8-25
[D] How to Make Arguments to the SEC Staff	8-26
[E] Copy of No-Action Request to Proponent	8-26
[F] Timetable for Rebuttal	8-27
[G] Proposal Revisions	8-28
[H] Withdrawn Proposals	8-29
[I] Third-Party Letters Permitted But Not Required to be Considered	8-29
[J] SEC Posts Incoming No-Action Requests	8-29
2.03 Staff Processing Procedures for Proposals	8-29
[A] Staff’s Workload Heavy	8-30
[B] Internal Staff Processing	8-30
[C] Staff Response Letters	8-32
[D] Types of Staff Responses	8-33
[E] How Staff Sends Responses	8-33
[F] Staff’s Form of Response May Impact Proxy Disclosure	8-34
[G] Single Basis Cited	8-34
[H] Lack of Precedential Effect	8-34
[I] No-Action Responses Provide Limited Protection	8-35
[J] Seeking Court Approval for Exclusion Rather Than SEC Staff	8-35
[K] Proponents Filing Lawsuits to Compel Inclusion	8-36
2.04 Post-Ruling Role of Staff	8-36
2.05 Inclusion of Proposal	8-36
[A] What Company Must Do to Include Proposal	8-36
[B] Seeking to Change the Proposal’s Language	8-37
[C] Companies Can’t Change Proposal Title Nor Mangle Proxy Card Description	8-37
[D] Disclosure of Opposition to Proposal	8-37
3. Defining a Proposal	8-38
3.01 Background	8-38
3.02 Mere Expression of Views	8-38
3.03 Request for Information Not Automatically Excludable	8-38

3.04	Determining Whether Communication is a Proposal or Suggestion/Complaint . . .	8-38
3.05	Determining Whether Communication is a Proposal or Nomination	8-39
3.06	Sometimes Difficult to Distinguish Shareholder Proposals & Shareholder Communications.	8-40
4.	Deadline for Seeking No-Action Relief	8-40
4.01	Deadline for No-Action Request	8-40
	[A] History of the Deadline	8-41
	[B] Purpose of the Deadline.	8-41
4.02	Obtaining a Waiver of the Deadline.	8-42
	[A] Identifying the Key Issues.	8-42
	[B] Delay Caused by Proponent’s Tardiness	8-42
	[1] Grant of Waiver and Exclusion Allowed	8-42
	[2] Grant of Waiver But No Exclusion Allowed	8-42
	[C] Delay Caused by Company’s Tardiness	8-43
	[1] Decline to Waive Deadline But Address Other Bases	8-43
	[2] Decline to Grant Waiver and Exclusion Not Allowed	8-43
4.03	Exclusion Without Staff Relief	8-43
	[A] Exclusion when Staff Denied Relief	8-44
	[B] Exclusion when Staff Declined to State View	8-44
4.04	Practice Pointers.	8-44
5.	Appealing a Staff Decision	8-45
5.01	Introduction	8-45
5.02	Reconsideration of Staff Decisions	8-45
5.03	Commission Appeal of Staff Decision.	8-46
5.04	Litigating Against the Company	8-46
	[A] Staff Guidance is Non-Binding	8-47
	[B] Staff Expressing “No View”	8-48
	[C] Attorneys’ Fees	8-48
5.05	Lawsuits Against the Commission or Staff	8-49
5.06	Practice Pointers.	8-49
6.	Statements in Opposition	8-50
6.01	Background of the Provision	8-51
	[A] History of the Provision	8-51
	[B] Purpose of the Provision	8-51
6.02	Application of the Provision	8-52
	[A] Identifying the Key Issues.	8-52
	[B] Staff Review of Proposal Disclosure.	8-52

[C] Company Not Liable for Proponent’s Disclosure	8-52
[D] No Word Limitation	8-52
[E] Advance Copy Must Be Provided to Proponent	8-53
[F] Making Statement Changes After Already Provided	8-53
[G] Inability to Meet Advance Copy Deadline	8-54
[H] Proponent’s Belief that Disclosure Is False and Misleading	8-54
[I] Revising Statements in Opposition	8-55
[J] Who Has Standing to Challenge Disclosure	8-56
[K] Excluding Statement from Preliminary Proxy Statement	8-56
[L] Don’t Give Proponent’s Topic More Prominence Than Necessary	8-56
[M] What is a “Statement in Opposition”?	8-57
[N] Seeking to Change Proposal’s Language	8-57
[O] Seeking to Change Proxy Statement’s Formatting	8-57
[P] Regulation FD Concerns	8-58
[Q] Statements in Support Permissible	8-58
[R] Can Discuss Proposal Topic with Other Shareholders (But File Written Communications)	8-58
6.03 Practice Pointers	8-59
7. Eligibility to Submit a Proposal	8-59
7.01 Background of the Exclusion	8-60
[A] History of the Exclusion	8-60
[B] Purpose of the Eligibility Requirements	8-61
7.02 Application of the Exclusion	8-62
[A] Identifying the Key Issues	8-62
[B] Only Applies to Section 12 Companies	8-62
[C] Securities Must Have Voting Rights	8-62
7.03 Verifying Eligibility	8-62
[A] Requirements for Proponent’s Transmittal Letter	8-63
[B] Proponent as Record Holder	8-63
[C] Proponent as Beneficial Owner	8-63
[D] Non-Shareholder As Proponent	8-63
[E] Trade Must Be Settled	8-64
[F] Request for Proof of Eligibility	8-64
[1] Beneficial Owners	8-64
[2] Record Holders	8-65
[G] Company Must Request Proof Within 14 Days	8-65
[H] Deficient Requests for Information	8-66
[I] Deficiency Unable to Be Overcome	8-67
[J] Proponent’s Failure to Satisfy Request for Information Deadline	8-68
7.04 Proof of Ownership Requirement	8-68
[A] Documentary Support from a Record Holder	8-68

[B] Broker Documentation as Proof; DTC Participants vs. Introducing Brokers	8-69
[C] Failure by Broker to Provide Documentation	8-70
[1] Snapshots in Broker Statements	8-70
[D] SEC Filings	8-71
[E] Phone Conversations	8-72
[F] Failure to Respond Appropriately	8-72
7.05 Holding Period	8-72
[A] One-Year Period	8-72
[B] Tacking of Holdings in Predecessor Company	8-73
7.06 Valuation of Securities	8-74
[A] \$2,000 Requirement	8-74
[B] No Need for Continuous Ownership of \$2,000	8-74
[C] Shareholders Permitted to Aggregate Holdings to Meet Threshold	8-74
[D] Proposed Tiered Ownership Thresholds	8-74
7.07 Continuous Ownership Until Shareholders’ Meeting	8-75
[A] Statements about Continuous Ownership	8-75
[B] Failure to Hold Securities until Meeting Date	8-75
7.08 Practice Pointers	8-75
8. One-Proposal Rule	8-77
8.01 Background of the Exclusion	8-77
[A] History of the Exclusion	8-77
[B] Purpose of the Exclusion	8-77
8.02 Application of the Exclusion	8-78
[A] Identifying the Key Issues	8-78
[B] Distinct Multiple Proposals	8-78
[C] Opportunity to Cure	8-78
[1] Failure to Provide Notice and Opportunity to Cure	8-79
[D] Relate to One Concept	8-79
[E] No Substitute Proposals	8-79
8.03 Practice Pointers	8-79
9. Alter Egos	8-80
9.01 Introduction	8-80
9.02 Family Members	8-80
9.03 Persons Under Common Control	8-80
[A] Common Interest in Securities	8-81
[B] Agents for Proponents	8-81
[C] Investment Advisor as Permissible Agent	8-81

10. Limitation on Proposal Length	8-82
10.01 Background of the Exclusion	8-82
[A] History of the Exclusion	8-82
[B] Purpose of the Exclusion	8-82
10.02 Application of the Exclusion	8-83
[A] Identifying the Key Issues	8-83
[B] Staff Performs Own Count Manually	8-83
[C] Waiver of Word Limit	8-83
[D] Need for More Words	8-83
10.03 Notification of Deficiency and Opportunity to Cure	8-84
[A] Notification Requirement	8-84
[B] Contents of Notice	8-84
[C] No Second Chance to Cure	8-84
[D] Revised Proposal Exceeding Limit	8-85
10.04 Determination of What Constitutes a “Word”	8-85
[A] Titles and Introductory Statements	8-85
[B] Numbers and Acronyms	8-85
[C] Hyphens	8-85
[D] Graphics	8-85
[E] Web Site Addresses	8-87
10.05 Practice Pointers	8-88
11. Submission Deadline	8-89
11.01 Background of the Exclusion	8-89
[A] History of the Exclusion	8-89
[B] Purpose of the Exclusion	8-90
11.02 Application of the Exclusion	8-90
[A] Identifying the Key Issues	8-90
[B] Disclosure of Deadline in SEC Filings	8-91
[C] Erroneous Disclosure of Deadline in SEC Filings	8-91
[D] Applicability of Advance Notice Bylaw Provisions	8-92
[E] Different Methods to Submit Proposals	8-92
[F] Adding a Co-Proponent	8-92
[G] Company as Cause for Missing Deadline	8-93
[H] Notifying the Proponent	8-93
[I] Deadline & Proof of Ownership Are Different	8-93
11.03 Calculation of Deadline for Annual Meetings	8-93
[A] Normal Deadline	8-93
[B] How Not to Calculate Deadline	8-94
[C] Deadline Is Bright-Line Rule	8-95
[D] Receipt Date Counts	8-95
[E] Deadline May Fall on Weekend or Holiday	8-95

[F] Other Type of Deadline: Floor Proposals & Advance Notice Bylaws	8-95
[G] What Disclosure Looks Like	8-96
[H] Amended Proposals	8-97
[I] Withdrawals and Resubmissions	8-97
[J] Notice of Intention to Submit	8-97
[K] Meeting Date Must Be Set	8-98
[L] Assess What Type of Proposal Received	8-98
[M] Spun-Off Company Deadlines	8-99
[N] Use of Discretionary Proxy Authority	8-99
11.04 Calculation of Special Meeting and Changed Meeting Deadlines	8-100
[A] Deadline If No Annual Meeting in Prior Year	8-100
[B] Deadline for Special Meetings	8-101
[C] Changing the Deadline	8-101
[D] Changing Meeting Date	8-102
11.05 Definition of “Principal Executive Offices”	8-102
[A] What Are “Principal Executive Offices”	8-102
[B] Good Faith Efforts Irrelevant	8-102
11.06 Practice Pointers	8-103
12. Attendance at the Meeting	8-103
12.01 Background of the Exclusion	8-104
[A] History of the Exclusion	8-104
[B] Purpose of the Exclusion	8-105
12.02 Application of the Exclusion	8-105
[A] Identifying the Key Issues	8-105
[B] Before-the-Fact Application	8-105
[C] Evidence of Lack of Attendance	8-105
[D] What Constitutes “Presenting” a Proposal	8-106
[E] Proponent Not Required to Vote for Proposal	8-107
[F] Proposals Submitted During Two-Year Period	8-107
[G] Applies to Special & Annual Shareholders’ Meetings	8-107
[H] Applies to Virtual Shareholders’ Meetings	8-107
[I] No Need for a “Second”	8-108
[J] Adjournments	8-108
12.03 Good Cause Exception	8-108
[A] Explanations That Are Not “Good Cause”	8-108
[B] Even Showing Good Cause May Be Insufficient	8-109
[C] Proponent Must Actually Present Proposal	8-109
12.04 Qualifications for Proponent Representatives	8-110
[A] State Law Governs Representative Process	8-110
[B] Representative Does Not Have to be Shareholder	8-111
[C] Representative Must Show Shareholder’s Authority Delegation	8-111
[D] Representative Can Obtain Own Representative	8-111

[E] Company Employee as Representative	8-112
12.05 Failing Proposals	8-112
[A] Company Moves Failing Proposal (& Proponent Can’t Withdraw)	8-112
[B] Company Allows Failing Proposal to Be “Withdrawn”	8-113
12.06 Practice Pointers.	8-113
13. Identification of Proponents	8-114
13.01 Background of the Exclusion.	8-114
[A] History of the Exclusion	8-114
[B] Purpose of the Exclusion	8-115
13.02 Application of the Exclusion	8-115
[A] Identifying the Key Issues.	8-115
[B] Providing Identifying Information Upon Request.	8-115
[C] Inclusion of Identifying Information in Proposal or Supporting Statement	8-116
[D] Rule Applies to All Types of Identifying Information.	8-116
[E] Applies to Co-Proponents or Representatives	8-116
[F] Need to Provide More than Name and Address upon Request	8-117
14. Improper under State Law	8-117
14.01 Background of the Exclusion.	8-117
[A] History of the Exclusion	8-117
[B] Purpose of the Exclusion	8-119
[C] Overlap with Other Exclusions	8-119
14.02 Application of the Exclusion	8-119
[A] Identifying the Key Issues.	8-119
[B] Lack of State Law Guidance for Staff.	8-120
[C] Judicial Interpretation of Interplay Between State and Federal Law	8-120
[D] Exclusion Causes Tension Between State and Federal Law	8-120
[E] Legal Opinion Requirement.	8-121
[1] Form of Opinion	8-121
[2] Opinion Content	8-121
[3] Bar of Lawyer Rendering Opinion	8-121
[a] No Requirement for Proponent to Submit Legal Opinion.	8-121
[b] Dueling Opinions	8-122
14.03 Interpretive Approaches	8-122
[A] “Mandatory” Versus “Precatory” Proposals	8-122
[1] Rebuttable Presumption that Precatory Proposals Includable	8-122
[2] Precatory Presumed Unless Binding Nature Evident.	8-123
[3] Which State Law Applies.	8-123
[4] Opportunity to Cure	8-123
[5] Laws that Provide Specific Power to the Board.	8-123

[B] Precatory Characterization Not a Cure	8-123
[1] Exxon Corporation	8-124
[2] Pennzoil Corporation	8-124
[C] Mandatory Bylaw Proposals	8-125
[1] Laws that Allow Shareholders to Mandate Bylaw Amendments	8-125
[2] Staff Analysis of Bylaw Amendment Proposals	8-126
[3] SEC Staff May Have “No View”	8-126
[4] Battles Over Mandatory Bylaw Amendments	8-127
[a] Fleming Companies	8-127
[b] Quickturn Design Systems, Inc.	8-128
[c] Shiva Corporation	8-128
[d] General DataComm	8-129
[5] CA v. AFSCME Employees Pension Plan	8-129
14.04 Practice Pointers	8-131
15. Violation of Law	8-132
15.01 Background of the Exclusion	8-132
[A] History of the Exclusion	8-132
[B] Purpose of the Exclusion	8-132
[C] Overlap with Other Exclusions	8-132
15.02 Application of the Exclusion	8-133
[A] Identifying the Key Issues	8-133
[B] Opportunity to Cure	8-133
15.03 Legal Opinion Requirement	8-133
[A] Form of Opinion	8-134
[B] Opinion Content	8-134
[C] Bar of Lawyer Rendering Opinion	8-134
[D] No Requirement for Proponent to Submit Legal Opinion	8-134
[E] Dueling Opinions	8-135
15.04 Types of Law	8-135
[A] State Law	8-135
[1] State Corporate Law	8-135
[2] Other State Laws	8-135
[3] Breach of Contract	8-135
[4] Renegotiations of Existing Contract Rights	8-136
[B] Federal Laws	8-136
[C] Foreign Law	8-136
[1] Foreign Law Resulting in Breach of State or Federal Law	8-136
15.05 Common Type of Proposals	8-137
[A] Shareholder Rights	8-137
[B] Unilateral Amendment of Certificate of Incorporation	8-137

[C] Board Structure	8-137
[D] Rights Plans	8-138
[E] Mandatory Arbitration	8-138
15.06 Practice Pointers	8-138
16. Violation of the Proxy Rules	8-139
16.01 Background of the Exclusion	8-139
[A] History of the Exclusion	8-139
[B] Purpose of the Exclusion	8-140
[C] Overlap with Other Exclusions	8-140
16.02 Application of the Exclusion	8-140
[A] Identifying the Key Issues	8-140
[B] Time Consuming Nature for Staff	8-141
[C] Violation of Rule 14a-9	8-141
[D] Violations of Other Proxy Rules	8-142
[E] Types of SEC Staff Responses	8-142
[F] Problems Only with Supporting Statement	8-142
[G] Opportunity to Correct or Support	8-142
[H] Impact of Word Limit	8-143
[I] Presentation of Proposal	8-143
16.03 Overly Vague Proposals	8-143
[A] Lack of Direction About Implementation	8-143
16.04 False & Misleading	8-144
[A] Types of “False & Misleading” Information	8-144
[B] Rare for Staff to Allow Exclusion Due to False Supporting Statement	8-144
[C] Personal Disclosures About the Proponent	8-144
[D] Defamation or Impugning Character	8-144
[E] URLs in Proposals	8-145
16.05 Modifying Proposals or Supporting Statements	8-145
[A] Adequacy of Support	8-145
[B] Presenting Statements as Opinions	8-145
[C] Purely Factual Corrections	8-146
[D] Statements Unrelated to Proposal’s Subject Matter	8-146
[E] Scope of Required Changes	8-146
16.06 Trends by Types of Proposals	8-146
[A] Social Proposals	8-146
[B] Workplace Conduct Proposals	8-147
[C] Sale or Business Combination Proposals	8-147
[D] Independent Chair Proposals	8-148
16.07 Practice Pointers	8-149

17. Personal Claim or Grievance	8-150
17.01 Background of the Exclusion	8-150
[A] History of the Exclusion	8-150
[B] Purpose of the Exclusion	8-152
[C] Overlap with Other Exclusions	8-152
17.02 Application of the Exclusion	8-152
[A] Identifying the Key Issues	8-152
[B] Inconsistency of Staff Responses	8-152
[C] Burden to Show Improper Motive	8-153
[D] Prospective Relief to Exclude Future Proposals	8-153
17.03 Issues Relating to Particular Types of Proponents	8-153
[A] Employees	8-153
[B] Business Partners	8-154
[C] Institutional Investors	8-154
[D] Labor Unions	8-154
17.04 Determining Who is the Real Proponent	8-154
[A] Proponents as Alter Egos	8-154
[B] Grievance Has to Be Personal	8-155
[C] Personal Interest of Proponent's Affiliate	8-155
17.05 Motive Evaluation	8-155
[A] Proponent Allowed to Have Some Personal Interest	8-155
[B] Types of Motives	8-155
[1] Compensation for Damages	8-155
[2] Investor Relations	8-156
[3] Self-Enrichment	8-156
[4] Embarrassment	8-156
[5] Targeting Employees	8-156
[C] Difficulties in Evaluating Motives	8-156
[1] Staff Requires Evidence of Motive	8-157
[D] Motive Evident from Proposal Itself	8-157
[E] Campaign of Harassment	8-157
17.06 Practice Pointers	8-157
18. Relevance	8-158
18.01 Background of the Exclusion	8-158
[A] History of the Exclusion	8-158
[B] Purpose of the Exclusion	8-160
[C] Overlap with Other Exclusions	8-160
[D] Factors for 14a-8(i)(5) Board Analysis	8-161
18.02 Application of the Exclusion	8-162
[A] Identifying the Key Issues	8-162

[B]	Review of Both Proposal and Supporting Statement	8-162
[C]	Proponent’s Burden to Show “Significant Relationship”	8-163
[D]	“Significant Relationship” Can Be Shown Supplementally	8-163
18.03	Application of Numerical Tests	8-163
18.04	Interpretation of “Otherwise Significantly Related to the Company’s Business”	8-164
[A]	SEC’s Examples Illustrating Meaning of Catch-All Phrase	8-165
[B]	SEC’s Interpretation Supported by Case Law	8-165
[C]	“Otherwise Significantly Related” Even If Minor Economic Interest	8-166
[D]	Some Nexus Must Exist	8-166
[E]	Proponents Must Show More Than “Abstract” Significance	8-166
[F]	Corp Fin Considers Board’s Determination of Relevance	8-166
[G]	Corp Fin Gives Weight to Recent Shareholder Votes	8-167
18.05	Common Types of Proposals	8-168
[A]	Foreign Operations	8-168
[B]	Company’s Products and Services	8-168
[C]	Equal Employment Opportunity/Discrimination	8-168
[D]	Political Contributions	8-169
[E]	Environmental	8-169
[F]	Executive Compensation	8-169
[G]	Employee Related Matters	8-169
[H]	Business Operations	8-170
[I]	Investment Activities	8-170
[J]	Shareholder Matters	8-170
[K]	Board Matters	8-170
[L]	Anti-Takeover Matters	8-170
18.06	Practice Pointers	8-170
19.	Absence of Power or Authority	8-172
19.01	Background of the Exclusion	8-172
[A]	History of the Exclusion	8-172
[B]	Purpose of the Exclusion	8-173
[C]	Overlap with Other Exclusions	8-173
19.02	Application of the Exclusion	8-173
[A]	Identifying the Key Issues	8-173
[B]	Importance of Framing Arguments	8-174
19.03	Possibility of Implementation	8-174
[A]	Impossible Proposals	8-174
[B]	Action Cannot Be Taken Immediately	8-174
[C]	Action Cannot Be Taken in its Entirety	8-174
[D]	Lack of Control Over Third Parties	8-175
[E]	Violation of Law	8-175

	[1] Illegal Activity	8-175
	[2] Violation of Existing Legal Obligations.	8-175
	[a] Executive Compensation	8-175
	[b] Sale or Merger	8-176
	[F] Violation of Laws Relating to Boards, Management and Their Functions	8-176
	[1] Qualification Criteria for Directors or Board Committees.	8-176
	[2] Procedure for Nomination and Election of Directors.	8-176
	[3] Board and Management Activity	8-177
	[4] Unilateral Amendment of Certificate of Incorporation	8-177
19.04	Vague and General Objectives	8-177
19.05	Practice Pointers.	8-177
20.	Ordinary Business	8-178
20.01	Background of the Exclusion.	8-178
	[A] History of the Exclusion	8-178
	[1] The Cracker Barrel Saga	8-179
	[B] Purpose of the Exclusion	8-181
	[C] Overlap with Other Exclusions	8-182
20.02	Application of the Exclusion	8-182
	[A] Identifying the Key Issues	8-182
	[B] Creation of Federal Common Law	8-183
	[C] Definition of “Significant Policy Issue”	8-183
	[D] Reversals of Position.	8-185
	[E] Staff Focuses on Subject Matter Rather Than on Risks, Report Preparation, Committee Formation or Disclosure	8-186
	[F] Corp Fin Considers Board’s Determination of “Significant Policy Issue”.	8-186
	[G] Corp Fin Gives Weight to Recent Shareholder Votes	8-188
	[H] Can Use Committee for SLB 14I Analysis.	8-189
	[I] Use Discretion: Description of Board Analysis & Materials Will Be Publicly Available	8-190
	[J] No Need to Include Board Analysis If Precedent Permits Exclusion.	8-190
	[K] The Micro-Management Alternative.	8-191
	[1] Micromanagement Prong Focuses on Level of Detail.	8-191
	[2] Micromanagement Framework Applies to Proposals Calling for Study or Report	8-191
	[L] Rarely-Used “Fundamental Business Strategy” Carve-Out	8-192
20.03	Common Types of Proposals	8-192
	[A] Accounting Matters	8-192

[B] Banking	8-192
[C] Compensation	8-193
[1] Senior Executive Compensation	8-193
[2] Director Compensation	8-194
[3] Golden Parachutes	8-194
[4] Definition of “Executive Compensation”.	8-194
[5] Proposals Linking Ordinary Business Matters to Executive Compensation	8-195
[6] General Compensation	8-195
[7] Employee Benefits	8-196
[8] Repricing of Stock Options	8-197
[9] Expensing of Stock Options	8-197
[D] Corporate Governance Including CEO Succession	8-197
[E] Shareholder Matters	8-198
[F] Interim Vote Tallies	8-198
[G] Energy	8-198
[H] Environment	8-199
[I] Workplace Practices and Equal Employment	8-200
[J] Allegedly Harmful Products	8-201
[1] Tobacco	8-201
[2] Food and Pharmaceutical Products	8-202
[3] Opioids	8-202
[K] Military Production	8-202
[L] Operational Matters	8-203
[M] Political Issues & Charitable Contributions	8-203
[N] Lobbying Expenditures	8-203
[O] Human Rights	8-204
[P] Business Combinations & Financial Performance	8-205
[Q] Independent Auditor Issues Including Mandatory Rotation	8-205
[R] Board’s Oversight of Risk	8-205
[S] Net Neutrality	8-206
[T] Virtual Annual Meetings	8-206
20.04 Practice Pointers	8-207
21. Election to Office	8-208
21.01 Background of the Exclusion	8-208
[A] History of the Exclusion	8-208
[B] Purpose of the Exclusion	8-209
[C] Overlap with Other Exclusions	8-210
21.02 Application of the Exclusion	8-210
[A] Identifying the Key Issues	8-210

[B]	Nominations of Specific Persons	8-211
[1]	Nominations of Specific Persons Not Permitted	8-211
[2]	Determination of Whether Communication Is a Proposal or Nomination	8-211
[C]	Nomination Criteria or Procedures	8-212
[1]	Proponent Seeks Nomination of Persons from Particular Group.	8-212
[2]	Private Ordering of Proxy Access	8-212
–	Most Large Companies Have Adopted Proxy Access Bylaws	8-213
–	Proxy Access “Fix-It” Proposals	8-214
–	Use of Proxy Access Bylaws	8-214
–	Preparing for Use of Proxy Access Bylaws	8-214
[3]	Multiple Nominations	8-215
[4]	Eligibility Criteria	8-215
[5]	Impugning Nominees	8-216
[6]	Removal of Directors	8-216
[a]	Removal of Specific Director	8-216
[b]	Removal of Entire Board	8-216
[D]	Voting Procedures and Nominee Disclosure	8-217
[1]	Voting Levels	8-217
[2]	Nominee Disclosure	8-217
[3]	Hiring Proxy Advisory Firms	8-217
21.03	Practice Pointers	8-217
22.	Counterproposals	8-218
22.01	Background of the Exclusion	8-218
[A]	History of the Exclusion	8-218
[B]	Purpose of the Exclusion	8-219
[C]	Overlap with Other Exclusions	8-219
22.02	Application of the Exclusion	8-220
[A]	Identifying the Key Issues	8-220
[B]	Direct Conflicts with Company Proposals	8-220
[C]	Company and Shareholder Proposals Can Co-Exist	8-221
[D]	Company Actions Taken in Response to Shareholder Proposals	8-221
[1]	Addition of Management Proposal for Purpose of Excluding Shareholder Proposal	8-221
[2]	Bona Fide Proposals	8-222
[3]	Proponent Solicitation Activities Irrelevant	8-222
22.03	Common Types of Proposals	8-222
[A]	Proxy Access	8-222
[B]	Director Eligibility Criteria	8-222
[C]	Business Combinations & Extraordinary Corporate Transactions	8-222

[D] No Solicitation of Offers to Merge or Sell	8-223
[E] Executive Compensation	8-223
[F] Hiring Auditing Firms	8-223
[G] Majority Voting Standard	8-224
[H] Special Meeting Threshold	8-224
22.04 Practice Pointers.	8-224
23. Substantially Implemented	8-225
23.01 Background of the Exclusion.	8-225
[A] History of the Exclusion	8-226
[B] Purpose of the Exclusion	8-226
[C] Reliance on Exclusion Increasing	8-226
23.02 Application of the Exclusion	8-227
[A] Identifying the Key Issues.	8-227
[B] Interpretation of “Substantially Implemented”	8-227
[C] Abandoned or Never Conducted Activities	8-227
[D] Delivery of Reports or Studies to Shareholders	8-228
[E] Implementation of Guidelines	8-228
23.03 What Can Render a Proposal Moot	8-228
[A] Company Actions that Render Proposal Moot	8-228
[B] Third Party Actions that Render Proposal Moot	8-228
[C] Action Must Already Be Implemented	8-229
[D] Taking Action After Receipt of Proposal.	8-229
23.04 Common Types of Proposals	8-229
[A] Executive Compensation.	8-229
[B] Human Rights	8-229
[C] Workplace Conduct	8-229
[D] Sale, Merger or Strategic Alternatives.	8-230
[E] Shareholder Rights Plans.	8-230
[F] Change in Company’s Products or Services	8-230
[G] Business Operations	8-230
[H] Board Criteria and Conduct.	8-230
[I] Confidential Voting and Shareholder Meeting Matters.	8-231
[J] Disclosure in SEC Reports	8-231
[K] Disclosure Pursuant to Other Laws.	8-231
[L] Proxy Access	8-231
23.05 Practice Pointers.	8-234
24. Substantially Duplicative	8-235
24.01 Background of the Exclusion.	8-235
[A] History of the Exclusion	8-235
[B] Purpose of the Exclusion.	8-235

	[C] Overlap with Other Exclusions	8-236
24.02	Application of the Exclusion	8-236
	[A] Identifying the Key Issues	8-236
	[B] First of Duplicate Proposals Cannot Be Excluded	8-236
	[C] Second Proposal Excluded Entirely	8-236
	[D] SEC Staff May Conduct Its Own Investigation	8-236
	[E] Application to Co-Sponsoring Arrangements	8-237
24.03	Definition of “Substantially Duplicative”	8-237
	[A] Substantively Duplicative Proposals with Dissimilar Supporting Statements	8-237
	[B] Inconsistent Outcomes of Substantially Duplicative Proposals	8-237
	[C] Substance of Substantially Duplicative Proposals	8-238
	[D] Differences Between Mandatory and Precatory Proposals	8-238
	[E] Determination of Which Proposal Received First	8-238
	[1] Proper Evidence to Show Which Came First	8-238
	[F] Effect of Updates, Amendments and Withdrawals	8-238
24.04	Practice Pointers	8-239
25.	Resubmissions	8-240
25.01	Background of the Exclusion	8-240
	[A] History of the Exclusion	8-241
	[B] Purpose of the Exclusion	8-242
	[C] Overlap with Other Exclusions	8-242
25.02	Application of the Exclusion	8-242
	[A] Identifying the Key Issues	8-242
	[B] Calculation of Submission Thresholds	8-243
	[1] Abstentions and Broker Non-Votes Not Counted	8-243
	[C] Disclosure of Treatment of Abstentions and Broker Non-Votes	8-243
	[D] No Rounding	8-244
	[E] Vote Tabulation Required	8-244
	[F] Votes at Predecessor Companies	8-244
	[G] Disclosure of Voting Results from Prior Meetings	8-244
25.03	Interpretation of “Substantially the Same Subject Matter”	8-244
	[A] Both Proposal and Supporting Statement Considered	8-244
	[B] Same Subject Matter Not Dispositive	8-245
	[C] Proponent’s Identity Irrelevant	8-245
	[D] Ties to Executive Compensation	8-246
	[E] Request for Study or Report	8-246
25.04	Calculation of Three-Year Exclusion Period	8-246
	[A] Calculation Strictly Applied	8-246

	[B] Meeting Date Not Required to Be Set	8-247
25.05	Common Types of Proposals	8-247
	[A] Human Rights	8-247
	[B] Environmental	8-247
	[C] Executive Compensation	8-247
	[D] Workplace Conduct	8-248
25.06	Practice Pointers	8-248
26.	Dividends	8-249
26.01	Background of the Exclusion	8-249
	[A] History of the Exclusion	8-249
	[B] Purpose of the Exclusion	8-250
	[1] Confusion Over Dividend Levels	8-250
	[2] Dividend Setting as Core Management Function	8-250
	[C] Complementing the Ordinary Business Exclusion	8-251
26.02	Application of the Exclusion	8-251
	[A] Identifying the Key Issues	8-251
	[B] Defining “Dividend”	8-251
	[1] Property Distributions	8-251
26.03	Types of Dividends	8-251
	[A] Stock Dividends	8-252
	[B] Special Cash Dividends	8-252
	[C] Stock Splits and Reverse Stock Splits	8-252
	[D] Distribution of Fractional Shares	8-252
26.04	Dividend Policy Proposals	8-252
	[A] Policy Proposals Includable	8-252
	[B] Foregoing Charitable Contributions in Favor of Dividends	8-252
	[C] Foregoing Dividends in Favor of Charitable Contributions	8-253
26.05	Tying Executive Compensation to Dividend Payouts	8-253
26.06	Specific Amounts Excludable	8-253
	[A] Modified Dividends	8-253
	[B] Range of Dividends	8-253
	[C] Elimination of Dividends	8-254
	[D] Suspension of Dividends	8-254
	[E] Dividend Formulas	8-254
	[F] Replacement of Cash Dividends with Stock Dividends	8-254
26.07	Practice Pointers	8-254
27.	Shareholder Resolutions from the Floor	8-255
27.01	Background	8-255

27.02	Regulations Governing Shareholders’ Meetings	8-255
27.03	Compliance with Advance Notice Bylaw Provision	8-256
27.04	Presentation at the Meeting	8-256
27.05	Floor Resolutions	8-257
	[A] Advantages	8-257
	[B] Disadvantages	8-257
27.06	Discretionary Voting	8-257
27.07	Disclosure Considerations	8-260
27.08	Practice Pointers	8-261
28.	Shareholder Proposals & Solicitation	8-261
28.01	URLs in Shareholder Proposals	8-261
28.02	Consequences of Staff’s False & Misleading Position	8-263
28.03	Announcing Voting Information on the Web	8-264
28.04	Solicitation of Support for Shareholder Proposal Through Broadridge	8-264
28.05	Solicitation of Support for Shareholder Proposal on the Web	8-265
28.06	Solicitation Against Company Proposal on the Web	8-266
28.07	Interim Vote Tallies	8-266
28.08	Impact of the Internet on Shareholder Proposal Process	8-267
28.09	Proposal Trends	8-267
29.	Negotiation & Settlement of Proposals	8-267
29.01	Introduction	8-267
29.02	Participant Insights into the Process	8-267
30.	The Proponents	8-271
30.01	Introduction	8-271
30.02	Institutional Investors and the Collective Action Problem	8-271
30.03	Public Pension Funds	8-272
30.04	Union-Affiliated Investors	8-272
30.05	Council of Institutional Investors	8-273
30.06	Religious Investors	8-273
30.07	Socially Responsible Investment Funds	8-273
30.08	Mutual Funds and Investment Managers	8-273
30.09	Environmental and Social Justice Organizations	8-274
30.10	Individuals	8-274
Appendix A	—Checklist: Shareholder Proposal—Receipt Process	8-275
Appendix B	—Shareholder Proposals—Deadlines	8-276

Chapter 9—Confidential Treatment Requests (Exchange Act Rule 24b-2/ Securities Act Rule 406/FOIA Rule 83/Regulation S-K Item 601)

I.	SEC Rules and Regulations	9-6
II.	SEC Staff Guidance	9-18
III.	How the Rules Work	9-19
	a. What Can—and Cannot—Be Subject of Confidential Treatment Request	9-19
	– What is a “Confidential Treatment Request”?	9-19
	– Traditional CTR Doesn’t Require “Competitive Harm”	9-20
	– CTR Not Required for Exhibits	9-20
	– Exhibit Redactions Do Require “Competitive Harm”	9-21
	– Unclear whether CTR Required for Item 601(a)(4) Amendments	9-21
	– Redact Only Parts of Exhibit That Would Cause Competitive Harm	9-21
	– Mark Exhibit Index & Exhibit to Reflect Confidential Treatment	9-22
	– Can Only Seek Confidential Treatment for Portions of Document; Not Entire Thing	9-22
	– Limit Request to Just Words & Phrases; Not Overly Broad	9-22
	– CTRs Not Typically Granted for Required Disclosure	9-22
	– CTRs Not Typically Granted for Related Party Transaction Disclosure	9-23
	– Certain Provisions of Related Party Transaction Can Be Subject of CTR	9-23
	– Staff Not Likely to Grant CTR for Information in Financials	9-23
	– Staff Won’t Grant CTR If Information Already Public	9-24
	– Don’t Accidentally Make Information Public on Edgar	9-25
	– Don’t Accidentally Make Information Public Outside of Edgar	9-25
	– Don’t Need CTR to Omit Personal Information	9-25
	b. Process for Confidential Treatment Requests	9-25
	– Submit CTR in Paper	9-25
	– Submit CTR “At Same Time” as Publicly Filing Document	9-26
	– Timing for Emerging Growth Company’s CTR	9-26
	– SEC Staff Won’t Pre-Clear CTR Ahead of SEC Filing	9-27
	– Pre-Clearance Exceptions for EGCs, FPI IPOs or Certain Mergers	9-27
	– Seek Confidential Treatment For Your CTR	9-27
	– Mark Exhibit Index Plus Redact Words & Phrases With Legend When Filing	9-27
	– Consider Also Legending Exhibit Cover Page & Each Page of Exhibit	9-28
	– Inadvertent Omission of Confidential Treatment Legend	9-28
	– Update Confidential Treatment Legend Once CTR Granted	9-28
	– Staff May Issue Comments That Require Amending Exhibit	9-29

– Staff Won’t Declare Registration Statement Effective Until CTR Comments Resolved	9-29
– No Registration Statement Effectiveness Until CTR Comments Resolved.	9-29
– No Registration Statement Effectiveness Until CTR Comments Resolved Even If ’34 Act CTR	9-29
– WKSIs Don’t Have to Delay Automatic Shelf If CTR Pending	9-29
– When Filing Registration Statement, Alert SEC Staff If CTR Involved	9-30
– Option to Delay Exhibit Filing for 8-K	9-30
– Staff Issues Order to Grant or Deny Confidential Treatment.	9-30
– Staff Calls if Application is Granted or Withdrawal is Permitted	9-30
– Staff Mails Notice if Application is Denied.	9-30
– Staff Likely to Issue Separate Orders If Grant CTR Under Both ’33 and ’34 Acts	9-31
– Duration of Staff’s Order	9-31
– Unredacted Agreement for Which Confidential Treatment Expired Filed with Next Periodic Report	9-31
– If Staff Denies CTR, Must File Unredacted Exhibit Promptly In Amendment	9-31
– If Staff Denies CTR, Must File Unredacted Exhibit to Periodic Report; Not 8-K	9-31
– If Staff Denies CTR, May Want to Contact Other Party to Contract.	9-32
 c. How SEC Staff Processes Exhibit Redactions & Confidential Treatment Requests	 9-32
– Corp Fin Staff Reviews Exhibit Redactions	9-32
– Be Judicious With Redactions	9-33
– All Applications for Confidential Treatment Reviewed.	9-33
– Staff Calls If More Information Needed	9-33
– Corp Fin’s Office of Disclosure Support’s Technical Compliance Review	9-33
– Corp Fin’s Legal Compliance Review	9-33
– Timing of Staff Review	9-34
– Staff Process for Reviews of CTRs	9-34
– Impact on Post-Effective Amendment’s Effectiveness	9-34
– Appeal If Unable to Agree on Resolving Comment	9-35
– Confidential Treatment Orders.	9-35
– Streamlined Exhibit Process Shouldn’t Lead Company to Withhold Required Information.	9-36
– Grant of CTR Has No Impact on Liability	9-36
– Exhibit Can Be Dropped From Exhibit Index Even If CTR Granted	9-36

d. How to Draft Confidential Treatment Requests	9-36
– No Specific Form to Follow; Follow Rules & CF Disclosure Guidance: Topic No. 7 Instead	9-36
– Cite Both Rules If Unclear	9-37
– Get Business People Who Negotiated Contract Involved Before Drafting CTR	9-37
– Checklist: Technical Compliance With Confidential Treatment Rules	9-37
– Specific Duration Requested Must Be Supported	9-38
– Duration Requested Might Need to Tie to “Right to Terminate” Rather Than Stated Term	9-38
– Three-Year Period If Terminable At Will	9-39
– Include Consent to Release for Official Purposes	9-39
– Include Contact Information for Correspondence, Orders & Notices	9-40
– Include Documents Marked to Show Redacted Portions of Filed Version	9-40
– Checklist: Substantive Compliance With Confidential Treatment Rules	9-40
– Identify Each Item & Category in CTR	9-41
– Tie Facts to Legal Analysis	9-41
– Cite Caselaw to Help Provide Substantive Analysis	9-42
– Limit Request to Just Words & Phrases; Not Overly Broad	9-42
– Be Alert to Optics of Redaction	9-43
– Have Business People Make First Cut at Redaction	9-43
– Explain Analysis for FOIA Rule’s Application to Facts	9-43
– Use DOJ’s “Freedom of Information Act Reference Guide”	9-44
– Staff Not Likely to Grant CTR Just Because Information Is “Immaterial”	9-45
– Contractual Agreement to Keep Confidential Has No Bearing on CTR	9-45
– Can Incorporate By Reference Another Company’s Exhibit	9-45
– When Incorporate Another Company’s Exhibit, CTR Arguments May Differ	9-45
– When Incorporating Another Company’s Exhibit By Reference, Weigh Pros & Cons	9-46
– Coordinate CTR With Other Parties to Contract	9-46
– Contract Between Two Companies Where “Materiality” Differs For Each	9-46
– Can Incorporate By Reference Parent Company’s Exhibit Covered by a CTR	9-47
– Change to Redacted Pricing Schedule Requires New CTR	9-47
– CTRs for Schedules & Exhibits to Exhibits	9-47
– Best Ways to Make Competitive Harm Argument	9-47
– Blanket Competitive Harm Argument Doesn’t Typically Work	9-48

– Don’t Focus Solely on Competitive Harm & Bypass Materiality	9-48
– Counterparty Needs to File Agreement But You Don’t	9-49
– Confidentiality of Contract Party or Customer Names	9-49
– Keep CTRs in Mind When Filing Form 8-Ks	9-49
– Timing of Exhibit Filing After 8-K Describes Agreement	9-50
– Confidentiality of Performance Target Levels	9-50
– Form 13F CTRs Governed by Form Instructions & Rule 24b-2	9-50
– How to Request Additional Time to Respond to Staff Comments	9-50
– If Wait Too Long to Respond to Comments, 30-Day Review Cycle Begins Anew	9-51
e. Extensions & Renewals of Confidential Treatment Requests	9-51
– Possible to Obtain Extensions or Renewals of Confidential Treatment	9-51
– Extension Not Necessary if Information Was Redacted Under Item 601	9-51
– Extending CTR Granted Under Rule 406 & Rule 24b-2	9-51
– Submit New Request for Extension of CTR Before Original Relief Expires	9-51
– Specify Duration of Extension Requested	9-52
– Staff Processes Extension Request Just Like New CTR	9-52
– Can File “Short Form” Extension Application for Previously Reviewed Material Agreements	9-53
– Checklist: What to Include in “Long Form” Extension Request	9-54
– Conduct New Analysis When Subject Agreement is Superseded	9-54
– Possible—Not Probable—to Get Confidential Treatment Extension Beyond Term of Agreement	9-54
– Extension Requests That Change from ’33 Act to ’34 Act Request	9-55
– CTR Inadvertently Expired Without Desired Extension	9-55
– Extension Request When Part of Redacted Agreement Now Public	9-55
– Impact of Merger on CTR	9-56
– Extension for ’34 Act Reports After IPO	9-56
– Filing CTR After De-Registration	9-57
f. Rule 83 Requests for Comment Letter Responses or Supplemental Information	9-57
– How FOIA Rule 83 Works	9-57
– Procedures Differ for Rule 83 Compared to CTRs	9-58
– SEC Doesn’t Make Determination Until Someone Makes FOIA Request	9-58
– No Need to Explain Rationale When Making Rule 83 Request (But Should Document)	9-58
– Three Separate Submissions for Rule 83 Requests	9-59
– Letter to SEC Staffer Examining Your Filing	9-59
– Response Letter Filed Via Edgar	9-60

– Cover Letter to SEC’s FOIA Office	9-60
– Rule 83 Requests Expire in 10 Years	9-60
– How SEC Staff Processes Rule 83 Requests	9-61
– “CTR Substantiation” Requests	9-61
– Responding to FOIA Office Comments	9-61
– Supplemental Information Is “Furnished”; Not “Filed”	9-62
g. Rule 418/Rule 12b-4 Requests for Comment Letter Responses or Supplemental Information	9-62
– How to Seek Return of Supplemental Materials Using Rule 418/Rule 12b-4 Requests	9-62
– Include Rule 83 Request As Part of Rule 418/12b-4 Request	9-63
– May “Furnish” In Paper If Particularly Sensitive Information	9-63
– Seek Return of I-Banker Books; Segment Analyses; Supplemental Statement Support	9-63
– Might Be Able to Remove Something Accidentally Edgarized in Comment Response	9-64
h. Disclosure Controls & Procedures for Confidential Information	9-64
– Keep Calendar Tickler for When SEC’s CTR Order Expires	9-64
– Keep Track of What Information is Covered by Granted CTR	9-64
– Avoid Breach of Contract With “Required by Law” Carveout in Confidentiality Provision	9-65
– Keep SEC’s FOIA Office 0 of Any Change in Contact Information	9-65
– Ask Corp Fin & FOIA Offices to Destroy Unredacted Information	9-65
i. No-Action Letter Confidentiality	9-65
IV. History	9-66
Appendix A: Checklist: Confidential Treatment Requests—Drafting	9-68
A. Technical Compliance With Exchange Act Rule 24b-2 and Securities Act Rule 406	9-68
B. Substantive Compliance With Exchange Act Rule 24b-2 and Securities Act Rule 406	9-69
C. What to Include in a Traditional Extension Request	9-69
D. What to Include in a Short Form Extension Application	9-69

Chapter 10—SEC Comment Letter Process

I. Overview	10-4
– What are “Comments”?	10-4
– Why You Need to Understand How Corp Fin Works	10-4

– Structure of Corp Fin	10-5
– How Each Office Is Structured.	10-6
– How to Find Which Office Reviews Your Filings	10-6
II. Screening Process to Determine Type of Review.	10-6
– Filings Are Screened to Determine If (& How) Will Be Reviewed By Staff	10-6
– Determination of Type of Review	10-7
– How to Find Out What Type of Review Your '33 Act Filing Will Receive	10-8
– Process to Find Out '33 Act Filing Screening Results As Soon As Possible.	10-8
– Staff Appreciates Heads Up for Novel Issues	10-9
– How to Find Out What Type of Review Your '34 Act Filing Will Receive	10-9
– Staff May Call Your CEO or CFO About '34 Act Review	10-9
– Different Screening Process for Preliminary Proxies & Non S-4 Merger Proxies	10-10
– 10-Day Rule Limited to Preliminary Proxies & Non-S-4 Merger Proxies	10-10
– Staff Review of Authorized Shares/Reverse Split/Proxy Contests	10-10
– Level of Review for Related SEC Filing May Have Impact on How Confidential Treatment Request Reviewed	10-11
– Large Cap Companies Likely Reviewed Every Year.	10-11
– Companies With Material Restatements Likely to Be Reviewed	10-11
– Companies With High Volatility Likely to Be Reviewed	10-11
– Emerging Companies With Price-to-Earnings Outliers Likely to Be Reviewed	10-12
– Companies That Significantly Impact Material Economic Sector Likely to Be Reviewed.	10-12
– Movement Towards “Continuous Review” Model	10-12
– Some Forms Are Unlikely to Be Reviewed.	10-12
– Trend Towards Staff Reviews That Result in No Comments	10-12
– Staff May Provide Oral Comments	10-13
– Just Because '34 Act Filings Recently Reviewed, Doesn't Mean Won't Be Reviewed Again Soon	10-14
– Just Because Didn't Receive Comments Doesn't Mean Your '34 Act Filings Weren't Reviewed	10-14
– Materially Deficient Registration Statements Receive “Bedbug Letter”.	10-14
– “Bedbug Letters” Available on Edgar	10-14
– Role of Corp Fin's Office of Disclosure Standards	10-14
III. Staff's Comment Process After Screening.	10-15
– Staff's Internal Process When Filing Selected for Full Review	10-15
– Possible Involvement of Other Staffers in Drafting Comments	10-16
– “Full Review” and “Monitor” Comments Received About 30 Days From Filing	10-17

– Timing of Staff Processing for Subsequent Rounds of Comments	10-17
– Most Anything Is Fair Game for Staff Comments	10-18
– Different Types of Comments Might Be Received (Revise Disclosure; “Futures”; Supplemental Info)	10-18
– Supplemental Request for Fairness Opinion Materials	10-19
– Futures Comment Turns Into “Amend Now” Comment If Ignore Staff Guidance	10-19
– Top 10 Comment Topics Trends In 2019	10-19
– Comment Process Is “Back & Forth”; Multiple Rounds Probable	10-22
– Critical Accounting Policy Comments	10-23
– Impairment of Goodwill Comments	10-23
– Segment Disclosure Comments	10-24
– Loss Contingency Comments	10-24
– Non-GAAP Financial Measure Comments	10-24
– MD&A Comments	10-25
– Liquidity Comments	10-25
– Staff May Comment If Business Description Omits Required Information	10-25
– Corporate Governance Comments	10-25
– Comments on Emerging Risks	10-25
IV. How to Respond to Comments	10-26
– Make Sure Your Contact Information is Accurate	10-26
– Tips to Ease Your Response Process	10-26
– Preparing In Advance for Challenging Comments	10-27
– Recognize When Response Is Due; Don’t Let Too Much Time Pass	10-27
– Figuring Out Who Should Serve on Team to Respond to Comments	10-27
– Doesn’t Matter If Comment Letter Addressee Not Involved	10-28
– Pick Appropriate Person As Project Manager for Responses	10-28
– How to Dialogue With SEC Staff Over Important Accounting Comments	10-28
– Protecting Privileged Information in Draft SEC Filings	10-30
– Involve Audit Committee & Auditor Before Responding to Accounting Comments	10-30
– Call Staff If Don’t Understand Comment	10-30
– Try Meeting In Person with Staff for Very Unique Issues	10-31
– Format for Responding to Comments	10-32
– Provide Hard Copies of Redlined Revised Disclosure to Front-Line Examiners	10-32
– Don’t Provide Tandy Language In Response Letters	10-32
– Different Approaches When Drafting Comment Responses	10-32
– Review Comment Letters of Peer Companies	10-33
– How to Search SEC’s Comment Letter & Responses Database	10-33
– When Providing Draft “Future” Disclosure, Be Careful	10-35
– How to Resolve Tricky Comment Over Phone	10-36
– Appeal If Unable to Agree on Resolving Comment	10-36

– Don’t Appeal Unless Try to Resolve Comments First With Front-Line Staffers	10-37
– Inadvertent Disclosure of Material Nonpublic Information In Comment Response	10-37
V. Closing Out the Comment Process	10-37
– For Registration Statements, Request Acceleration of Effectiveness Several Days In Advance	10-37
– Closing ’34 Act Filing Reviews	10-38
– Comment Letters Made Public 20 Business Days After All Comments Resolved	10-38
– Corp Fin Actions Available on Edgar	10-38
– Redacted Portions of Responses Not Made Public If Subject to Confidential Treatment Order	10-39

Chapter 11—Business Disclosure (Item 101 of Regulation S-K)

I. SEC Rules and Regulations	11-3
II. SEC Staff Guidance	11-10
III. How the Rules Work	11-11
a. General Development of Business	11-12
– Discussion Must Cover Past Five Years; If Shorter, Developments Since Inception	11-12
– Earlier Periods May Need to Be (and Often Are) Discussed	11-12
– Disclose Changes of Legal Form of Organization & Reincorporations	11-12
– Disclose Bankruptcies or Receiverships	11-13
– Disclose Mergers, Reclassifications or Consolidations	11-13
– Disclose Material Non-Ordinary Course Asset Acquisitions or Dispositions	11-13
– Must Disclose Any Material Change in Mode of Conducting Business	11-14
– Disclosure Must Include Subsidiaries & Predecessor Businesses	11-14
– Determining Segments Mostly Falls on CFO & Auditors	11-14
b. Financial Information About Industry Segments	11-15
– SEC Staff Challenges to Segment Determinations	11-15
– Measures of Profit & Loss and Total Assets for Segments Not “Non-GAAP Financial Measures”	11-17
– Restatement Required If Segments Change	11-17

c.	Narrative Description of Business	11-18
–	Disclosure Should Focus on Dominant Segment or Each Reportable Segment	11-18
–	Specific Items Must be Addressed for Each Segment If Material	11-18
–	Most Specific Disclosure Items Must Be Discussed by Segment	11-19
–	Dependence of Segment on Specific Customers & Distributors	11-19
–	Climate Change Disclosures	11-20
–	Cybersecurity Disclosures	11-21
–	Iran & Syria Activities Disclosure	11-22
–	Disclosure of Business Activities in Countries Designated as “State Sponsors of Terrorism” May Be Required	11-23
–	Hydraulic Fracturing “Fracking” Disclosures	11-24
d.	Financial Information about Geographic Areas	11-25
e.	Disclosure Regarding Availability of ‘34 Act Reports On Corporate Websites	11-25
–	All Companies Must Disclose Internet Address If Available	11-25
–	Accelerated & Large Accelerated Filers Required to Post Reports (Or Explain Why Not)	11-25
–	Should Disclose Specific URL Where Documents Are Posted	11-26
–	Posting Reports Required Same Day as Filing	11-26
–	Non-Accelerated Filers Not Required to Post Reports	11-26
–	Disclosure Has Lookback Requirement.	11-26
–	Failure to Meet Requirements for Entire Period Warrant Disclosure of Exceptions	11-26
f.	Smaller Reporting Companies	11-27
–	Only Three Years of Business Development Required	11-27
–	Specific Disclosure Requirements In Narrative Discussion	11-27
–	Principal Differences From Larger Company Requirements	11-28
–	Disclosure of Availability of Exchange Act Reports Through Website Not Required	11-28
IV.	Common Questions & Our Analysis	11-28
a.	Narrative Description of Business	11-28
–	Disclosure of Regulatory Environment Not Required, But Recommended.	11-29
–	Disclosure About Collective Bargaining & Union Relationships Not Required, But Common	11-29
b.	10% Customers	11-30
–	Distributor May Be Same As Customer.	11-30

– Customer of a Customer	11-30
c. Availability of Publicly-Filed Information	11-30
– Companies Encouraged to Keep SEC Reports On Website At Least 12 Months	11-30
V. History	11-31

Chapter 12—Properties Disclosure (Item 102 of Regulation S-K)

I. SEC Rules and Regulations	12-2
II. SEC Staff Guidance	12-3
III. How the Rules Work	12-3
– Purpose of Properties Disclosure	12-3
– Determination of “Materially Important Physical Properties”	12-3
– Can Provide Disclosure on Collective Basis	12-4
– Disclose Subsidiaries’ Properties If Material	12-4
– Disclose Joint Venture’s Properties If Material	12-4
– No Need to Describe Physical Characteristics	12-4
– Description of Properties Identified as Materially Important	12-4
– Identification of Segments	12-5
– Descriptions of “Material Encumbrances”	12-6
– Property Plans for the Future	12-6
– Ties to Financial Statements	12-7
– Real Estate, Oil & Gas, Mining and Other Extractive Enterprises	12-7
IV. History	12-7

Chapter 13—Legal Proceedings Disclosure (Item 103 of Regulation S-K)

I. SEC Rules and Regulations	13-4
II. SEC Staff Guidance	13-6

III. How the Rules Work	13-7
a. Whether Disclosure is Required	13-7
– Challenging Disclosure	13-7
– “Material” Pending Legal Proceedings Must Be Disclosed	13-7
– >10% as a Baseline “Materiality” Threshold	13-8
– Balancing Probability & Magnitude	13-8
– Carve-Out for “Ordinary” Course Litigation	13-9
– No Exception for Confidentiality Agreements	13-9
– Disclosure Required If Material Proceeding Where Executive Officer/Director Is Adverse Party/Has Material Adverse Interest	13-10
– Special Committee Formation & Internal Investigations as Disclosure Triggers	13-11
– Voluntary Disclosure Due to Insider Trading Concerns	13-12
– “Legal Proceedings” Broader Than Litigation	13-12
– Disclose Material Cybersecurity Litigation	13-13
– Threatened Litigation Typically Not Required to Be Disclosed	13-13
– “Pending” & Service of Process	13-14
– Disclosure Required If “Party,” Not Just Defendant	13-14
– Disclosure for Class Action Lawsuits	13-14
– Distinguish From ASC 450-20 Disclosure Requirements	13-14
– Contingencies Disclosed in Financials Might Not Match Up with 103 Disclosures	13-15
– Disclosure Not Required for Judgments Older Than 10 Years	13-15
– Sometimes Disclosure Appropriate Even Though Not Specifically Mandated	13-16
b. Timing of Disclosures	13-16
– Trigger of 10-Q/10-K Filing	13-16
– Voluntarily Filing 8-K Before 10-Q/10-K Due	13-16
– Can Incorporate By Reference to Disclosures in Form 8-K	13-17
– Legal Proceedings Arising After 10-Q/K’s Period End	13-17
– Disclose “Known to Be Contemplated” Government Proceeding	13-17
– Environmental Proceedings Not Deemed Routine	13-18
– Environmental Administrative Proceedings Broadly Construed	13-18
– Notice of Environmental Violation Triggers Disclosure Obligation	13-19
– Environmental-Related Disclosures – No Clear Rule of Thumb for Timing	13-19
– Scrutiny of Environmental-Related Disclosures Increases	13-19
– Availability of Insurance, Indemnification or Contribution for Instructions 5(A) and (B)	13-20
c. What Type of Disclosure Required	13-20
– Basics Must Be Disclosed	13-20

– Consider MD&A Implications	13-20
– Consider Risk Factor Disclosure	13-21
– Consider Accounting Disclosure for Asserted or Threatened Claims	13-21
d. SEC Staff Comments on Litigation Disclosure	13-22
– Seek Confidentiality When Responding to SEC Staff Comments.	13-26
– Item 103, MD&A & Accounting Disclosures Shouldn’t Be Identical.	13-26
e. Updating Disclosures	13-27
– Every Quarter Evaluate Need to Update for Material Developments	13-27
– Voluntary Disclosures in 8-K Permitted	13-27
– No Need to Link to “Cross-Referenced” Prior Reports or the Same Report.	13-28
– Exchange Requirements.	13-29
f. Discontinuing Disclosures for Terminated & Immaterial Proceedings	13-30
– Every Quarter Evaluate Need to Disclose Legal Proceeding Terminations	13-30
– Discontinuing Disclosure Due to Lack of Materiality.	13-30
g. Whether (& When) to Disclose SEC Investigations	13-30
– SEC Unlikely to Publicly Disclose Mere Investigation (But “Leaks” Still Possible).	13-30
– SEC Will Publicly Disclose Formal Enforcement Actions	13-31
– Deciding Whether to Disclose Investigation	13-31
– Disclosure of SEC Investigation May Be Required in MD&A.	13-32
– Disclosure of SEC Investigation May Be Required in Financials.	13-32
– Disclosure of Wells Notice Receipt Not Typically Required.	13-32
– Reasons for Voluntarily Disclosing Investigations Early	13-33
– Board’s Role In Disclosure	13-34
– Reasons for Not Voluntarily Disclosing Investigations Early	13-34
– What to Include In Disclosure (& What Not to Include).	13-34
– Prepare Spokespersons for Inquiries From All Quarters Before Making Disclosure.	13-36
– Don’t Waive Privilege When Consulting with Advisors	13-36
– Updating Voluntary Disclosures In Subsequent SEC Filings	13-37
h. Whether to Disclose DOJ Investigations	13-37
i. Process of Determination	13-38
– Common In-House Processes/Disclosure Controls & Procedures	13-38
– Annual Lawyer’s “Audit Letter” for Independent Auditor	13-38
IV. Common Questions & Our Analysis	13-41
a. Definition of “Legal Proceeding”	13-41
– Threatened Litigation.	13-41
– Definition of “Ordinary Course” Legal Proceedings.	13-41

– SEC Enforcement Investigation as “Legal Proceeding”	13-42
– Mediations and Arbitrations as “Legal Proceedings”	13-42
– Arbitration Pursuant to Contractual Provision: Still “Legal Proceeding”	13-43
– Patent Infringement Proceeding as “Legal Proceeding”	13-44
– Settlement with Former Executive	13-44
– Section 16(b) Short-Swing Settlement	13-45
– Customer Disputes as “Legal Proceeding”	13-45
– Bankrupting Charity as “Bankruptcy”	13-45
b. Timing of Disclosure	13-46
– Disclosure “As of End of Period” or “Filing Date”	13-46
– Dismissal of Legal Proceeding After Period End—But Before 10-Q Filing	13-46
– Whether to File 8-K Before 10-Q	13-46
– Determining End of Pending Proceeding	13-47
– No Need to Repeat Prior Disclosure of Settlement	13-47
– Form 8-K Disclosure	13-47
c. Updating Disclosure	13-48
– Updating Legal Proceeding Disclosures in Subsequent SEC Filings	13-48
– No Need to Repeat 8-K Disclosure	13-49
d. Discontinuing Disclosure	13-49
– Winding Down of Legal Proceedings	13-49
– Company’s Growth Renders Legal Proceeding Immaterial	13-49
– No Need to Disclose Settlement or Jury Award Amounts	13-50
– Disclosure Not Required for Judgments Older Than 10 Years	13-50
e. Calculating Amounts & Materiality	13-51
– How to Assess Insurance Coverage	13-51
– Determining Extent of Materiality Before Adverse Verdict	13-52
– “Current Assets” Definition	13-52
f. Confidentiality Concerns	13-52
– Confidential Insurance Settlement	13-52
g. Officer’s Interest “Materially Adverse” to Company	13-53
– Possible Officer Indemnification Not Necessarily Material Adverse Interest	13-53
h. Interplay of Legal & Accounting Disclosures	13-53
– Incorporation by Reference of Financial Statement Footnote	13-53
i. Impact on Insider Trading Blackout Periods	13-53
V. History	13-54

Detailed Table of Contents: Volume 2

Chapter 14—Description of Securities Disclosure (Item 202 of Regulation S-K)

I.	SEC Rules and Regulations	14-2
II.	SEC Staff Guidance	14-8
III.	How the Rules Work	14-9
	– Straightforward Requirement	14-9
	– Plain English Required	14-9
	– Item 202 Information Required as Exhibit to Form 10-K	14-9
	– Item 10-K Exhibit Can Incorporate By Reference to Earlier Exhibit	14-10
	– Can’t Incorporate From “Description of Capital Stock” In Prospectus	14-10
	– Item 10-K Exhibit Requirement Applies to Securities Registered as of Year-End	14-10
	– Item 10-K Exhibit Must Reflect Modifications & Amendments to Securities During Fiscal Year	14-10
	– Disclosure Required for Equity Securities	14-10
	– Standard Layout for Equity Securities	14-12
	– Disclosure Required for Debt Securities	14-12
	– Debt Often Registered on Shelf; General Descriptions Provided	14-14
	– Debt Securities Descriptions Individualized	14-14
	– Description of Debt Securities in Shelf Registration Statement	14-15
	– Disclosure Required for Warrants and Rights	14-16
	– Standard Description of Warrants in Shelf Registration Statement	14-16
	– Standard Description of Rights in Shelf Registration Statement	14-16
	– Convertible Securities & Stock Purchase Warrants Subject to Redemption or Call	14-17
	– Disclosure for Trust Preferred Securities	14-17
	– Disclosure Required for Other Securities	14-18
	– Asset-Back Securities	14-18
	– Foreign Companies	14-18
	– Disclosure Required for American Depositary Receipts	14-19

– Standard Disclosure for ADRs	14-20
– ADR Fees Chart	14-20
IV. History	14-20

Chapter 15—MD&A (Item 303 of Regulation S-K)

I. SEC Rules and Regulations	15-6
a. Item 303 of Regulation S-K	15-6
II. SEC Staff Guidance	15-16
a. Interpretive Guidance	15-16
b. Compliance & Disclosure Interpretations regarding MD&A	15-18
III. How the Rules Work	15-19
a. Fundamental Principles of MD&A	15-19
– What Regulations & Forms Govern MD&A	15-19
– Purpose of MD&A	15-20
– Not Intended to Be Recitation of Financials	15-20
– Provide Analysis, Not Just Mere Discussion	15-21
– Should Be “User Friendly”	15-21
– Not “Check-the-Box” Regulation	15-22
– Content & Focus of MD&A Disclosure	15-22
– Key Performance Indicators & Metrics Disclosure	15-23
– Format of Disclosure	15-24
– Better Usability of MD&A	15-25
– MD&A-Type Disclosures Must Appear in Filed Reports	15-25
– MD&A Not Part of Financial Statements	15-26
– Relationship of CEO/CFO Certifications	15-26
– Related Party Transactions Disclosure May Be Required	15-26
– Risks to Technology & IP May be Required	15-26
– Litigation-Related Disclosure May be Required	15-27
b. Disclosure Controls & Drafting Process	15-28
– Written Disclosure Controls & Procedures for MD&A	15-28
– Role of Disclosure Committees for MD&A	15-28
– Who Takes Lead for Drafting MD&A	15-29
– Who Should Not Take Lead for Drafting MD&A	15-29
– Independent Auditor Involvement	15-30
– Tie to Financials & Other Sections of Disclosure Document	15-30
– Look at Corp Fin Staff Comments	15-30
– Involvement of Audit Committee	15-31

–	Litigation Counsel Should Review Litigation-Related MD&A Disclosures	15-31
–	Outside Law Firm Involvement Possible	15-31
–	Periodic Underwriter Counsel Involvement Ahead of Imminent Deal	15-31
c.	MD&A Summaries	15-32
–	MD&A Summary Facilitates "Layered Disclosure"	15-32
–	Non-GAAP Use in MD&A Summaries	15-32
d.	Item 303(a) & Full Year Comparisons	15-33
–	Form 10-K's MD&A	15-33
–	Discuss At Least Two Full Fiscal Years	15-33
–	Discussion of 2 Years and Incorporation by Reference	15-34
–	Many MD&As Still Cover Three-Year Period	15-36
–	Common Definitions	15-36
–	Segments	15-37
–	Discuss Business Results by Geographic Area if Material	15-37
–	Corp Fin Comments Often on Segment Determinations	15-37
–	How to Respond to Corp Fin Comments on Segment Determinations	15-37
e.	"Known Trends"	15-41
–	Two-Step Analysis for Determining When "Known Trends" Must Be Disclosed	15-41
–	Identifying "Known Trends"	15-42
–	Concerns Over Turning "Known Trends" Into Self-Fulfilling Prophecies	15-42
–	Concerns Over Creating a "Duty to Update"	15-44
–	Addressing "Recent Accounting Pronouncements"	15-44
–	"Known Trends" Disclosure on Emerging Issues	15-47
–	Actually Known Trends vs. Should-Have-Known	15-48
–	Merger Negotiations Need Not Be Disclosed As "Known Trend"	15-48
f.	Liquidity & Capital Resources	15-48
–	Importance of Liquidity & Capital Resources Disclosure	15-48
–	Discussions of Liquidity & Capital Resources Frequently Combined	15-49
–	Type of Liquidity & Capital Resources Disclosure Required	15-49
–	Evaluate Liquidity on Short-Term and Long-Term Basis	15-50
–	Disclosure About Potential Cash Flow Fluctuations Required	15-50
–	Intra-Period Variations Required If Material	15-50
–	"Capital Resources" Disclosure	15-50
–	Cash Flow, Cash Requirements & Cash Management	15-51
–	Known or Anticipated Breaches of Material Debt Covenants Required	15-52
–	Addressing Repurchase Agreements	15-52
–	Restrictions on Intra-Company Loans and Dividends	15-53
–	Discuss Known Trends	15-53

g. Results of Operations	15-54
– Four Requirements for “Results of Operations” Section	15-54
– Address Known Trends	15-54
– “Unusual or Infrequent Events”	15-55
– Impact of Inflation	15-55
h. Off-Balance Sheet Arrangements	15-55
– Controversy Over Off-Balance Sheet Arrangements	15-55
– Definition of “Off-Balance Sheet Arrangement”	15-55
– Required Types of Disclosure	15-56
– Not Required Until Definitive Agreement (Or Subject Only to Customary Closing Conditions) Exists	15-57
– Multiple Arrangements Should Be Aggregated in Groups or Categories	15-57
– Disclosure of Only Most Recent Fiscal Year Required	15-57
– Cross-Referencing to Financial Statement Footnotes Permitted	15-57
– Cross-Reference to Financials Doesn’t Require Hyperlink	15-57
– Relationship to Liquidity & Capital Resources Disclosure	15-57
– No Specific Confidentiality Exemption for Off-Balance Sheet Arrangements	15-58
i. Contractual Obligations	15-58
– Table of Contractual Obligations Required	15-58
– Subcategories Required for Tabular Presentation	15-59
– Definition of Required Subcategories	15-59
– Repurchase Obligations	15-59
j. Accounting Policies & Estimates	15-60
– No Specific SEC Rules for Accounting Policies & Estimates	15-60
– Differences Between Accounting “Estimates” v. “Policies”	15-60
– PCAOB Staff’s Concept Paper on Accounting Estimates & Fair Value	15-62
– Supplement—Not Duplicate—Financial Statement Notes	15-62
– Include Risk Assessments & Sensitivity Analysis, Quantified If Possible	15-62
– Audit Committee’s Involvement with Audit Estimates	15-63
– Cases Addressing Faulty Segment Reporting	15-63
k. Item 303(b) & Interim Period Updates	15-64
– Form 10-Q’s MD&A	15-64
– Address Known Trends	15-64
l. Safe Harbors for Forward-Looking Information	15-65
– Use of Safe Harbor in MD&A	15-65
– Private Securities Litigation Reform Act of 1995	15-65
– Comparing the PSLRA Safe Harbor & “Bespeaks Caution” Doctrine	15-66

– Safe Harbor Only Applies to Forward-Looking Statements	15-67
– Safe Harbor May Not Apply to “Mixed” Statements	15-67
– “On Track” Statements May Not Be Forward-Looking	15-68
– Interplay—and Cross-References—of Risk Factors (& Cautionary Language) With MD&A	15-68
– Make Sure Risk Factors & MD&A Align	15-69
– No Single Way to Format FLS Disclaimer (Just Don’t Make It Boilerplate)	15-69
m. Smaller Reporting Companies	15-70
n. Foreign Private Issuers	15-70
o. Non-GAAP Financial Measures	15-70
– How Non-GAAP Financial Measures Are Used in MD&A	15-70
– Definition of “Non-GAAP Financial Measure”	15-71
– Restrictions on Use of Non-GAAP Financial Measures in SEC Filings	15-71
– Trends in Use of Non-GAAP Financial Information in MD&A	15-72
– Key Performance Indicators & Metrics Disclosure	15-73
p. SEC Enforcement Actions Addressing MD&A	15-74
– Cases Involving Insufficient Known Trend Disclosure	15-74
– Cases Addressing Material Misrepresentations	15-78
– Cases Addressing Insufficient Disclosure of Accounting Issues	15-78
– Cases Addressing Incomplete Disclosure of “Unusual Events”	15-79
q. Private Litigation Over MD&A	15-79
IV. Common Questions & Our Analysis	15-80
a. MD&A Disclosure Generally	15-80
– MD&A Should Address General Economic Conditions, Particularly During Times of Uncertainty	15-80
– Disclosure of Future Non-Recurring Transaction May Be Required	15-81
– SEC Staff Expects Quantification of Forward-Looking Information If Feasible	15-82
– Updating Registration Statement & Omission of Year 3 Discussion	15-83
– Correcting Errors in MD&A Depends on Materiality	15-84
b. Specific Disclosure Requirements of Item 303(a) & Full-Year Comparisons	15-84
– Affirmative Statement About Sufficient Liquidity & Capital Resources for 12 Months Required	15-84
– “Capital Resource” Is Intentionally Undefined	15-85
– Disclosure May Be Required for Possible Default Even If Negotiating for Waiver/Amendment	15-85

– Immaterial Defaults: Item 303 Doesn’t Require Disclosure (But Reg S-X Might)	15-87
– Pro Formas May Be Required in MD&A Following Material Change	15-87
c. Specific Disclosure Requirements of Item 303(b) & Interim Updates	15-88
– Contractual Obligations Update Generally Not Required in 10-Q	15-88
– Only Material Changes to Critical Accounting Policies Required in Form 10-Q	15-88
– Post-Period Disclosure in 10-Q and Interaction with Rule 135c	15-89
– Change in Auditor for Review of Interim Financials	15-90
d. Non-GAAP Financial Measures	15-90
– Meaning of “Not More Prominent” Than GAAP Disclosure	15-90
– “Effective Tax Rate” Is Non-GAAP Financial Measure	15-90
– Earnings Release Information Need Not Be Repeated Unless MD&A Requires (But Disclosures Should be Consistent)	15-91
e. M&A–Related Disclosures	15-92
– M&A Costs for Deals Not Yet Announced	15-92
– Pro Forma MD&A Not Required in Form S-4	15-92
– MD&A After Merger With Shell Must Include Historical Discussion of Shell Operations	15-92
– Form S-4: Don’t Need to Include MD&A for Non-Reporting Target	15-93
– Offering to Fund Acquisition	15-94
V. History	15-94

Chapter 16—Accountant Changes & Disagreements Disclosure (Item 304 of Regulation S-K/Item 4.01 of Form 8-K)

I. SEC Rules and Regulations	16-4
II. SEC Staff Guidance	16-10
III. How the Rules Work	16-13
a. Required SEC Filings & Timing	16-13
– Purpose of Accountant Change Disclosure	16-13
– Disclose Accountant Change on 8-K Within Four Business Days	16-14
– Accountant Change Disclosure Can’t Be Made in 10-K	16-14
– Disclose in 10-K When Auditor Change Involved “Disagreements or Reportable Events”	16-14

– Accountant Departure & Engagement are Separate Reportable Events	16-15
– Form 8-K/A Required When Dismissal Occurs Before Audit Complete	16-15
– Attach Former Accountant's Letter as Exhibit	16-16
– Use Item 304 Terminology	16-16
– Previously Reported Change Still Required for Proxy Statement, But Not Form 10-K or Glossy Annual Report	16-16
– Disclosure Typically Limited to Just 8-K & Two Consecutive Proxy Statements	16-16
– File Letter & Consent From Former Accountant as 10-K Exhibits	16-17
– Basis for Multi-Year Disclosure Requirement	16-17
– Reuse Last Year's Accountant Change Disclosure for Subsequent Proxy Statement	16-18
– Disclosure Required for "Subsequent Interim Period"	16-18
– Exchange Requirements	16-18
b. What Constitutes a "Change in Accountant"	16-19
– Newly Engaged Accountant <i>Affiliated</i> with Former Accountant Considered Reportable Change	16-19
– Merger of Accountant May Be Reportable Change	16-19
– Reverse Merger Involving Company Typically Results in Change	16-19
– Change in Lead Partner Not Reportable Change	16-19
– Use of Same Big 4 Accounting Firm in Different Country Likely Reportable Change	16-20
c. Type of Disclosure Required	16-20
– Details Required to Be Disclosed When Accountant Departs	16-20
– "No Disagreements" Disclosure Required, But "No Reportable Events" Disclosure Not Required	16-21
– Going Concern Explanatory Note Must Be Disclosed	16-21
– Disclose PCAOB Registration Issues If Accountant Departs	16-22
d. Disagreements With Former Accountant	16-22
– Affirmative Disclosure Required	16-22
– Period of Time Covered by Disclosure Not Limited to Fiscal Periods	16-22
– Both Resolved & Unresolved Disagreements Must be Disclosed	16-22
– Disagreements by Decision-Makers—Not Other Personnel—Require Disclosure	16-22
– "Disagreements" Broadly Construed	16-23
– SEC Staff Unlikely to Referee Disagreements	16-23
– "Reportable Event" Disclosed Under Item 304(a)(1)(iv)—Not Item 304(a)(1)(v)	16-23
– Must Disclose Nature of Any Disagreements	16-23

e. “Reportable Events” Disclosure	16-24
– What is a “Reportable Event”	16-24
– Affirmative Disclosure Not Required	16-24
– Disclose Nature of Reportable Event.	16-24
– Disclose “Reportable Event” Involving Disagreement Under Item 304(a)(1)(iv)—Not Item 304(a)(1)(v)	16-25
– Internal Control Deficiencies May Be Reportable Event	16-25
– Differences Over Whether Internal Controls Are Deficient Might Not Be Disagreement	16-25
– Disclose Adverse Internal Controls Opinion When Disclosing Accountant Change	16-26
– Internal Controls Explanatory Note Not Required	16-26
f. Engagement of New Accountant.	16-26
– Accountant Departure & Engagement are Separate Reportable Events.	16-26
– Content of Item 304(a)(2) Disclosure	16-26
– Disclosure Must Include Pre-Engagement Consultations	16-27
– Inclusion of New Accountant’s Response in Annual Report or Proxy Statement.	16-28
– If Auditor Changes, Only Disclose Fees for Current Auditor	16-28
– Change in Auditor After Proxy Mailing.	16-28
g. Former Accountant’s Review & Response to Company Disclosure	16-29
– Must Share Disclosure with Departing Accountant & Accountant Then Provides Letter for Filing	16-29
– Former Accountant Permitted to Provide Interim Overview Letter	16-29
– If Former Accountant Won’t Provide Letter, Disclose That Fact	16-29
– Inclusion of Former Accountant’s Response in Annual Report or Proxy Statement.	16-29
– Provide Disclosure to Former Accountant Even if Identical to Prior Filing	16-30
h. Disclosure Required If Former and New Accountants’ Views Differ	16-30
– No Disclosure Required If Former Accountant’s Method No Longer Generally Accepted	16-30
– Item 304(b) Information Required Even If Previously Disclosed.	16-31
i. Foreign Private Issuers/Form 10	16-31
– Foreign Private Issuers Disclose Accountant Changes Annually	16-31
– Form 10 & Accountant Changes	16-31
IV. History	16-31

Chapter 17—Internal Controls Disclosure (Rules 13a-14 & 13a-15/ Item 308 of Regulation S-K)

I.	SEC Rules and Regulations	17-5
II.	SEC Staff Guidance	17-13
	– SEC Rules	17-13
	– Staff Interpretations	17-14
	– PCAOB Regulation	17-23
III.	How the Rules Work	17-23
	a. Internal Controls Report	17-23
	1. General Requirements	17-23
	– Relationship to CEO/CFO Certifications	17-24
	2. When First Report Required	17-25
	– Report Included in Form 10-K After 1st Cycle	17-25
	– Transition Report As 1st Annual Report	17-25
	– Reverse Acquisition Form 8-K As 1st Annual Report	17-25
	– Auditor Attestations Not Required for Non-Accelerated Filers	17-25
	– Exiting Accelerated Filer Status	17-26
	– Accelerated Filer Status Determined Each Year	17-26
	– New Companies Not Accelerated Filers Until Second Annual Report	17-27
	– New Companies Can Use Accelerated Filer’s Reporting History for S-3 Eligibility	17-27
	– Reverse Acquisition Surviving Issuer Not New Company	17-27
	– Reports Required in Transition Reports	17-27
	– Disclosure of Changes Not Required Until After 1st Report	17-27
	3. Relationship with Timely Filer Status	17-28
	– Omitted Report Renders 10-K “Materially Deficient” & Not Timely	17-28
	– Disclosure That ICFR Ineffective Doesn’t Impact Timely Status	17-28
	4. Location of Management’s Report	17-28
	– No Specific Location Required	17-28
	– Most Include in Close Proximity to MD&A	17-28
	b. Applicability	17-29
	1. Foreign Private Issuers	17-29
	2. Asset-Backed Issuers	17-29
	3. Investment Companies	17-30
	4. Consolidated Entities	17-30
	5. Equity-Method Investments	17-30
	6. Acquired Companies	17-31
	– Might Not Need to Include Acquired Company in 1st Report After Deal	17-31

– Different Position Taken for Reverse Acquisitions	17-32
c. ICFR Defined	17-32
1. SEC Definition of ICFR	17-32
– Definition in Rules 13a-15(f) and 15d-15(f)	17-32
– ICFR Distinguished from Other Internal Control Definitions	17-33
– Safeguarding of Corporate Assets Included	17-33
– Definition Doesn’t Include Compliance with All Laws	17-33
– Design to Provide “Reasonable Assurance” of Financials Reliability	17-34
– “Reasonable Assurance” Defined	17-34
2. Relationship of ICFR & Disclosure Controls	17-34
d. Management’s Report	17-35
1. Management’s Responsibility	17-35
2. Evaluation Framework	17-35
– Must Use Suitable Recognized Framework	17-35
– Nearly All Use COSO Framework	17-35
3. Evaluation Process	17-36
– SEC Suggests “Top-Down” Approach	17-36
– Identifying Financial Reporting Risks	17-37
– Methods & Procedures for Identifying Risks Vary	17-37
– Fraud Risk Evaluation	17-37
– Financial Reporting Risk Controls: Identification & Evaluation	17-38
– Only Required to Identify Controls Adequate to Address Risks	17-38
– Evaluation of Selected Controls	17-38
– Entity-Level Controls	17-38
– Information Technology	17-39
– Multiple Location Considerations	17-40
– Outsourced Functions	17-41
– Changes to Accounting Standards	17-41
4. Management’s Assessment of ICFR Effectiveness	17-41
– Annual Evaluation Requirement	17-41
– Methods for Testing Operating Effectiveness	17-41
5. Evaluation of Control Deficiencies	17-42
– “Material Weakness” Defined	17-42
– “Significant Deficiency” Defined	17-42
– Combination of Control Deficiencies May Constitute Material Weakness	17-42
– Deficiency Severity Includes Both Quantitative and Qualitative Factors	17-43
– Deficiency Severity Doesn’t Depend on Whether Misstatement Actually Occurred	17-43

– Determining Whether Deficiency Creates Reasonable Possibility of Misstatement	17-43
– Determining Magnitude of Misstatements.	17-43
– Indicators of Material Weaknesses.	17-44
6. Disclosure Considerations	17-44
– Both CEO & CFO Sign Report as Best Practice	17-44
– Disclaimer on “Inherent Limits on ICFR Effectiveness” Permissible (If Worded Right)	17-45
– Disclosure Requirements for Material Weaknesses.	17-45
– Don’t Hide Material Weaknesses From Investors	17-45
– Disclosure Requirements for Significant Deficiencies	17-46
– Disclosure Requirements Not Limited to Changes Responding to Deficiencies	17-46
– Affirmative Statement of Conclusion Required.	17-46
7. Remediation	17-47
– Must Retest Before Remediation Deemed Effective	17-47
– Material Weakness Identification Creates Presumption of Ineffective Disclosure Controls	17-47
– Other Considerations	17-48
e. Auditor Attestation.	17-48
– Auditors Must Render Opinion on ICFR.	17-48
– Auditor Opinion Doesn’t Directly Cover Management’s Assessment	17-49
– Auditor Attestation Not Required for Non-Accelerated Filers	17-49
– Impact of PCAOB Inspection Reports.	17-49
– Auditor’s Use of Work of Others.	17-49
– Auditor Contrary View Isn’t Item 304 Reportable Event	17-49
– Auditor “Incorporation By Reference” Consents Include ICFR Report	17-50
f. Quarterly Evaluations of ICFR Changes	17-50
– Quarterly Evaluation Not Required Until After 1st Annual Evaluation	17-50
– Disclosure of Changes Made Prior to 1st Report Not Required Unless Material Weakness	17-50
– Auditor Attestation Not Required for Quarterly Evaluations	17-50
g. Evidentiary Backup	17-51
– General Documentation Requirement	17-51
– Evidence Should Relate to Financial Reporting Element & Risk of Control Failure	17-51
h. Role of Audit Committees	17-52
– Audit Committee Oversight.	17-52
– Audit Committee Role in ICFR Evaluations	17-53
– Supervision of Internal Auditors	17-54

i.	Impact of Restatements on ICFR Evaluations	17-54
j.	Inability to Assess ICFR	17-55
k.	Negative ICFR Attestations & Assessments	17-55
l.	ICFR Enforcement Actions	17-56
IV.	Common Questions & Our Analysis	17-57
a.	General Requirements	17-57
–	Clerical Error in 10-K ICFR Disclosure Must Be Fixed By Amendment	17-57
–	ICFR Disclosure Not Required in Form 11-K	17-57
–	Failure to Include ICFR Report Indicates Disclosure Controls Failure.	17-57
–	Management Can’t Qualify ICFR Effectiveness Conclusion	17-58
–	Impact of Late 8-K on ICFR	17-59
–	Transition Report As “First Annual Report” for Initial Compliance	17-60
b.	Location of Report	17-60
–	Some Put Report Immediately Before Financials with Note in 10-K’s Item 9A.	17-60
–	Companies Encouraged to Include ICFR Reports in Glossy Annual Reports	17-61
c.	Auditor Attestation.	17-61
–	SRCs with Greater Than \$75 Million Public Float: Auditor Attestation Required.	17-61
–	Disclosure of Adverse Auditor Opinion May Be Required If Auditor Change	17-61
d.	Evaluation Frameworks	17-62
–	Cite COSO (or Other) Framework Rather than SEC Guidance	17-62
e.	Disclosure of Material Weaknesses	17-62
–	Management & Auditor Disagree Whether Material Weakness Exists for 10-Q	17-62
–	Include CEO/CFO Certification Even If Material Weakness Identified	17-63
–	Filing Form 12b-25 Doesn’t Mandate “Disclosure Controls Ineffective” Conclusion	17-64
–	Using Material Weakness Disclosure to Place Change-in-Controls in Context.	17-64
f.	Controls Over Related Entities	17-64
–	Internal Controls Over Unconsolidated Affiliates	17-64
g.	Incomplete Testing	17-66
–	Failure to Timely Complete ICFR Precludes Auditor Opinion	17-66
h.	Disclosing Changes to Internal Controls	17-66
–	Disclose Change to Internal Audit Provider if ICFR Change as Result	17-66

i.	SEC Enforcement Actions	17-67
–	SEC Enforcement Actions & Internal Control Violations	17-67
V.	History	17-67

Chapter 18—D&O Biographical/Director Qualifications & Skills Disclosure (Item 401(a)-(e) of Regulation S-K)

I.	SEC Rules and Regulations.	18-3
II.	SEC Staff Guidance	18-6
III.	How the Rules Work	18-9
a.	Identifying Executive Officers & Directors	18-9
–	Who is an “Executive Officer?”	18-9
–	Comparing Definitions of “Executive Officer” & Section 16’s “Officer”	18-9
–	Consequences of Being Deemed “Executive Officer”.	18-10
–	How Many Executive Officers Should a Company Have?	18-10
–	Process of Making Executive Officer Determinations.	18-11
–	Judgment Calls Involved in Executive Officer Determinations	18-12
–	Executive Officers Can’t Avoid Being Named, Even If Don’t Consent	18-13
–	Don’t Include Any Executive Officer Who Left Before Filing	18-13
–	Executive Officer List Often Disclosed in 10-K; Not Proxy Statement	18-13
–	Director Nominee Consent to Serve	18-14
–	Don’t Include Directors Whose Terms Won’t Continue	18-15
–	Don’t Include Advisory Directors	18-15
b.	Disclosure of Biographical Information.	18-15
–	Include Name, Age, Positions, Terms & Third-Party Arrangements.	18-15
–	Include Five Years Worth of Business Experience	18-15
–	Risks of Selective Disclosure.	18-16
–	How to Disclose Retirement From Day Jobs.	18-17
–	No Need to Include Immaterial Subsidiary Positions	18-17
–	Disclose Material Subsidiary Positions	18-17
–	Include Other Directorships	18-17
–	Date References Specificity	18-17
–	Include Family Relationships Among Insiders	18-18
–	Include Referral Source for First Time Nominees (Even If Already a Director)	18-18
c.	Disclosure of Specific Experience, Qualifications, Attributes & Skills for Directors and Director Nominees	18-19
–	Include Specific Experience, Qualifications, Attributes & Skills	18-19

– Linking Specific Qualifications to Company-Specific Circumstances	18-19
– Deciding Whether to Describe “Soft” Skills and Attributes	18-20
– Disclosures on Group Basis Not Permitted	18-21
– SEC Comments on Specific Experience, Qualifications, Attributes or Skills	18-22
– Discuss Self-Identified Diversity Attributes If Considered By Board	18-22
– Discussion of Committee Qualifications Often Not Required	18-23
– Include All Directors Even If Classified Board	18-23
– Consider “Parity” in Director Qualification Disclosures	18-23
– “Humanize” Your Directors	18-23
– Who Prepares the Director Qualifications Disclosure?	18-24
– Flexible Disclosure Placement & Format	18-24
d. Disclosure Controls & Procedures	18-25
– Ensure Disclosure Controls Track Backgrounds, Other Company Disclosures & Online Bios	18-25
– Directors Should Review Own Disclosures	18-26
IV. Common Questions & Our Analysis	18-26
– Change in Executive Officers Between 10-K & Statement Filings	18-26
– Change in Director’s Principal Employment Between Proxy Statement Filing & Meeting Date	18-27
– New Director Nominee in Proxy Statement	18-27
– Add New Director to Proxy Statement/Card if Appointed Before Meeting	18-28
– Announcing Director Nominee in Advance of Filing Definitive Proxy	18-28
– Director Resigns/Dies Between Proxy Statement Mailing & Annual Meeting	18-28
– Best Way to Draft Director Qualifications Disclosure	18-29
– Qualification & Skill Determinations for Incumbent Directors and Continuing Directors Not Up for Renomination	18-29
– Inactive CPA	18-31
– Describe Employment & Affiliations of Registered Broker	18-32
– Describing Soft Skills Attributable to Entire Board	18-32
– Board Matrices	18-33
– Item 401(a): Interplay with Item 403 Beneficial Ownership Disclosure	18-33
– Item 401(a): Agreements Between Third Parties & Company	18-33
– Item 401(b): Arrangements Under Which Officers Selected	18-34
– Item 401(e): Non-Continuing Directors	18-34
– Item 401(e)(2): Five Year Look Back	18-35
– Item 401(e) Doesn’t Apply to Private Company Directorships	18-35
– Outside General Counsel an Executive Officer	18-36
– Annual Appointment of Executive Officers	18-36
V. History	18-37

Appendix A: Sample Resolution Designating Executive Officers	18-38
Appendix B: Sample D&O Questionnaire “Qualifications & Skills” Language for Directors & Nominees	18-38

Chapter 19—Director & Executive Officer’s Legal Proceedings Disclosure (Item 401(f) of Regulation S-K)

I. SEC Rules and Regulations	19-2
II. SEC Staff Guidance	19-4
III. How the Rules Work	19-5
– Purpose of Disclosure to Evaluate Fitness to Serve	19-5
– Voluntary Disclosure Rare	19-5
– How to Furnish Supplemental Information to Corp Fin	19-6
– Disclosure Not Required If Director Leaving Board	19-6
– Disclosure Obligations Include Executive Officers	19-6
– Specific Types of Legal Proceedings Required to be Disclosed	19-6
– Possible Need to Look Beyond Enumerated List of Legal Proceedings	19-7
– No Need to Disclose Traffic Violations and Other Minor Offenses	19-7
– Disclose Administrative Proceedings If Akin to Enumerated Trigger	19-8
– Materiality Qualifier Difficult to Apply	19-8
– May Need to Disclose Involvement in Pending Proceedings	19-8
– May Need to Disclose Conduct Not Yet Fully Appealed	19-9
– Mitigating Circumstances Not Uncommon	19-10
– No Misleading Statements Permitted	19-10
– Control Person Concept Applied	19-10
– Ten-Year Lookback	19-10
– D&O Questionnaire as Diligence Starting Point	19-11
– Independent Verification May Be Required	19-11
– Role of Disclosure in Recruitment	19-11
IV. Common Questions & Our Analysis	19-11
a. Look-Backs	19-11
– Start of Ten-Year Lookback Period	19-11
– Evaluating Bankruptcy’s Two-Year Partnership/Corporation Lookback	19-12
b. Types of Proceedings	19-12
– Personal Bankruptcy	19-12
– Disclose Involvement as Bankrupt Company Officer	19-13
– Don’t Disclose Involvement as Bankrupt Company Director	19-14
– Lifetime Ban/Permanent Injunction	19-14

– Misdemeanor Drunk Driving	19-15
– FDIC Action	19-15
– Bank Regulatory Order	19-16
– Bank Failure	19-16
– Class Action Lawsuit	19-16
– Non-US Legal Proceedings	19-17
c. Appeals Process	19-17
– Appeal Process Not Yet Finalized	19-17
V. History	19-17

Chapter 20—Beneficial Ownership Table (Item 403 of Regulation S-K)

I. SEC Rules and Regulations	20-4
II. SEC Staff Guidance	20-6
III. How the Rules Work	20-8
– Purpose of Beneficial Ownership Table	20-8
– Which 5% Owners Get Included in Table	20-8
– Don’t Include Wholly-Owned Subsidiary in Table	20-8
– Include 401(k) Plan as 5% Owner Only If Has Vote or Disposal Power	20-8
– Identify Executive Officer Who Owns 5%—Even If Not NEO	20-9
– Which Directors & Executive Officers Get Included in Table	20-9
– “Group” Ownership of All Directors & Executive Officers Not Simple Math	20-9
– Replace Percentage Owned Column with Footnote If Less Than 1% Ownership	20-10
– Determination Date for Who Included	20-10
– Address of Beneficial Owner	20-10
– Determination Date for Calculating Beneficial Ownership	20-10
– How to Determine Numerators for Ownership Calculations	20-11
– How to Determine Denominator for Ownership Calculations	20-11
– Include Options That Have Vested—or Will Vest—Within 60 Days in Column (3)	20-12
– Don’t Forget RSUs (& Other Convertible Securities) Vesting Within 60 Days	20-12
– Include ESPP Shares to be Acquired Within 60 Days	20-12
– Fractional Shares Aren’t Typically Reported	20-13
– Disclosing Pledged Shares in Column (3)	20-13
– Pledges Disfavored by Shareholders	20-14

– Hedging Disclosure Required Elsewhere	20-15
– Disclosing Standalone Stock Appreciation Rights in Column (3)	20-15
– Shares Attributable to SARs May Vary Year to Year	20-17
– Disclosing Phantom Stock in Column (3)	20-17
– Footnoting Pledges	20-19
– Disclosing Shares Held by Family Members in Column (3)	20-19
– Shares held in GRAT	20-19
– Liberal Use of Footnotes to Table Encouraged	20-20
– Disclosing Joint Ownership With Spouse	20-20
– Explain Type of Voting & Investment Power for 5% Owners	20-20
– Sound Diligence Practices as Part of Disclosure Controls & Procedures	20-20
– How Should Diligence for Management Be Conducted	20-21
– How Should Diligence for 5% Owners Be Conducted	20-21
– Can Look at Schedule 13Fs (But Don't Rely on Them)	20-23
– How Should Diligence for Former NEOs Be Conducted	20-24
– Rely on Later Filed Form 4 Over Schedule 13D	20-24
– Disclaimer for Possible Omissions	20-24
– Placement of Table in Proxy Statement; Table Often Split Into Two	20-24
– How Much Can Table Be Varied	20-25
– Fixing Errors in Beneficial Ownership Table	20-25
– Penalties for Missing 5% Owner	20-25
– Penalties for Disclosing Incorrect Information for 5% Owner	20-26
– Disclosure Not Dispositive Proof of Beneficial Ownership	20-26
– IPO Table Includes Post-Closing Ownership	20-26
– Section 16 Report's Use of "Beneficial Ownership"	20-26
– Foreign Private Issuers Must Include 5% Owner Information in Form 20-F	20-26
IV. Common Questions & Our Analysis	20-27
a. Determining Which Directors & Officers Get Included	20-27
– Interplay of "Executive Officer" Definition	20-27
– Counting NEOs Who Also Are Directors	20-27
– Departing NEO Determination	20-28
– "Directors and Executive Officers as a Group" Includes Departed NEO	20-28
– Departed Director Doesn't Get Included	20-28
– Retired Director Who Has Departed Doesn't Get Included	20-30
– Director Emeritus Not Likely Included	20-30
– "Significant Employees" Don't Get Included	20-30
– Smaller Reporting Companies NEOs	20-31
b. Determining Which 5% Owners Get Included	20-32
– Schedule 13G Just Below 5%	20-32
– Relying on Schedule 13D Over More Recent Schedule 13F	20-32
– Rule of Three & SEC Staff's Comment Letters Questioning It	20-32

– Investment Management Funds	20-33
– Private Equity Firm & Intermediaries Both Disclosed	20-33
– Report Private Equity Funds Ownership on Separate Rows of Table	20-34
c. Ownership Calculations	20-34
– Calculation of 60 Days Under Rule 13d-3	20-34
– Definition of “Most Recent Practicable Date”	20-35
– Ownership Changes After “Most Recent Practicable Date”	20-35
– Calculation Date for Total Shares Outstanding	20-36
– Calculating Total Shares Outstanding	20-36
– Whether Column 4 Determined on Fully-Diluted Basis	20-36
– Interplay With Item 401 Age Disclosure	20-37
d. Determining What is Beneficially Owned	20-37
– Spouse’s Shares Included Even If Not Jointly-Owned	20-37
– Disclosure of Spouse’s Joint Ownership	20-38
– 5% Owner and Spouse Who Can’t Exercise Options	20-39
– Director of Entity-Shareholder	20-40
– Inclusion of Qualifying Shares	20-40
– Inclusion of Restricted Stock	20-41
– Time-Based Restricted Stock With No Voting, Dividend or Transfer Rights	20-41
– Inclusion of Time Vested RSUs With Deferred Delivery	20-42
– Inclusion of RSUs and SEUs	20-43
– RSUs & Share Withholding for Taxes	20-44
– Inclusion of PSUs & Performance-Based RSUs	20-44
– Inclusion of Phantom Stock	20-45
– Inclusion of Underwater Options	20-45
– Inclusion of SARs	20-45
– Inclusion of Shares Issuable Upon Conversion of Convertible Securities	20-46
– Conversion of Convertible Preferred Stock for IPO Prospectus	20-47
– Typically Include Director & Executive 401(k) Shares	20-47
– Not Including ESOP Allocated Shares	20-47
e. Disclosure Issues	20-48
– Preliminary Proxy & Omission of Beneficial Ownership Numbers	20-48
– Schedule 13D Amendment Filed After Preliminary Proxy Statement, But Before Definitive Filed	20-48
– How to Disclose Ownership Through IRA Accounts	20-49
– Type of Assets Pledged Doesn’t Matter for Pledged Shares	20-49
– Security Interest in Pledged Option Shares	20-49
– Footnoting Change-in-Control Disclosure	20-50
– Pecuniary Interest Disclaimer Irrelevant	20-50

– Inclusion of Direct Stock Purchase Plan Shares in IPO Table	20-50
f. Conducting Diligence for Directors & Officers	20-51
– D&O Questionnaires for Former Executive Officers	20-51
– Reliance on Form 4s	20-51
g. Conducting Diligence for 5% Owners	20-51
– No Need to Use 5% Owner Questionnaires	20-51
– Duty to Identify 5% Shareholders Is Limited	20-52
– Conducting Diligence on Schedule 13Gs	20-52
– Determining Holdings After Acquisition of 5% Owner Can Be Tricky	20-52
– Relying on Schedule 13F Rather Than Schedule 13G	20-53
– Effect of Buybacks on Passive Investor Exceeding 10% Owner Status	20-54
V. History	20-54

Chapter 21—Related Party Transactions Disclosure (Item 404 of Regulation S-K)

I. SEC Rules and Regulations	21-5
II. SEC Staff Guidance	21-11
III. How the Rules Work	21-15
a. Overall Disclosure Requirements	21-15
b. Item 404(a): Related-Party Transaction Disclosure	21-15
– What Transactions Must Be Reported	21-15
– What Must Be Disclosed About Reportable Transactions	21-16
– What is a “Transaction”?	21-16
– Definition of “Amount Involved”	21-16
– Transactions In Which Company is “Participant”	21-18
– Identifying “Related Persons”	21-19
– Meaning of “Since the Beginning of Registrant’s Last Fiscal Year”	21-20
– Transactions Prior to Becoming—or After No Longer Being— Related Person	21-21
– Exceptions to Item 404(a) Disclosure Requirement	21-21
– Definition of “Materiality”	21-26
– Overdisclosure Typical Due to Vague Materiality Standard	21-26
c. Item 404(b): Approval Procedures	21-28
– What Must Be Disclosed About Related Party Transaction Policies	21-28
– Best Practices for Ensuring Compliance with Policies & Procedures	21-29
– Best Practices for Board Oversight of Policies & Procedures	21-31
d. Item 404(c): Promoters & Control Persons	21-33

e.	Item 404(d): Smaller Reporting Companies	21-33
f.	Foreign Private Issuers.	21-34
g.	Section 16 Short-Swing Trading Rules: Non-Employee Directors	21-34
h.	Relationship with Director Independence Determinations of Item 407(a)	21-35
i.	Item 5.02(c) of Form 8-K.	21-36
j.	Exhibit Filing Requirements	21-36
k.	Confidential Treatment Requests	21-36
l.	PCAOB’s Related Party Transactions Standard	21-36
IV.	Common Questions & Our Analysis.	21-37
a.	Definition of “Transaction”	21-37
	– Charitable Gift May Be Related Party Transaction	21-37
	– Loans to Company by Insiders May Be Related Party Transaction	21-38
	– Legal Fee Payments to Directors May Be Related Party Transaction	21-38
	– Legal Fee Reimbursement by Executive May Be Related Party Transaction.	21-39
	– Shares Repurchased in Merger May Be Related Party Transaction	21-39
	– Shares Repurchased from Officers May Be Related Party Transaction.	21-40
	– Director Exception for When Also Serve As Director of Customer, Etc.	21-40
	– Instruction 6 Interpreted Narrowly	21-40
	– Proxy Contest Reimbursement for 5% Shareholder	21-41
b.	Computing Transaction Amounts	21-41
	– No Proration of Amount for Officer Who Served Only Part of Year.	21-41
	– Equity Interest in Entity Contracting with Company	21-41
	– Computing Amount When Multiple Recipients	21-42
	– Computing Amount for Service Contract Between Reporting Company & Director’s Company.	21-42
	– Share Purchase Price May Indicate Value of Non-Monetary Arrangements with Significant Shareholder	21-43
	– Transaction Amount for Lease Agreement Assumed in Merger	21-44
c.	Definition of “Participant”	21-44
	– Open-Market Purchases or Sales of Company Securities	21-44
	– Follow-On Offering Purchases	21-45
	– Private Purchases or Sales of Company Securities	21-45
	– Transactions Between 5% Shareholder & Acquired Company	21-45
	– Director’s Business as Subcontractor for Company	21-46
d.	Definition of “Related Persons”	21-46
	– Director of Subsidiary	21-46
	– Significant Shareholder with Continuing Rights	21-47
	– Ongoing Transaction with Former Significant Shareholder	21-47

– Eternal Disclosure isn’t Required—Disclose Transactions for Period Covered by Report	21-48
– Board Observer Agreement Typically Disclosed	21-48
– Investment Management Funds	21-49
– Adult Children are “Related Persons”	21-50
e. Time Periods Covered	21-50
– Cut-Off Date for Item 404(a) Disclosure in Form 8-K	21-50
– Three-Year Lookback for Registration Statements	21-51
– Disclosure Timing for New Officer’s Family Member Who is Employee Too	21-51
– Include Pre-Acquisition Payments in Calculation of “Amount Involved”	21-52
f. Transactions with Current or Former Related Persons	21-52
– Multiple Family Members Employed at NEO’s Company	21-52
– Insider With Related Party Transaction Moves From One Company to Another (That is Party to Transaction).	21-53
– New Director Retiring From Firm Transacting with Company	21-53
– Consulting Agreement with Former Director	21-54
– Transactions With Entity Owned By Former Executive	21-54
g. Materiality Issues	21-55
– Limited Partners in Limited Liability Partnerships	21-55
– Executive’s Relative’s Position in Company Owned by Executive with 404(a) Disclosable Contract.	21-56
– Law Firm Partner as Related Person	21-56
– Prior Relationship With Director of Acquired Company	21-57
– Bank Officer as Trustee	21-57
h. Director/Officer Compensation Exemption	21-58
– Distinguishing Related Person Transaction from Compensation	21-58
– May Be Better to Characterize Payments as “Perks” Vs. “Related Person Transaction”	21-58
– Meaning of “Is Reported”	21-59
– Compensation to Employee Who Becomes Executive	21-59
– Compensation for Related Person’s Immediate Family Member	21-60
– Compensation Computation for Relative of Reported Person.	21-62
– Stock Options Granted to Related Person’s Immediate Family Member	21-63
– Parent Supplies Executive Officers to Subsidiary for Management Fee	21-64
– Payments to Non-NEO Employee Director	21-65
– Current Director Who Is Former Executive Officer	21-65

– Current CEO is Former Joint Venture Partner	21-66
– Cash Compensation to Director Before Joining Board	21-66
– Disclose Option Granted to Director Nominee	21-67
– Options Not Received as Compensation	21-68
– Evaluate Whether Perks Disclosure Might Be Disclosable Under Item 404(a)	21-69
– Perk Reimbursements Over \$120k Might Require Related-Party Disclosures	21-69
– Director Independence Determinations May Be Disclosable Under Item 407, Even If Not Disclosable Under Item 404	21-70
– Sale of Stock With \$120k or More Withholding	21-71
– Director Loan’s Impact on “Non-Employee Director” Status	21-71
– Director Acquires Company’s Public Debt	21-72
i. Bank Loan Exemption	21-72
– Bank Loan Exemption Does Not Cover Loan From Subsidiary	21-72
– Disclosure for Bank Loan Covered by Instruction 4(c)	21-72
j. Other Exemptions from Item 404(a) Disclosure	21-73
– Shares Received in Merger	21-73
– Payments Related to Ownership of Securities	21-74
– Related Person is Non-Executive Officer of Company’s Telephone Provider	21-74
– Bank Depository & Similar Services: Construe Exemption Narrowly	21-75
k. Filing of Agreements	21-75
– Exhibit Filing Requirements	21-75
– Confidential Treatment Requests	21-76
l. Policies & Procedures	21-76
– Scope of Policy	21-76
– Due Diligence Requirements in D&O Questionnaires	21-76
– Cross-Reference to Committee Charters	21-77
– Pre-Approved for Policy Purposes: What About 404(b)?	21-78
– Pre-Approved Transactions: 404(a) Disclosure Still Required	21-78
m. Violation Identification	21-78
– Violations of Exchange Act Section 13(k)	21-78
– Code of Conduct Waiver Typically Unnecessary If Procedures Followed	21-79
n. Smaller Reporting Companies	21-80
– Definition of Two-Year Period	21-80
– Calculating Amount Involved	21-80
o. Incorporation by Reference	21-81
– Difficult to Incorporate 8-K Into Proxy (But Not Vice Versa)	21-81

p. Entry into Director Indemnification Agreements Typically Not Reportable as Related Party Transaction	21-82
V. History	21-82
Appendix A—Sample Annotated Policy: Related Party Transaction Policies & Procedures	21-83

Chapter 22—Section 16 Delinquencies Disclosure (Item 405 of Regulation S-K)

Disclosure Requirements	22-2
[1] Reporting Delinquencies	22-2
[a] The Disclosure Requirement	22-3
[b] Persons Covered	22-3
[c] Time Period Covered	22-3
[d] Types of Delinquencies Covered	22-4
– No Minimum Threshold	22-5
– No Fault Required	22-5
[e] Presentation of Required Disclosures	22-6
[i] Caption	22-6
[ii] Names of Violators	22-6
[iii] Information About Violations	22-7
[f] Disclosure Format	22-7
[g] Delinquency Disclosable Only Once	22-8
[h] Determining Whether Reporting Violations Occurred	22-8
[i] Permissible Assumptions	22-9
[j] Consequences of Inadequate Disclosure	22-9
[2] Disclosure of Enforcement Proceedings	22-10
[3] Disclosure of Section 16(b) Liability and Disgorgement	22-10
[4] Disclosure of Section 16(b) Trading Restrictions	22-12

Chapter 23—Code of Ethics/Conduct Disclosure (Item 406 of Regulation S-K/Item 5.05 of Form 8-K)

I. SEC Rules and Regulations	23-4
II. SEC Staff Guidance	23-6
III. How the Rules Work	23-7
a. Disclosing Whether Company Has Code of Ethics	23-7
– Disclose Whether Have Code in Form 10-K	23-7
– General Principles-Based Definition of Code of Ethics	23-7
– Different Codes for Different Types of Officers	23-8
– Methods of Making Code Publicly Available	23-8
– Incorporation by Reference from Proxy Statement May Be Available	23-8
– Pros/Cons of Exhibit Filing vs. Website Disclosure vs. Providing upon Request	23-9
– Need Only File/Post/Provide Portions of Code Required by Item 406	23-9
– How—and How Long—to Post Code on Company Website	23-9
b. Disclosing Whether Company Has Amended or Waived Code Provision	23-10
– Disclosure of Amendments & Waivers Via 8-K or Website	23-10
– Weighing Considerations of 8-K vs. Website Disclosure	23-10
– What is a “Waiver”?	23-11
– What is an “Implicit Waiver”?	23-11
– Non-Substantive Amendments Need Not Be Disclosed	23-11
– Amendments & Waivers Not Involving Senior Officers Need Not Be Disclosed	23-11
– Amendments & Waivers Relating to Other Topics Need Not Be Disclosed	23-12
– Listed Companies Required to Disclose Any D&O Waivers	23-12
c. Disclosure Controls & Procedures	23-12
– Implement Disclosure Controls & Procedures to Capture Waivers & Amendments	23-12
– Annual Reminder & Acknowledgement of Receipt and Review	23-13
d. Board or Committee Oversight: Code of Ethics and Compliance Program	23-13
– Importance of Board Oversight & Potential Director Liability	12-14
e. NYSE & Nasdaq Listing Standards	23-16
– Listing Standards Require Code Adoption	23-16
– Listing Standards Broader Than SEC Rules	23-16

– NYSE Requirements for Code of Business Conduct and Ethics	23-16
• Broad Applicability	23-16
• Substantive Code Requirements	23-16
– NYSE Requires Disclosure of Code of Business Conduct and Ethics	23-18
– NYSE Code Waivers & Amendments	23-18
– Nasdaq Requirements for Code of Conduct	23-18
• Broad Applicability	23-18
• Substantive Code Requirements	23-18
– Nasdaq Requires Disclosure of Code of Conduct	23-19
– Nasdaq Code Waivers & Amendments	23-19
f. Violation Reporting & Enforcement Standards	23-19
IV. Common Questions & Our Analysis	23-20
a. Disclosing Whether Company Has Code of Ethics	23-20
– Incorporation by Reference of Code Exhibit into 10-K	23-20
– Incorporation by Reference and Item 5.05 of 8-K	23-21
– Newly Public Company and Use of Item 5.05(c) of 8-K	23-21
b. Disclosing Amendment or Waiver	23-22
– Whether to File Amended Code with 8-K	23-22
– No Need to File Revised Code as 10-Q Exhibit	23-22
– Length of Time for Code Waiver to Remain Posted	23-23
– Waiver of Corporate Governance Guidelines Isn’t Code Waiver	23-23
– Officer Reprimand Ordinarily is Enforcement of Code Violation—Not Waiver	23-24
– Union Approval to Amend Code	23-24
– Director Conflicts of Interest	23-24
– Director Duty of Confidentiality	23-25
– Violation of Other Policies May Cause Implicit Waiver of Code of Ethics	23-25
c. Disclosure Controls & Procedures	23-26
– Selecting Board Committee to Oversee Code Compliance	23-26
– Audit Committee Delegation Practices	23-26
d. NYSE & Nasdaq Listing Standards	23-27
– NYSE’s Position on Website Postings	23-27
– NYSE Disclosure Requirement for Code Waivers	23-27
– NYSE’s Definition of “Executive Officers” for Waiver Disclosure	23-27
– Code of Conduct Waiver Typically Unnecessary If Procedures Followed	23-28
– Nasdaq & Online Posting	23-28
– Nasdaq’s “Fair Process to Determine Violations”	23-28
– Nasdaq & Enforcing Code Compliance	23-29
– Nasdaq & Overseas Employees	23-29

e. Issues to Consider When Drafting & Enforcing a Code of Ethics	23-30
– How to Draft a Code	23-30
– How to Create Code When Company Operates in Multiple Countries	23-30
– Whether to Adopt Separate Codes for Directors & Employees	23-30
– Extending Code Beyond Required Whistleblowing Topics	23-31
– Translation of Code Into Other Languages	23-31
– Director Certification of Compliance with Code	23-32
– How to Evaluate Whether Employees Are Complying	23-32
– Fraud Policies	23-33
– Whether Board Approval Required for All Code Changes	23-34
– Quickly Implement Code of Ethics at Acquired Company	23-34
V. History	23-35

Chapter 24—Board Meeting/Board Committee Disclosure (Item 407(b) of Regulation S-K)

I. SEC Rules and Regulations	24-3
II. SEC Staff Guidance	24-4
III. How the Rules Work	24-4
– Disclose Number of Board Meetings	24-4
– Disclose Both Regular & Special Board Meetings	24-4
– Disclose Both In-Person & Remote Access Meetings	24-4
– Disclose Number of Key Board Committee Meetings	24-5
– Don’t Need to Count Non-Key Board Committee Meetings; But Can Voluntarily Do So	24-5
– Don’t Include Meetings Held Since End of Fiscal Year But Before Proxy Statement Filed	24-5
– Don’t Include Meetings Held By Predecessor Companies	24-5
– Don’t Include Meetings Held By Subsidiaries	24-5
– Only Include “Official Meetings” of Boards & Board Committees	24-6
– Minutes Dictate How to Count Multi-Day Meetings	24-6
– Don’t Include Board Action By Written Consent as Meeting	24-6
– Don’t Include Committee Action by Written Consent as Meeting Either	24-7
– Disclose Whether Have Standing Key Board Committees	24-7
– Identify Members of Standing Key Board Committees	24-7
– Deciding Whether to Include Committee Members Who Have Joined Since End of Fiscal Year	24-7
– Describe Function of Standing Key Board Committees	24-8

– Disclose Any Directors Who Didn’t Attend 75% of Meeting Obligations	24-8
– Consider Providing Actual Attendance Data	24-8
– Explain Why Missed So Many Board Meetings (If There’s Valid Excuse)	24-9
– When Calculating Attendance at Board Committee Meetings, Use Even Ad Hoc Committees	24-9
– When Calculating Attendance at Board Committee Meetings, Include Subcommittees	24-9
– Don’t Disclose Delinquent Directors If Left Board or Not Up for Reelection . . .	24-10
– Ex-Officio Committee Members Often Not Disclosed	24-10
– Include Delinquent Director Even If Joined Board During Midst of Last Fiscal Year	24-10
– Disclose “Board Attendance at Annual Shareholder Meeting” Policy	24-10
– Option to Post “Board Attendance at Annual Shareholder Meetings Policy” Online	24-11
– Disclose How Many Directors Attended Last Year’s Annual Shareholder Meeting	24-11
– Disclosure Controls Should Keep Track of Number of Meetings & Attendance	24-11
– Disclose Whether Key Committee Charters Posted on Corporate Website	24-11
IV. History	24-12
Appendix	
– Checklist: Board Meetings—Scheduling	24-13
– Checklist: Board Committees—Meeting Scheduling	24-15
– Checklist: Board Meetings—Attendance	24-18

Chapter 25—Director Attendance at Annual Meetings (Item 407(b) of Regulation S-K)

I. SEC Rules and Regulations	25-2
II. SEC Staff Guidance	25-2
III. How the Rules Work	25-3
– Disclose “Board Attendance at Annual Shareholder Meeting” Policy	25-3
– Option to Post “Board Attendance at Annual Shareholder Meetings Policy” Online	25-3
– Disclose How Many Directors Attended Last Year’s Annual Shareholder Meeting	25-3
– Remote Director Attendance	25-3

– Best Practice: Require Director Attendance	25-4
– Adopting Director Attendance Policies	25-4
– Prepping Directors for Annual Meeting.	25-4
– Annual Meeting Script.	25-5
– Assigning Speaker Roles to Directors for Q&A	25-5
– Introduction of Directors as Group or Individually	25-6
– Housekeeping Items.	25-6
– Regulation FD Applicability	25-6
IV. History	25-6
Appendix A: Checklist for Annual Meetings Scripts	25-7
A. Script Process & Drafting	25-7
1. Why Use a Script	25-7
2. Use At Least Talking Points	25-7
3. Update Last Year’s Script	25-7
4. Creating Script for First Time	25-7
5. Who Prepares Script Draft & When	25-7
6. Minimize Number of Speakers	25-8
7. Common Items Addressed in Script	25-8
8. Finish Official Portion of Meeting First.	25-9
9. Short & Sweet	25-9
10. “Easy to Follow” Formatting	25-9
11. Review by Others of Script	25-9
12. Rehearse in Advance	25-9
13. Tweak Script for Next Year Right After Meeting	25-9
B. Guidelines for Using Scripts on the Day of the Annual Meeting	25-9
1. Last Minute Reminders for Chair	25-9
2. Many Should Have Script	25-10
3. Consider Teleprompter.	25-10

Chapter 26—Nominating Committee Process/Director Nominee Qualifications Disclosure (Item 407(c) of Regulation S-K)

I. SEC Rules and Regulations.	26-3
II. SEC Staff Guidance	26-6
III. How the Rules Work	26-7
a. Purpose of Disclosure Requirement	26-7
– Evaluation of Nominating Committees	26-7
– Disclosures Required Even If No Formal Nominating Committee.	26-8

b. Disclosure of How Nominating Committees Set Qualifications	26-8
– Describe Specific Minimum Qualifications & Director Qualities and Skills	26-8
– Describe How Diversity Policy is Implemented & Monitored	26-8
– Interplay with Item 401(e)	26-8
– Discuss Consideration of Attributes Contemplated by Diversity Policy	26-9
– Impact of Stock Exchange Requirements	26-9
– Using Board Matrices for Better Board Composition	26-9
– Public Disclosure of Matrices: Shareholder Initiatives	26-10
c. Disclosure of Nominating Committee Process	26-11
– Describe Process, Including Nominee Sources & Use of Third Parties	26-11
d. Policies for Shareholder Submission of Director Candidates	26-12
– Describe Policy for Shareholders to Submit Director Candidates	26-12
– Directors Serving Under Shareholder Agreements	26-12
e. Board Diversity Policies	26-12
– Do We Have a Director Diversity Policy?	26-12
– Diversity Policies in Nominating Committee Charters or Corporate Governance Guidelines	26-14
– Discuss Consideration of Attributes Contemplated by Diversity Policy	26-14
– SEC Staff Comments on Diversity Disclosures	26-14
f. Disclosure in Periodic Reports of Material Changes for Shareholder Nominations	26-15
– Description of Material Changes in Quarterly or Annual Reports	26-15
g. Location & Process of Drafting Disclosure	26-15
– Location of Disclosure	26-15
– How to Prepare Disclosure	26-16
– Disclose Whether Committee Charter Posted on Corporate Website	26-16
IV. Common Questions & Our Analysis	26-17
– Director Qualification Bylaws	26-17
– Director Nominee Questionnaires	26-18
– Director Background Verification	26-19
– Need for Nominee NDA Depends on Circumstances	26-19
– Process for Vetting Officers Asked to Serve on Other Boards	26-20
– Waiting to Announce New Director Until After Definitive Proxy Filed	26-20
– Handling Pseudo Self-Nominations	26-20
V. History	26-21

Appendix A

Sample Board Matrix	26-22
Board Skills Matrix	26-23

Appendix B

Sample Policy on Shareholder Recommendation of Director Candidates	26-23
--	-------

Appendix C

Sample Procedures for Shareholders Submitting Nominating Recommendations (Website Disclosure)	26-24
--	-------

Chapter 27—Audit Committee Disclosure (Item 407(d) of Regulation S-K)

I. SEC Rules and Regulations	27-4
II. SEC Staff Guidance	27-9
III. How the Rules Work	27-9
a. Why Form an Audit Committee	27-9
– SEC Doesn’t Require Audit Committee, But Exchanges Do	27-9
b. Disclosure of Audit Committee Meetings & Members	27-9
– Disclosure of Audit Committee Meetings	27-9
– Disclosure of Audit Committee Members	27-10
– If Audit Committee Member Isn’t Independent, Special Disclosure Required	27-10
c. Audit Committee Charters	27-10
– Disclose Whether Audit Committee Charter Exists	27-10
– Disclose That Audit Committee Charter Posted on Corporate Website	27-11
– Use Charter As Proxy Statement Appendix Triennially If Not Posted Online	27-11
– Content of Audit Committee Charter Dictated by Exchanges	27-11
– Drafting Suggestions for Audit Committee Charters	27-14
d. Audit Committee Reports	27-15
– Purpose of Audit Committee Report	27-15
– Audit Committee Report Not Required in 10-K	27-15
– Contents of Audit Committee Report	27-15
– Review & Discussions Not Required by SEC, But Driven by Auditing & Exchange Standards	27-15
– Details of Review Not Required, But Additional Information Often Included	27-16
– Trend of Expanding Audit Committee Disclosure	27-17

– Risks & Benefits of Enhanced Audit Committee Disclosure	27-19
– Tenure & “CAM” Audit Report Requirements	27-19
– Identifying CAMs	27-20
– Understanding Auditor’s CAM Communications	27-21
– Not Every Audit Will Have a CAM.	27-22
– SEC’s & PCAOB’s Concept Releases	27-22
– Printed Names of Each Member Included Under Audit Committee Report.	27-23
– Only Names of Those Who Participated Should Be Included.	27-23
– Matters Discussed Between Audit Committee & Auditor	27-23
– Auditor’s Independence Discussed With Audit Committee	27-24
– Auditor Independence Violations: Required Communications & Risks . . .	27-25
– Audit Committee Report Not Intended to Heighten Liability	27-27
– Safe Harbors Against Heightened Liability	27-27
e. Audit Committee’s Role for Disclosures & Earnings Releases	27-28
– Audit Committee Review Process for 10-Ks, 10-Qs & Earnings Releases	27-28
– Alternative Audit Committee Approaches for 10-Ks, 10-Qs & Earnings Releases	27-29
– Audit Committee’s Involvement in MD&A	27-30
– Audit Committee’s Involvement with Risks of Material Misstatements. . .	27-31
– Audit Committee’s Involvement with Internal Controls	27-31
f. Audit Committee Financial Experts.	27-32
– Purpose of Audit Committee Financial Experts.	27-32
– Must Have At Least One “Audit Committee Financial Expert” (or Disclose Why Not).	27-33
– Must Identify Financial Expert	27-33
– Permitted to Have More Than One Financial Expert	27-33
– Definition of Financial Expert	27-34
– Financial Experts Must Possess All Five Attributes	27-34
– Attribute Requires Understanding of GAAP	27-34
– Attribute Requires Ability to Assess Application of GAAP to Estimates, Accruals, Reserves	27-35
– Attribute Requires Experience “Generally Comparable” To Those Raised By Company’s Financials	27-35
– Attribute Requires Understanding Internal Controls	27-35
– Alternative Means of Acquiring Attributes—Don’t Need Auditor Experience	27-35
– “Active Supervision” As Way to Gain Relevant Attributes & Experience	27-36
– “Experience” As Way to Gain Relevant Attributes & Experience.	27-36

– “Education” Alone Not Enough to Gain Requisite Attributes & Experience	27-37
– Non-Exclusive Factors to Consider	27-37
– Serving on Audit Committee Alone Doesn’t Justify Expert Designation	27-38
– Serving as CFO or Auditor Doesn’t Automatically Qualify Person As Expert	27-38
– Designated Financial Expert Must Have Integrity.	27-38
– Audit Committee Chair Commonly Designated as Financial Expert	27-39
– Financial Experts Have Safe Harbor Protection From Extra Liability	27-39
– Other Audit Committee Members Still Have Obligations; Should Not Defer to Designated Expert	27-39
– Financial Expert Designation is Board Determination	27-39
– Designate Audit Committee Financial Expert Annually	27-39
– Neither SEC Nor Proxy Advisors Likely to Second Guess Designation.	27-40
– Financial Expert Disclosure Required Only in 10-K.	27-41
– NYSE & Nasdaq Financial Expertise/Sophistication Requirements.	27-41
– Per Exchange Standards, All Audit Committee Members Must be Financially Literate	27-42
– OTCBB Companies & Audit Committee Financial Experts	27-42
g. Foreign Private Issuers.	27-43
– Foreign Private Issuers Subject to Audit Committee Requirements	27-43
– Foreign Private Issuers Need Not Include Audit Committee Report.	27-43
– Foreign Private Issuers Need to Make Financial Expert Disclosure	27-44
h. Disclosure of Engagement Partners.	27-44
IV. History.	27-44

Chapter 28—Shareholder Communications with Directors Disclosure (Item 407(f) of Regulation S-K)

I. SEC Rules and Regulations.	28-2
II. SEC Staff Guidance.	28-3
III. How the Rules Work	28-3
– Purposes of Shareholder-Director Communication Requirement	28-3
– Most Companies Provide Shareholder-Director Communication Process	28-4
– If Company Doesn’t Have Process, Board’s Reasons Must Be Disclosed	28-4

– No Need to Disclose Internal “Screening” Process If Independent Directors Approve	28-4
– Option to Post Shareholder-Director Communication Disclosure Online	28-4
– Employee-Shareholder Communications May Need to Be Relayed	28-5
– Shareholder Proposals Not Part of Process	28-5
– Interplay with SEC’s Rules for Audit Committee Procedures to Receive Confidential, Anonymous Complaints	28-5
– Interplay with NYSE’s Requirement for Anyone to Communicate with Presiding Director or Non-Management/Independent Directors	28-6
– Creating Disclosure Framework That Complies with All Three SEC/Exchange Requirements	28-7
– Important to Document Communication Processes	28-11
– Shareholder Engagement Disclosure Increasingly Common	28-12
IV. History	28-13
Appendix A—Sample Website Disclosure for Shareholder Communication with Directors	28-14

Chapter 29—Risk Factors Disclosure (Item 105 of Regulation S-K)

I. SEC Rules and Regulations	29-4
II. SEC Staff Guidance	29-5
a. Compliance & Disclosure Interpretations	29-5
b. SEC Staff Guidance on Use of Plain English & Risk Factor Disclosure	29-5
c. SEC Interpretive Guidance on Climate Change Disclosure	29-5
d. SEC Staff Guidance on Cybersecurity Disclosure	29-6
e. SEC Staff Guidance on International Technology, Data and Intellectual Property Disclosures	29-6
f. SEC Staff Guidance on European Sovereign Debt Exposure	29-6
III. How the Rules Work	29-6
a. Where Should Risk Factors Be Used & How	29-6
– What is a “Risk Factor”?	29-6
– Why Use Risk Factors?	29-6
– Risk Factors Required in Form 10-Ks & Registration Statements	29-7
– Risk Factors Must Be In Plain English	29-7
– Plain English Means Clarity, Not Brevity	29-7

– Reg S-K Concept Release Gives Risk Factor Best Practices	29-8
– “Material Changes” to Previously Disclosed Risk Factors Updated in Form 10-Qs	29-8
– Smaller Reporting Companies Not Required to Provide Periodic Report Risk Factors	29-8
– Update Cautionary Language When Risk Factors Updated	29-8
– Deciding Whether to Include Just Updates in Form 10-Q or Full Laundry List (Or Something In-Between)	29-9
– Drafting Process If Merely Update Each Quarter Rather Than Repeat All	29-10
– Repeat Updated Risk Factors in Subsequent 10-Qs Until Next 10-K	29-10
– No Need for Negative Disclosure If No Update for 10-Q	29-11
– Include New Risks That Arise During Quarter; Don’t Just Update 10-K Risks	29-11
– Most Companies Don’t Regurgitate 10-K Risk Factors in 10-Q	29-12
– Not Common to Use Form 10-Q to Eliminate Risk Factor	29-12
– Include Risks That Arise After Reporting Period Ends, But Before Filing	29-12
– When to File 8-Ks to Disclose Updated Risk Factors Between Periodic Reports	29-13
– New “One-Off” Risk Factor Triggers	29-13
– Use 8-K to Update Risk Factors Between Periodic Reports; Not Amendment to 10-K/10-Q	29-15
– Amend 10-K/Q to Correct Risk Factor	29-15
– Can’t Incorporate Risk Factors Filed In Exhibit by Reference	29-15
– Risk Factors Required in Form 20-Fs	29-16
– Including Risk Factors in Prospectus Rather Than Incorporate By Reference	29-16
– Whether to Include Risk Factors in Base Prospectus or Prospectus Supplement	29-17
– Update 10-Q Risk Factors Following Issuance of New Class of Security	29-18
– Whether to Use Risk Factors in Private Placements	29-18
– Transitional 10-K/Subsequent 10-Q When Exiting Smaller Company Status	29-18
b. PSLRA Safe Harbor & “Bespeaks Caution” Doctrine	29-19
– Risk Factors as Cautionary Language for PSLRA Safe Harbor & “Bespeaks Caution” Doctrine	29-19
– What Does “Accompany” Mean?	29-20
– Placement of Safe Harbor Legend	29-21
– Risk Factor Disclosure Different Than PSLRA Safe Harbor	29-21

– Use of “Forward-Looking Statements” Section	29-21
– Impact on Disclaimer to Not Update Forward-Looking Statements	29-22
– Interplay—and Cross-References—of Risk Factors (& Cautionary Language) With MD&A	29-22
c. How to Determine Which Risk Factors to Use	29-23
– Almost Anything Can Be a Risk Factor.	29-23
– Number of Risk Factors	29-24
– Categories of Risk Factors	29-25
– Identifying Risk Factors: Use Your Risk Management Program.	29-25
– Identifying Risk Factors: Consult Board Minutes, Investor Feedback & Trade Publications	29-26
– Navigating Balancing Act of Low Probability Risk With High Magnitude	29-27
– Benchmark Against Peers for Risk Factors, Particularly for Industry Risks.	29-29
– Don’t Include Risks That Apply to Any Company	29-29
– Macro Events or Trends Can Be Appropriate Risk Factors.	29-30
– Illustrate How General Economic Conditions/Other Macro Trends Specifically Impact Your Company	29-32
– SEC Guidance on Cybersecurity Risk Factors	29-32
– SEC Guidance on International Technology, Data and Intellectual Property Disclosures	29-34
– Common Areas of Risk Factors	29-36
d. How to Draft Risk Factor Disclosure.	29-44
– Captions Must Adequately Describe Risk Factors Including Single Sentence Amplifiers	29-44
– Use Plain English.	29-45
– Order Risk Factors According to Risk Magnitude.	29-46
– Reorder Risk Factors As Materiality Changes.	29-46
– Use of Categories to Organize Risks By Common Themes	29-47
– Don’t Explain Risks Away or Otherwise Include Mitigating Factors	29-47
– Don’t Generalize Risk If It’s Started to Occur.	29-48
– Tie to Other Sections of Disclosure Document	29-48
– Look at Corp Fin Staff’s Plain English Samples	29-49
– Look at Corp Fin Staff Comments.	29-49
– Better Usability of Risk Factors.	29-52
e. Disclosure Controls & Drafting Processes for Risk Factors	29-52
– Specifically Mention Risk Factors in Disclosure Controls	29-52
– Consider Whether Risk Factors May Adversely Impact Disclosure Controls	29-52

– For Starters, Do Gut Check With Your Senior Management Team & Key Personnel	29-53
– Draft Risk Factors Last	29-53
– Keep the Audit Committee In The Loop	29-53
– Litigators Should Review Litigation-Related Risk Factors	29-54
– Outside Law Firm Involvement Possible	29-54
– Periodic Underwriter Counsel Involvement Ahead of Imminent Deal	29-54
IV. History	29-54

Chapter 30—10-K and 10-Q Exhibits (Item 601 of Regulation S-K)

I. SEC Rules and Regulations	30-7
II. SEC Staff Guidance	30-30
– Item 601 CDIs	30-30
– Inline XBRL CDI	30-37
III. How the Rules Work	30-37
a. General Requirements	30-37
– Many Exhibits Required for Periodic Reports	30-37
– Approximately 30 Types of Exhibits Required for 10-Ks; 20 Types for 10-Qs	30-38
– Confidential Treatment Requests Not Uncommon	30-38
– Only Need to File One Copy of Substantially Identical Documents	30-38
– Copies Permitted to Be Filed; No Need for Originals	30-38
– Paper Filing Permitted in Rare Circumstances	30-38
– Exhibits Must Be Filed Again For Each Periodic Report But Can Use Incorporation by Reference	30-39
– Item 601 Requires Links to Exhibits Incorporated by Reference	30-39
– Smaller Reporting Companies Have Substantially Similar Exhibit Filing Requirements	30-39
– Inline XBRL	30-39
– Sample Exhibit 101—Interactive Data Files	30-40
– Include Reference to Exhibit 104 in Exhibit Index and Cross Reference to Exhibit 101	30-40
b. Exhibit Index	30-40
– Flexibility Permitted for Exhibit Numbering But Ensure Your System Workable In Practice	30-40
– Continue to List “Incorporated by Reference” Items in Exhibit Index	30-41
– Full Exhibit Index Not Required in Form 10-Q	30-41

– Restate Entire Exhibit Index If Amended in 10-K or 10-Q	30-41
– Sometimes Need Special Notation in Exhibit Index	30-41
– Removal of Exhibits From Exhibit Index	30-42
– Exhibit Index Need Not Include Page Number for Each Exhibit	30-43
– Exhibit Index Should Include Notations for Management Contracts	30-43
– Exhibit Index Must Appear Before Required Signatures	30-43
– Okay to Include Only One Exhibit List	30-43
– Include “Interactive Data Files” as Exhibit 101 & 104 in Exhibit Index	30-44
– Description of “Interactive Data” Exhibits Must Include Word “Inline”	30-44
– Exhibit 104 Should Cross-Reference to Exhibit 101	30-44
c. Links to Exhibits Required	30-44
– File Exhibits in HTML	30-44
– No Need to Refile Old Paper Exhibits (But Can Do So Voluntarily)	30-45
– Include Notation for Paper Exhibits	30-45
– Can Delete Original Filing Info When Adding E-Version of Paper Exhibit	30-45
– Link to Full Filing for Exhibits Previously Filed in ASCII Format	30-45
– Include Links to All Exhibits in Amended & Restated Exhibit Index	30-46
d. Timing of Exhibit Filing	30-46
– Material Contracts & Merger Agreements Must Be Filed No Later Than Periodic Report Covering Date of Relevant Document	30-46
– Choice of Filing Date for Agreements Signed Between End of Reporting Period and Filing of Corresponding Periodic Report	30-46
– No Need to File Contract Twice If “When Executed” & “When Effective” Are Different Quarters	30-47
– Special Timing Rules for Articles & Bylaws	30-47
– Special Timing Rules for Incorporated Glossy Annual Reports	30-47
– Relationship of Exhibit Filings in Periodic Reports with 8-K	30-47
– Amended Exhibit Should Be Filed in Next Periodic Report	30-48
– Unredacted Agreement for Which Confidential Treatment Expired Must Be Filed with Next Periodic Report	30-48
e. Instruments Defining the Rights of Security Holders	30-48
– File Most Long-Term Debt Instruments	30-48
– No Need to File Indentures Amounting to 10% or Less of Total Assets	30-49
– Item 202 Information Required as Exhibit to Form 10-K	30-49
– Item 10-K Exhibit Can Incorporate By Reference to Earlier Exhibit	30-49
– Most Companies Don’t Include Specimen Stock Certificate as Exhibit	30-49
– Can’t Incorporate From “Description of Capital Stock” In Prospectus	30-50
– Item 10-K Exhibit Requirement Applies to Securities Registered as of Year-End	30-50
– Item 10-K Exhibit Must Reflect Modifications & Amendments to Securities During Fiscal Year	30-50

f.	Material Contracts	30-50
	– “Materiality” Definition for “Material Contract”	30-50
	– “Immaterial in Amount or Significance” vs. “Material Definitive Agreement”	30-51
	– Ordinary Course Contracts Not Filed Even If Dollar Amounts Huge	30-51
	– File Contracts That Are Material & Require Ongoing Performance	30-52
	– Non-Compensatory Agreements as Exhibits: It’s Not Just Materiality	30-52
	– Terminated Contracts Can Be “Material Contract”	30-53
	– File Material Contract Even If No Longer Material By Filing Date	30-53
	– Can Omit Immaterial Confidential Information without Submitting CTR	30-53
	– Can Omit Immaterial Schedules to Exhibits	30-54
	– Exhibit Index Should Include Notations for Management Contracts	30-54
	– Compensatory Agreements as Exhibits	30-54
	– Summarizing Unwritten Compensation Agreements: Standard Arrangements	30-55
	– Signature Requirements	30-56
g.	Other Exhibit Types	30-56
	– Acquisition Agreements	30-56
	– Change in Auditor: File Letter & Consent From Former Accountant as 10-K Exhibits	30-57
	– Subsidiary List Not Required if Company is a Wholly Owned Subsidiary	30-58
h.	Disclosure Controls & Practice Pointers	30-58
	– Assess Disclosure Controls for Linking Exhibits	30-59
i.	Failure to Timely File Consequences	30-59
	– Chronic Failure to File Required Exhibits May Indicate Problem with Disclosure Controls	30-59
	– Failure to Incorporate Previously-Filed Exhibit—Pick Up in Next 10-K	30-60
j.	Exhibits Can Result in Liability	30-60
IV.	Common Questions & Our Analysis	30-61
a.	General Requirements	30-61
	– Incorporation by Reference for 8-K Exhibit Filed After Quarter Ended	30-61
	– Incorporation by Reference for 8-K Itself As 10-Q Exhibit	30-61
	– Incorporation by Reference to Exhibits of Acquired Subsidiary	30-61
	– Incorporation by Reference to Exhibits Filed by Predecessor	30-61
	– Filing Exhibits With Different Formatting	30-62
b.	Exhibit Index	30-62
	– Deleting Compensation Arrangements for Former Executive Officers/Directors	30-62
	– Deleting Old Merger Agreement	30-63

– Numbering for 10-Q Exhibit of Amended Material Contract	30-63
– Deleting Ongoing Agreement That’s No Longer Material	30-63
– Restate Entire Exhibit Index If Amended in 10-K or 10-Q	30-64
– Restated Exhibit Index: Incorporate By Reference To Previously Filed Exhibits	30-64
c. Links to Exhibits	30-65
– No Need to Refile Old Paper Exhibits (But Can Do So Voluntarily)	30-65
– Include Notation for Paper Exhibits	30-65
– Can Delete Original Filing Info When Adding E-Version of Paper Exhibit	30-66
– Link to Full Filing for Exhibits Previously Filed in ASCII Format.	30-66
– Contract Amendments: Separately List & Link.	30-66
– Missing Links Probably Don’t Render Filing “Materially Deficient”.	30-67
– Include Links to All Exhibits in Amended & Restated Exhibit Index.	30-67
d. Timing Issues	30-67
– No Need to File Exhibit Before Periodic Report for Corresponding Period.	30-67
– 8-K Exhibits Filed During Last Quarter; Include in Next 10-Q’s Exhibits.	30-68
– File New Director’s Pre-Existing Contract When Appointed to Board.	30-68
– 10-Q Exhibits Previously Reported as 10-K Exhibits	30-68
– Can Attach Exhibit in “Applicable Period”—Even If Earlier Report Had Narrative Description.	30-69
– No Need to File Contract Twice If “When Executed” & “When Effective” Are Different Quarters	30-69
– Exhibit Amended & Restated After Disclosed in 8-K But Before Filed as Exhibit	30-70
– File Material Contract Even When Made & Performed Within Single Period	30-70
– File Amended Articles with Next Periodic Report if Included in Proxy Statement	30-71
– Don’t Need to File Earlier Amendments in Prior Quarters Within Single Year for 10-K.	30-71
– When to Fix Error in Exhibit	30-71
– Failure to Incorporate Previously-Filed Exhibit—Pick Up in Next 10-K	30-72
– Amend 10-K to Correct Failure to File Description of Securities Exhibit	30-72
– File Missed Exhibit In 8-K or Next 10-Q Rather Than Wait Until 10-K	30-72
e. Material Contracts	30-73
– Filing Exhibits, Annexes & Schedules to Material Agreements	30-73
– Management Contracts: Filed v. Furnished	30-73

– Exhibit Required for NEO’s Separation Agreement	30-74
– Exhibit Required for Director’s Separation Agreement.	30-74
– Exhibit Often Unnecessary for Non-NEO Separation Agreement	30-74
– File Individual “Management Contracts” As Exhibit	30-75
– Can File “Form” Agreements if Substantially Similar	30-75
– Substantially Similar Agreement—Substantive Term Change Likely Requires Filing.	30-76
– Don’t Label Unique Agreements as “Form”	30-76
– File Amended Agreement If Inconsistent With “Form”	30-76
– Keep Incentive Plan in Exhibit Index as Long as Awards Outstanding.	30-77
– Exhibits to Underwriting/Distribution Agreements	30-78
– No Need to File Immaterial Rule 144A Purchase Agreement	30-78
– Investment Banker Engagement Letter as “Material Contract”	30-79
– Confidentiality Agreements as “Material Contract”	30-79
– Immaterial Related Party Agreements Need Not Be Filed (In Most Cases)	30-80
– “Property, Plant or Equipment” Definition	30-80
– Disclosing 15% Property Acquisition Even if Ordinary Course	30-80
– Voluntarily Filing Broad-Based Pension Plans & Other Non-Required Plans Can Create Headaches	30-81
– ESPP Likely Covered by Exception to Exhibit Requirement	30-81
– Rules Don’t Allow Filing Summary of Written Arrangements	30-82
– Indemnification Agreements Filed for ’34 Act Reports (Not ’33 Act Registration Statements)	30-82
– Definition of “Material Lease”.	30-83
– Executive Officer Becomes NEO; Timing of Filing	30-83
– Whether to Still Identify Exhibit as “Management Contract” If Individual No Longer Management.	30-84
– Must File Amendments to Material Contracts Even If Amendment Immaterial	30-84
– Immaterial Changes May Not Need to Be Refiled If No Formal Contract Amendment	30-85
– File Waiver If It Alters Ongoing Contractual Obligations.	30-85
– File Forbearance or Waiver Agreement that Amends Material Contract.	30-85
– No Need to Refile Exhibits Solely to Reflect Name Change.	30-86
– Must Still File Initial Restated Contract Even Though Restated Again Within Quarter	30-86
– Can’t Forego Filing Material Contract Entirely.	30-87
– Don’t Need to File Term Sheet & Definitive Employment Agreement If Substantially Identical	30-87
– Section 16 Settlements.	30-88
f. Exhibits Other Than Material Contracts	30-88

– Refile Entire Articles of Incorporation When Amended (Even Though Practice Varies)	30-88
– Redlined Bylaw Amendments	30-89
– File Amended Articles or Bylaws With “Next” Periodic Report	30-89
– Filing Amended Articles as Exhibit for First Time	30-90
– File Articles & Bylaws With Every 10-Q	30-90
– Long-Term Debt Instruments Under Exhibit 4	30-91
– Trust Preferred Securities	30-92
– May Include Capital Stock in Description of Securities Exhibit Too	30-92
– No Need to File Supplemental Indentures If Duplicative (& Details Adequately Disclosed)	30-93
– Remove Debt/Equity Instrument Once Retired	30-93
– Attach As-Filed “Certificate of Designation”	30-93
– Legal Opinions & Updating Pre-Effective Amendments	30-93
– Exhibit 15 Filed with 10-Q Might Raise Need to File Amended 10-Q for Auditor Independence Failure	30-94
– Powers of Attorneys & Signatures	30-95
– Filing Target Financials as Exhibit to 10-K	30-95
g. Proxy Statements & Form 10-K Wraps	30-96
– No Need to Deliver Exhibits for “Wrapped” 10-K to Shareholders; Just File Them	30-96
– Appendix in Proxy Statement As “Exhibit”	30-96
– No Need to Attach Plan as Proxy Statement Appendix	30-96
– Don’t Link to Documents Not Filed with SEC	30-97
h. CEO/CFO Certification Issues	30-97
– No Need for New 906 Certification for Amended 10-K If Just to File Missing Exhibit	30-97
– Section 906 Certification References Wrong Period; Refile Entire Periodic Report	30-97
– CEO/CFO Certifications Need Not Be Delivered to Shareholders	30-98
– Date of Certifications If Omit Them Accidentally	30-98
i. Auditor Consents	30-98
– Required Date of Consent	30-98
– Auditor Consent Mistakenly Refers to Wrong Registration Statement	30-99
– Amend Registration Statement to Fix Error in Auditor Consent	30-99
– Form S-8 & Auditor Consents Filed in 10-Ks	30-99
– Can Remove Lapsed Registration Statements From Auditor Consent	30-100
j. Subsidiaries	30-100
– Indirectly Owned Subsidiaries	30-100
– Subsidiary List Should Be of Recent Date (In Most Cases)	30-101
k. Inline XBRL	30-101

– Timing of Inline XBRL Requirement for Non-Calendar Year Large Accelerated Filers	30-101
– Timing of Inline XBRL Requirement for New Large Accelerated Filer	30-101
– Drafting Exhibit 101—Interactive Data Files	30-102
– Include Reference to Exhibit 104 in Exhibit Index	30-102
V. History	30-102

Chapter 31—CEO/CFO Certifications (Exchange Act Rules 13a-14 & 15d-14/Item 601(b)(31) & (32) of Regulation S-K)

I. SEC Rules and Regulations	31-4
II. SEC Staff Guidance	31-5
a. Exchange Act Rules CDIs	31-5
b. Exchange Act Forms CDI	31-8
c. Regulation S-K CDIs	31-8
III. How the Rules Work	31-9
a. Overview	31-9
– Purpose of CEO/CFO Certifications	31-9
– Two Types of CEO/CFO Certifications	31-9
– CEO & CFO Must Sign Separate Section 302 Certifications	31-9
– Section 906 Certifications Can Be Separate or Joint	31-10
– How Section 906 Certifications Differ from Section 302 Certifications	31-10
– Don’t Combine Section 906 & Section 302 Certifications Into One	31-10
– Certifications Don’t Apply to XBRL Filings	31-10
– Foreign Private Issuers Must Provide Certifications	31-11
– Certifications Can’t Be Withdrawn or Canceled	31-11
– Certification Process May Be Part of Disclosure Controls & Procedures	31-11
– SEC & DOJ Enforcement Actions	31-12
b. Section 302 Certifications	31-13
– Certifications Required for 10-K, 10-Q, 20-F & 40-F; Not 8-K, 6-K, 11-K or Proxy Statements	31-13
– Wrapped Form 10-Ks Need Certifications	31-13
– Certification Accommodation for Newly Public Companies	31-13
– Transition Reports	31-14
– No Accommodation for Other Certification Disclosures Regarding Internal Controls	31-14

– Certifications for Comprehensive “Catch-Up” 10-K	31-14
– Certifications Deemed to Cover Information Yet-To-Be-Disclosed, But Currently Incorporated by Reference	31-15
– Section 302 Certifications Must Be Filed As Exhibits to Quarterly & Annual Reports	31-17
– Five Representations That Section 302 Certifications Must Include	31-17
– SEC’s Zero Tolerance Policy for Modifying Section 302 Certification Language	31-18
– Zero Tolerance Policy Exceptions for Asset-Backed Issuers	31-18
– Explain Circumstances In Disclosure Rather Than In Certifications	31-19
– Signature Date for Certifications	31-19
– 10-K Certification Covers CD&A and Executive Compensation Tables If Incorporated by Reference	31-20
– Certification Requires Review of Report	31-20
– Certification Regarding Material Accuracy & Completeness	31-20
– Certification Regarding Fair Presentation of Financials is Broader Than GAAP Compliance	31-21
– Certifications Regarding Disclosure Controls & Internal Controls	31-21
– Certification Regarding Communication of Weaknesses or Fraud to Auditors and Audit Committee	31-23
– Voluntary 1934 Act Filers Need to Provide Section 302 Certifications	31-23
c. Section 906 Certifications	31-24
– Section 906 Certification Relates to Criminal Laws: Not Civil	31-24
– Section 906 Upheld as Constitutional	31-24
– Certifications Required for 10-K, 10-Q, 20-F & 40-F; Not 8-K, 11-K or Proxy Statements	31-24
– Section 906 Certifications Must Be Furnished As Exhibits to Quarterly & Annual Reports	31-24
– Section 906 Certifications Allowed to Be “Furnished” Rather Than Filed	31-25
– Two Representations That Section 906 Certifications Must Make	31-25
– Broad Certification Regarding Compliance with Securities Laws	31-25
– Certification Regarding Fair Presentation of Financial Information Exceeds GAAP Compliance	31-25
– Knowledge Qualifiers Routinely Added	31-26
– DOJ Staff Not Actively Involved in Monitoring Certifications	31-27
– Severe Penalties for Knowingly Making False Section 906 Certifications	31-27
– Immediate Error Correction Critical	31-28

– File Entire Report with Corrected 906 Certification	31-28
d. Certifications for Amended Filings	31-28
– Section 302 Certification Always Required for Amended Periodic Report	31-28
– Section 906 Certification Not Required for Amended Report If No Financials Included.	31-29
– If Certification Omitted from Original Filing, Entire Report Must Be Refiled With Certification	31-29
– If Certification Omitted, Refiled Report Considered Delinquent If Not Filed Before Report Deadline	31-29
– Inadvertent Error in Certification Doesn’t Render Report Delinquent	31-29
– Certification Errors Closely Monitored By SEC Staff	31-29
– 4 Types of Errors Require Refiled Report With Corrections	31-30
– Other Types of Errors Might Be Able to Be Corrected in Future Filings	31-30
– Call Corp Fin Staff to Ascertain Whether Can Fix Error In Future Filings	31-31
– Paragraph 3 May Be Omitted for Amendment With No Financials	31-31
– Paragraphs 4 & 5 May Be Omitted for Amendment With No Disclosure Controls or Internal Controls Implications	31-31
– Don’t Refile Certifications from Original 10-K when Filing 10-K/A to Restate	31-31
– Certifications for 10-K/A That Includes Part III Information	31-31
– No Need for New Certifications to File Forgotten XBRL Exhibit	31-32
e. Impact of CEO/CFO Changes or Novelties.	31-32
– Key is Who Functions As PEO/PFO; Title Not Dispositive	31-32
– Factors to Consider In Making “Principal Executive Officer” Determination	31-33
– Possible That One Person Signs Both PEO & PFO Certifications	31-33
– If Two Persons Have Same or Shared Position, Each Must Sign Own Certification.	31-33
– CEO/CFO At Time of Filing Signs Certification Even If Hired After Period End	31-33
– Current PEO/PFO Signs Certification for “After Hours” Filing on Departure Date.	31-34
– New CEO Signs Certification Even If Hired After Period End— & Former CEO Still on Payroll	31-34
– Even If Company Doesn’t Have CEO or CFO, Someone Must Sign Certification	31-35
– Implications of Willful Failure to File Certifications.	31-35

f. Sub-Certifications	31-36
– Not All Companies Use Sub-Certifications—But Most Do	31-36
– What Might Be In Sub-Certifications	31-37
– More Companies Adding “Cybersecurity” to Sub-Certifications	31-37
– What to Do With Sub-Certifications	31-37
– Automated Sub-Certification Processes	31-38
g. Exchange Certifications	31-38
IV. History	31-39
Appendix A—Decision Tree for Amended Filing Section 302 Certifications	31-39

Chapter 32—Voting Requirements & Results Disclosure (Items 6 & 21 of Schedule 14A/Item 5.07 of Form 8-K)

I. SEC Rules and Regulations	32-3
II. SEC Staff Guidance	32-6
III. How the Rules Work	32-7
a. Item 6: Voting Securities & Principal Holders	32-7
1. Shares Outstanding for Each Class Entitled to Vote at Meeting	32-7
– One Vote Per Share of Common Stock	32-7
– Dual-Class Stock	32-8
– Treasury Stock & Other Company-Owned Stock May Not Vote	32-9
– Preferred Stock	32-9
– “Non-Voting Stock” May Have Statutory Voting Rights	32-9
– Voting Rights of Pledgor Vary By State & Individual Circumstance	32-9
– Voting Rights for Jointly-Owned Stock Governed by State Law	32-10
– If Shares Loaned, Borrower May Have Voting Rights	32-10
2. Record Dates	32-10
– Substantive Requirements for Record Dates Set by State Law	32-10
– Delaware Corporations May Bifurcate Record Dates	32-11
– “Holders of Record” Limited to Trades Which Have Settled On— or Before—Record Date	32-12
– Post-Record Date Stock Sales	32-12
– Determining Number of Record Holders & Beneficial Owners	32-13
– Special Problems When Determining Beneficial Owners Entitled to Vote	32-13
• Share Lending and Over-Voting	32-13
• Empty Voting	32-14

– Preliminary Proxy Statement May Be Filed Prior to Record Date	32-15
– Need to Provide Notice to DTC of Record & Annual Meeting Dates	32-15
– NYSE Companies Must Notify Exchange of Record & Annual Meeting Dates	32-16
3. Cumulative Voting Rights for Directors	32-16
– How Cumulative Voting Works	32-16
– Cumulative Voting Rights Must Be Set Forth in Charter	32-16
– Many Proxy Statements Have Affirmative Statement That Shareholders Have No Cumulative Voting Rights	32-17
4. Beneficial Ownership Table	32-17
b. Item 21: Voting Procedures	32-17
1. Voting Standards	32-17
– Quorum	32-17
– Description of Voting Standards	32-18
– Majority Votes Outside Election of Director Context	32-18
– Director Elections	32-19
– Company-Specific Shareholder Voting Outcome Requirements	32-23
– Other Considerations Regarding Voting Requirements	32-24
– Shareholder Ratification	32-25
2. Vote Required for Each Proposal	32-25
– “Non-Voting” Stock May Have Vote On Certain Proposals	32-26
– How to Calculate Voting Result Percentages	32-26
– Abstentions & Broker Non-Votes	32-26
• Effect of Abstentions & Broker Non-Votes May Vary By Proposal	32-27
• Abstentions	32-27
• Broker Non-Votes	32-28
– Treatment of Broker Non-Votes Under Delaware Law	32-29
– Sample Computations	32-29
– Treatment of Abstentions & Broker Non-Votes for Proposals Subject to NYSE Rule 312	32-30
– Impact of NYSE Actions Restricting Broker Discretionary Voting	32-30
– Broker Discretionary Voting for Incomplete Voting Instructions on VIF	32-31
– Broker Non-Votes Require At Least One Item On Which Brokers Can Vote	32-31
– Attach Final Voting Report to “Ballot of Appointed Proxies”	32-32
– Use of Routine Items to Obtain Quorum	32-33
– NYSE’s Rules on Quorum for Shareholder Approval	32-33
– Changing Voting Requirements Year to Year	32-34
– Explaining Impact of Shareholder’s Failure to Vote	32-34

– Director Voting	32-35
• Treatment of Abstentions for Majority Voting	32-35
• Treatment of Broker Non-Votes for Majority Voting	32-35
3. Inaccurate Vote Disclosure May Encourage Proxy Strike Suit	32-35
– Why Do Plaintiffs Like These Targets?	32-36
– What Should You Do Now to Avoid a Problem?	32-36
– What Should You Do If You Get a Demand Letter?	32-38
c. Certified List of Shareholders Required at Meeting	32-39
d. Unusual Vote Counting Issues	32-40
e. Item 5.07(b) Form 8-K	32-40
– Requirement to Disclose Voting Results	32-40
– No Disclosure of Broker Non-Votes for Say-on-Frequency	32-40
IV. History	32-41

Chapter 33—Audit Fees & Pre-Approval of Non-Audit Services Disclosure/Auditor Ratification (Item 9 of Schedule 14A/Item 14 in Part III of Form 10-K)

I. SEC Rules and Regulations	33-3
II. SEC Staff Guidance	33-6
III. How the Rules Work	33-9
a. Audit Committee Oversight of Independent Auditor	33-9
– Independent Auditor Must Be Hired—& Fired—by Audit Committee	33-9
– Annual Engagement of Independent Auditors	33-9
– Audit Committee Always Engages—Regardless of Who Signs Engagement Letter	33-11
– Change in Auditors Required to be Disclosed	33-11
– Role of Internal Audit in Audit Engagement	33-11
b. Auditor Fees	33-12
– Purpose of Independent Auditor Fees Disclosures	33-12
– Audit Fees Continue to Increase Overall (& As Percentage of Total Fees)	33-13
– Audit Fees Also Required in 10-K; Typically Incorporated by Reference	33-13
– Four Categories of Fees Required	33-13
– Last Two Years’ Worth of Fees Required	33-13

- Not Just Amounts Billed During Last Two Fiscal Years;
Also Include Expected Bills. 33-14
- Briefly Describe Types of Services Related to Categories Other Than
Audit Fees 33-14
- What to Include in “Audit Fees” Category 33-14
- What to Include in “Audit-Related Fees” Category 33-14
- What to Include in “Tax Fees” Category 33-15
- What to Include in “All Other Fees” Category 33-16
- “Audit Fees” Use of Term “Fees Billed” 33-16
- Include “Out-of-Pocket” Costs in Fees 33-17
- Split Fees If Service Provided By Multiple Auditors (Unless Auditor
Hires Others to Perform Work) 33-17
- Split Fees If Joint Audit Performed in Non-US Audit 33-17
- “Independent Auditor” Includes Affiliated Auditors 33-17
- Break Out Hours If More Than 50% of Audit Performed By
Employees Other than Auditor’s Full-Time Employees 33-17
- Registration Statement Reviews & Comfort Letters Are “Audit Fees”. 33-18
- Benefit Plan Audits Are “Audit-Related Fees” 33-18
- Internal Control-Related Fees Might Be Split Among Categories 33-18
- If Auditor Changes, Only Include Fees for Current Auditor 33-19
- Table for Fees Often Used 33-19
- Fee Disclosure Location Flexible, But Often With
Other Auditor Disclosures 33-20
- Fee Disclosures Often Not Included in Audit Committee Report 33-20
- Auditor Should Confirm Amounts Before Filing With SEC 33-20
- Correct Audit Fee Disclosure Error by Filing Supplement to Proxy
Statement 33-21
- Disclose Name of Independent Auditor (& Any Predecessor). 33-21
- Disclose Whether Independent Auditor Will Attend
Annual Shareholders Meeting 33-21
- c. Audit Committee Pre-Approval Policies & Procedures 33-22
 - Purpose of Audit Committee Pre-Approval Policies & Procedures 33-22
 - Nearly All Companies Use Pre-Approval Policies Rather Than
Approval on Engagement-by-Engagement Basis 33-22
 - Describe Pre-Approval Policy in Proxy Statement or Attach
Policy Itself 33-23
 - Pre-Approval Disclosure Also Required in 10-K;
Typically Incorporated by Reference. 33-23
 - Limited De Minimus Waiver of Pre-Approval Requirement. 33-24

d. Ratification of Independent Auditor	33-24
– Ratification of Independent Auditor Not Required; Good Governance Practice	33-24
– Disclosure for Auditor Ratification	33-24
– Disclose Whether Independent Auditor Will Attend & Speak at Annual Meeting	33-25
– Auditors Might Get Asked Questions at Annual Meetings	33-26
– How to Handle Auditor No-Shows at Annual Meeting	33-26
– ISS Policy on Auditor Ratification Proposals	33-26
– Consequences of Not Placing Auditor Ratification on Ballot	33-27
– Consequences of Failure to Obtain Auditor Ratification	33-27
IV. History	33-29