



Securities Law and the In-house Bar: Why a Public Company's SEC Filings Should Be Required Reading

Skills and Professional Development





CHEAT SHEET

- ***Free of charge.*** Filings are available free of charge on the SEC's Electronic Data Gathering Analysis and Retrieval website.
- ***Form 10-K.*** Also known as the Annual Report, it provides an overview of the company, from its business and finances to its risk factors and legal proceedings.
- ***Form 8-K.*** Also known as the Current Report, it presents up-to-date information on topics like material definitive agreements, results of operations and financial condition, and entry or departure of principal officers.
- ***Schedule 14A.*** Also known as the Proxy Statement, it contains board information and company pay practices and data.

Few professions require as much reading from their practitioners as law. Attorneys spend three years in law school poring over centuries of case law, only to redouble their efforts in practice, digesting words from the litany of briefs, contracts, statutes, motions, opinions, codes of conduct, bylaws, corporate policies, and more (as a result, you're more likely than not wearing glasses to read this article!).

But, for those employed by public companies, unless you are a securities lawyer, you're likely taking a well-deserved pass from reviewing your company's frequent filings with the Securities and Exchange Commission (SEC). However, these public company filings are your ticket to a far broader understanding of your own (or a competitor's or prospective employer's) business. While these filings may appear arcane and intimidating, you don't need to laboriously scrutinize them to get relevant information. You just need to know where to look to find what matters. And those important findings will reveal what's important to management, shareholders, and regulators. Accordingly, you'll be better equipped to add value and identify risk for your public company employer, understand the macro trends and issues affecting your industry and peer companies, and assess prospective public company employers.

The primary sources: What to read

Armed with a desire to learn more, there are three filings that you'll want to check out: the company's Form 10-K (or Annual Report), Form 8-K (or Current Report), and Schedule 14A (or the Proxy Statement). Each of these documents is filed with the SEC on a recurring and relatively predictable basis, and each contains a different set (with some overlap) of information of interest to lawyers. A company's Form 10-Q (Quarterly Report) belongs on this list as well. The Form 10-K is covered by this article, but the same principles and learnings that can be garnered from the Form 10-K are generally applicable to the Form 10-Q.

The Form 10-K

The Form 10-K is filed with the SEC on an annual basis, usually within 60 days of the end of the company's fiscal year-end (for smaller companies, that deadline may be as long as 90 days). A company's fiscal year represents a 12-month period of financial activity, and most commonly concludes on December 31 of each year (however, a company may opt for a different time frame based upon its own business considerations).

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The Form 10-K contains a company's audited financial statements, providing a snapshot of the company's assets and liabilities (on its Balance Sheet), income performance (on its Income Statement) and cash use (on its Statement of Cash Flows). While these financial statements tell an insightful story, we'll skip the numbers for this article. There are countless resources dedicated to understanding financial statements. And [the SEC has published its own brief guide for beginners](#).

A Form 10-K contains four "parts," each divided into multiple "items," and usually includes a table of contents to provide readers with page numbering (and online hyperlinks) to jump directly to each part and item. Several of these items will be particularly relevant to legal readers.

The Business (Part I, Item 1)

In this section, companies provide a "narrative description" of their business. Here's where you'll find details about a company's principal products and services, customer information, and the competitive landscape. This item is often the most "plain English" portion of the document and, as a

result, is the most reader-friendly. It is here that you'll find how a company makes its money and information about the multiple branches of its business. If you need a quick company overview, this is the place to go. And, if you are drafting a legal document where you need to describe the company with an economical sentence or two, this is your place to look. Oftentimes, the first sentence of this section provides a one-sentence distillation of the company in its own words. (Check out the "Name that company" sidebar to see if you can match the company with its brief description from its Form 10-K).

Risk Factors (Part I, Item IA)

Here, companies provide a discussion of the most significant factors that make an investment in that company "speculative or risky." While companies often tout their myriad past successes and plans for continued rewards into the future, this section presents just the opposite, namely, the many potential speed bumps, obstacles, and challenges that could derail future profits. As lawyers, we are trained to spot risks for our clients and enable sound decision making in light of those risks. This section is the company's own risk-spotting exercise. It is an insurance policy of sorts, putting prospective investors and regulators on notice of the risk landscape specifically germane to that company.

This section is particularly helpful to in-house lawyers in several ways.

Where do I find these filings?

The filings are available free of charge on the SEC's Electronic Data Gathering Analysis and Retrieval (EDGAR) website. The quickest way to locate a filing on EDGAR is to visit the [SEC's EDGAR search page](#). From here, you'll be able to look for a company's filings by either searching by the company's name or ticker (the shorthand series of letters used to designate that company for trading by the New York Stock Exchange or NASDAQ). Searching by ticker is generally more efficient because it will take you directly to the company's EDGAR landing page. Searching by company will often require you to wade through a search results page to specifically identify the company you are seeking by their precise corporate name (which can be a surprisingly challenging task at times).

Once you have your EDGAR search results, you'll then be able to filter your results by "Filing Type." In this box, you'll then type in 10-K, 10-Q, 8-K, or DEF 14A to take you to the specific document you are seeking. From there, you'll see a series of hyperlinks with your search results, ordered from top down by their recency of filing.

[The SEC has published a detailed EDGAR guide.](#)

While EDGAR is not always abundantly intuitive, there are alternative means to find these filings. First, a search engine query will often yield the document you are seeking on the first page of results. And, second, each public company generally maintains an Investor Relations webpage as part of its web presence. Those pages maintain links to the company's SEC filings and often have them downloadable as MS Word or Adobe PDF files. Lastly, third-party legal databases, like Westlaw and LexisNexis, can provide access as well.

First, the presented risk factors provide the “what keeps you up at night” scenarios for your employer. To the extent that you understand those risks and are part of the solution to address those risks, you’ll be a more valued lawyer to your corporate clients. Second, the risk factor list may identify where potential legal peril is lurking. Understanding what has been identified as potential risks by your management team will enhance your own ongoing risk analysis. Third, as you consider future employers, this list will inform the potential challenges your prospective employer faces and may inform your decision to change jobs (or at least make you a more informed candidate in an interview).

Legal Proceedings (Part I, Item 3)

If you are an in-house litigator, you may already be familiar with this section. Here, companies describe their material pending legal proceedings. While the threshold for materiality may be subject to lively debate, here’s where you’ll find a company’s big-ticket litigation, those matters where a company believes that adverse liability is a reasonably possible result of a matter and that the related liability may be material to the company’s bottom line. To the extent that the related liability is “reasonably estimable,” you may also find the company’s disclosure of that dollar estimate.

Crafting this disclosure often involves the convergence of corporate lawyers, litigators, and accountants as the company seeks to assess whether any matters within its portfolio of litigation rises to the disclosure standard. Collaborative communication is critical for attorneys whose work results in a “legal proceedings” disclosure; attorneys need time to consider whether the potential liability rises to the level of publication while accountants need time to determine the matter’s potential impact on the company’s financial statements.

An in-house lawyer’s interest in this section is somewhat self-evident. If you are personally involved in your company’s litigation, you’ll be consulted and interested in these narratives. And, your continued work on the matter will be increasingly vital to assisting the company in tackling this contingent liability. If you are considering a move to a new company, these legal proceedings may be indicative of your future employer’s current legal hurdles. To the extent that you have expertise in the area covered by the disclosure, you may find yourself as an even more valuable prospect to that employer.

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Management’s Discussion and Analysis (Part II, Item 7)

While much of the Form 10-K is prescriptive in its disclosure requirements, the Management’s Discussion and Analysis (MD&A for short) section is a bit more open-ended. While there are specific regulatory requirements that must be contained within this section, the SEC has noted that, “MD&A should be a discussion and analysis of a company’s business as seen through the eyes of those who manage that business.” Rather than simply mirroring what is already evident from the face of the financial statements (e.g., “Net income rose this fiscal year from US\$1.2 billion to US\$1.3 billion”), well-drafted MD&A sections provide readers with insight into the “why” of corporate performance. When done effectively, these sections may demonstrate why profitability was up, why expenses were down, why competition may have impacted sales, why inventory levels might be lower, and why liquidity may have been a short-term challenge during the fiscal period.

Admittedly, MD&A is not always an easy read; the SEC has criticized public filers for publishing MD&A that is unnecessarily lengthy, difficult to understand, and confusing. Given the “accessibility” challenges to this section, yet recognizing that it does offer an important vantage point into a company’s performance, in-house legal readers should focus on the initial few paragraphs of MD&A. At the SEC’s urging, many companies have added an introductory section/overview to their MD&A that includes the most important matters on which a company’s executives focus to evaluate their companies’ financial condition and operating performance. If you need more details, you can dig in deeper from there, but a quick scan of the outset of MD&A will prove worthwhile.

For the in-house reader, MD&A will be particularly rewarding for two reasons. First, you’ll garner insight into what specifically drove your corporate successes or shortcomings (or, a competitors’ as gleaned from their MD&A) in a particular period. And, that insight will be directly tied to your corporate executive team’s understanding of your business; it should illustrate what your C-suite believed were the key factors impacting your results that year or quarter. Second, companies must identify and disclose known trends and uncertainties that are reasonably likely to have a material effect on the company’s business. To the extent that companies ever engage in prognostication, here is where you’ll find it. Perceived favorable market conditions, significant regulatory changes, the entrants of major new competitors — each of these may be factors that indicate that the future prospects of the company’s business may meaningfully change. That soothsaying will be found in MD&A.

The Form 8-K

While the Form 10-K is an annual report that can be predictably anticipated, the Form 8-K is a “Current Report,” that, like its name suggests, provides up-to-date information. Following the passage of the Sarbanes-Oxley Act of 2002, the SEC revised the 8-K requirements to mandate “real-time disclosure” of certain materials occurrences in the life of a company. Since the rule’s revision in 2004, companies now have four business days following certain significant events to publicly disclose the required information. While four days may not seem “real-time” in the social media age, the rule does ensure that material information gets to the market in a relatively efficient manner.

Like the Form 10-K, the Form 8-K is broken down into “sections” and “items.” To the extent that a company files a Form 8-K under a certain item number, you’ll immediately have a general sense for what type of information is being disclosed. For in-house lawyers, there are four Form 8-K items worth keeping an eye on.

Entry into/Termination of Major Definite Agreements (Section 1, Items 1.01 and 1.02)

When a company enters into, or terminates, a material definitive agreement that is not made in the ordinary course of its business, it must file a Form 8-K that provides notice of the parties to the agreement and a brief description of the terms and conditions of that agreement. In addition to those disclosed details, the company must also file a copy of the agreement itself with the SEC, which will appear as an attachment to the Form 8-K EDGAR filing.

Note that these “attachments” (referred to within filings as “exhibits”) are arcaneously labeled, typically using a numbering system that begins with 99.1, 99.2, etc. Thankfully, the SEC has recently begun requiring filers to provide attachment links within the body of the filing itself, making the referenced document easier to find.

For commercial transactional lawyers, these Form 8-Ks serve two wonderful purposes. First, they provide a publicly available benchmarking service, permitting practitioners to understand where the market stands regarding certain material forms of agreements and potentially using that information for future leverage. And, second, they provide an abundance of precedent provisions, enabling lawyers to build their bank of common terms and conditions that might prove helpful in other commercial contexts into the future.

Results of Operations and Financial Condition (Section 2, Item 2.02)

Prior to the filing of a company's annual report on Form 10-K or its quarterly report on Form 10-Q, it will commonly issue an "earnings release." These quarterly narratives provide a quick glimpse into the company's most recent quarterly/annual financial results, along with insightful color on what drove that period's success or failure, as the case may have been. The filing of an Item 2.02 Form 8-K signals that the earnings release has been filed with the SEC and is available publicly. Typically, these filings are made on the same day that a company holds its earnings conference call, where its CEO, CFO, and possibly other members of senior management discuss the period's results with investors and equity analysts and answer their questions.

To the extent that you are interested in listening to that conference call, dial-in information can be found within this Form 8-K filing.

These filings offer the best real-time view into a company's performance and often are the headline drivers throughout each quarterly "earnings season."

Name that company

The first sentence or two of a company's Form 10-K is often a succinct statement of its business and purpose. Can you match the company with its 10-K description?

1. [The company] designs, manufactures, and markets mobile communication and media devices and personal computers, and it sells a variety of related software, services, accessories, networking solutions, and third-party digital content and applications.
2. [The company] is the world's leading internet television network with over 117 million streaming memberships in over 190 countries enjoying more than 140 million hours of TV shows and movies per day, including original series, documentaries, and feature films.
3. [This company] helps people around the world save money and live better — anytime and anywhere — in retail stores and through eCommerce.
4. [The company] is a pharmacy innovation company helping people on their path to better health ... We are currently the only integrated pharmacy health care company with the ability to impact consumers, payors, and providers with innovative, channel-agnostic solutions.
5. [The company] operates membership warehouses based on the concept that offering members low prices on a limited selection of nationally branded and private-label products in a wide range of merchandise categories will produce high sales volumes and rapid inventory turnover.
6. [The company] has approximately 134,000 employees worldwide engaged in the research and development, manufacture, and sale of a broad range of products in the health care field.
7. [The company] is a leading global food and beverage company with a complementary portfolio of enjoyable brands ... it makes, markets, distributes, and sells a wide variety of convenient and enjoyable beverages, foods, and snacks, serving customers and consumers

in more than 200 countries and territories.

8. [The company] invented express distribution over 40 years ago in 1973 and remains the industry leader, providing rapid, reliable, time-definite delivery of packages and freight to more than 220 countries and territories through an integrated global network.
9. [The company] opened its virtual doors on the World Wide Web in July 1995. It seeks to be Earth's most customer-centric company.

Answers: 1) Apple 2) Netflix 3) Wal-Mart 4) CVS 5) Costco 6) Johnson & Johnson 7) Pepsico 8) Federal Express 9) Amazon

While legal issues often are not predominant in these documents, a quick glance at these filings (even just the first page) will keep in-house readers in the know of a company's most recent track record and its place among peers.

Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers (Section 5, Item 5.02)

If a company's CEO, CFO, COO, or certain executive officers were to retire, resign, or be terminated from their role, a company would file a Form 8-K under this item. Similarly, new hires to these roles, as well as changes in personnel within a company's board of directors, would also result in this filing. These Form 8-Ks provide an avenue for the in-house reader to track the comings/goings of the members of a company's senior executive team. While these filings are often devoid of the "rest of the story," they do put readers on notice that significant personnel changes have occurred.

Other Events (Section 8, Item 8.01)

Lawyers appreciate a good "catch-all," the place for miscellaneous items that do not quite fit anywhere else; that's why the Item 8.01, Form 8-K exists. Here, the SEC instructs filers to discuss that information that "is not otherwise called for ... that the [company] deems of importance." If readers come across an Item 8.01 Form 8-K, the reader knows that the company thinks public disclosure of this information is significant. That's why you should check it out. It may not contain legal information relevant to your practice, but it often will contain an interesting nugget. It doesn't need to be at the top of your securities law reading list, but a quick peek at the 8.01 filings will often be rewarded with a key takeaway.

The Proxy Statement

Companies generally file a proxy statement in connection with their annual meeting of shareholders or other matters for which they must seek a shareholder vote; the proxy statement puts shareholders on notice that their approval is required for some corporate action. For in-house readers, the proxy statement filed in connection with the company's annual meeting will be of more interest and relevance.

At the SEC's urging and through changing market practices, these documents have become increasingly reader-friendly over time, often containing modern design and graphical content to capture a reader's attention. The timeline for the proxy's filing varies widely among companies and is typically a function of state law; that said, most annual meeting proxy statements are filed in the

late winter/early spring and precede a company's annual meeting by a month or two.

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At its annual meeting, companies often look to have shareholders approve any number of actions, but two are most common, namely, the election of corporate board members and the “say-on-pay” vote. It is information regarding these two items that should be of interest to in-house readers.

Board information

In the proxy statement, companies will provide a short biography for each current board member as well as a brief rationale describing why each board member is qualified to serve on the company's oversight body. While some in-house lawyers are disconnected from board activity, maintaining an awareness of board personnel and their qualifications should merit some attention. An understanding of the board's composition and individual board member's strengths will convey a sense of a company's priorities. Do board members have a track record of leading growth in their distinct professional capacities, a history of digital successes, an ability to lead through distressed times? Visibility into board personnel and their qualifications provides yet another vantage point into corporate strategy.

Significant Form 8-K "items"

Here's a listing of the Form 8-K “items” that will likely hold the greatest interest for in-house readers:

Item 1.01/Item 1.02 Entry into/Termination of a Material Definitive Agreement

Item 2.02 Results of Operations and Financial Condition

Item 5.02 Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers

Item 8.01 Other Events

The compensation cornucopia

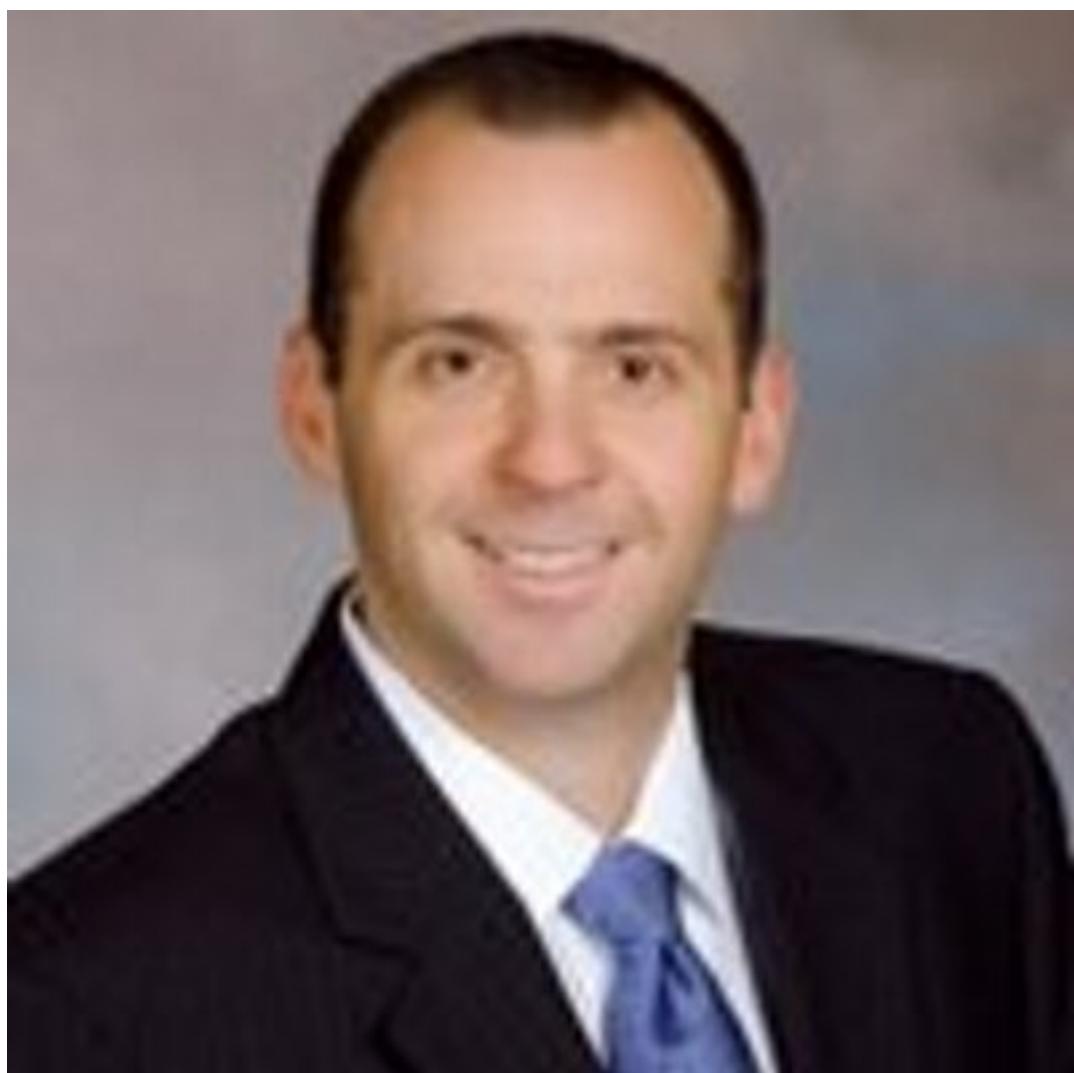
In addition to useful board insights, the proxy statement contains a wealth of information regarding a company's pay programs and practices, as well as actual pay data for the company's CEO, CFO, and the three additional most highly compensated executive officers. In-house readers will want to note a couple of pay-related items. First, like the MD&A section noted above, the proxy statement contains a Compensation Discussion and Analysis section (CD&A for short). In this section, the company explains the material elements of compensation for its executive team. While actual compensation paid to in-house lawyers will undoubtedly differ from those of their executive colleagues, oftentimes the same principles and practices governing how pay is earned for the executive team will apply more broadly to a company's employees.

Understanding what metrics drive pay is knowledge worth having. Insofar as the work of the in-house lawyer can positively impact or affect those metrics, the in-house lawyer can become an even greater strategic asset to the company. The CD&A will also often contain a list of those companies considered “peers” by the company’s board. This list will provide in-house lawyers with a set of entities to use as a baseline when doing comparative or market analytics.

Conclusion

While securities filings have a well-earned reputation for impenetrability, your in-house career would benefit from an occasional glimpse into them. It won’t take a considerable investment of time to glean the insights discussed above. And, in that time, you’ll become a better informed, even more effective in-house lawyer.

[Mac Stuckey](#)



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He manages all corporate legal services for the company, including corporate governance, securities, capital markets, compliance, and commercial transactions.