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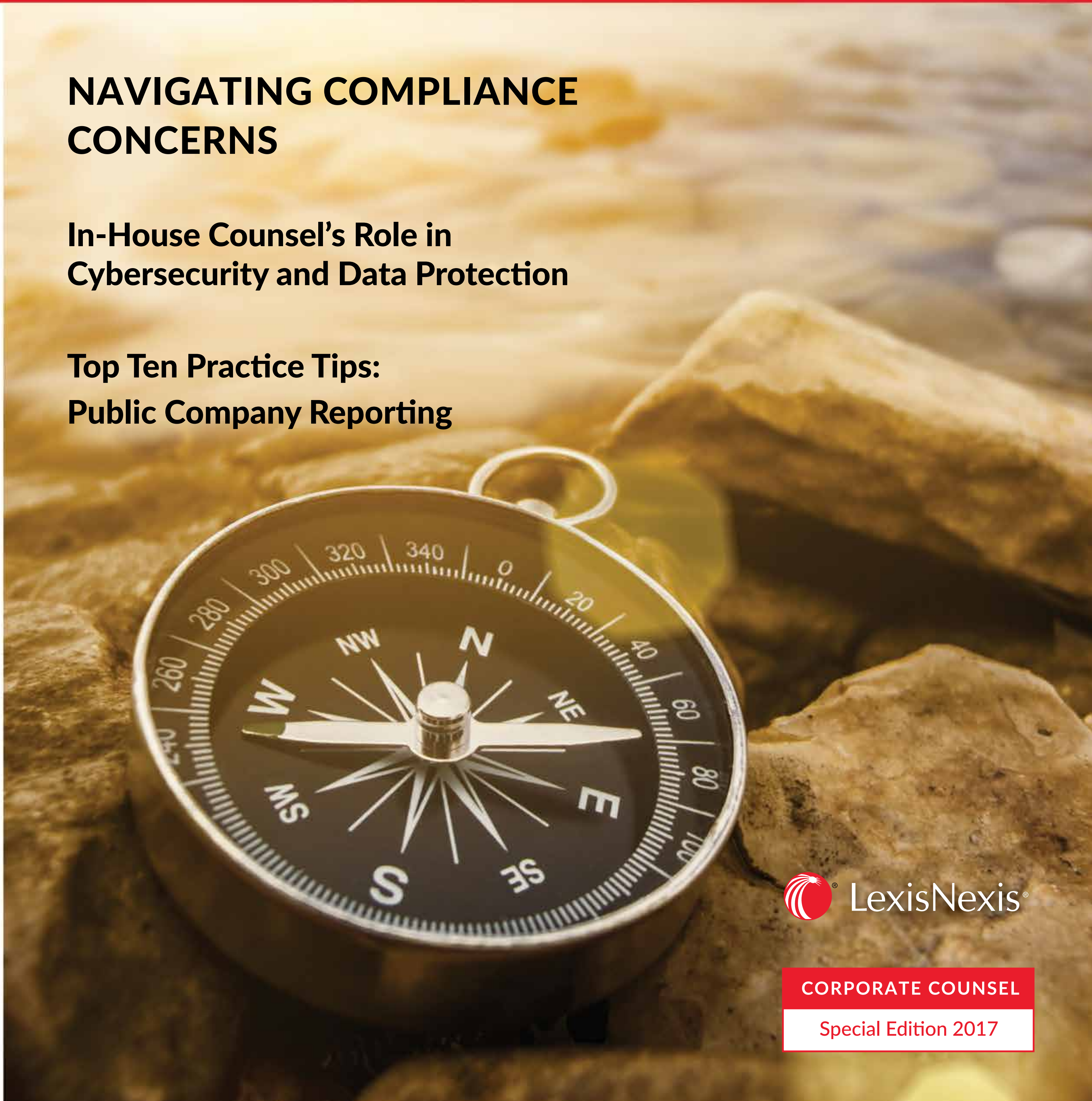

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SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

TOP TEN PRACTICE TIPS: PUBLIC COMPANY REPORTING

The planning and preparation that each public company must undertake in connection with periodic and current reporting is substantial in terms of time, effort, and resources. Managing the reporting process can be a daunting task for a company as members from several departments within the organization typically are involved in addition to service providers. A company's internal legal team and outside counsel play critical roles in the reporting process. Below are 10 practice points for attorneys that can help ensure you are best positioned to effectively and efficiently assist with a company's periodic and current reporting.

1 Familiarize yourself with the rules and know the applicable deadlines.

It seems simple to say that lawyers need to know the rules; however, there is a broad and complex tapestry of rules and regulations that apply to periodic reporting. The three primary reports that all domestic public companies are required to file are Annual Reports on Form 10-K, Quarterly Reports on Form 10-Q, and Current Reports on Form 8-K. Merely reviewing a form itself is not enough to sufficiently familiarize yourself with the applicable form requirements. The forms direct the user to rules and regulations outside of the form, such as Regulation S-K or Regulation S-X, for much of the substance of the required disclosure. Further, if the company has securities listed on a stock exchange, the stock exchange may have additional requirements for disclosure items to be contained in certain periodic reports of which you must be aware.

In addition to understanding the substance of what goes into each report, it is critical to know when the report is due. Late filings can have a number of implications for a company. A late filing may affect a company's ability to use a short form registration statement on Form S-3 or cause a company to lose its status as a well-known seasoned issuer, each of which could have a significant impact on the company's capital raising activities. Filing delinquencies could also subject a company to liability under the securities laws, including the antifraud provisions; affect the company's ability to remain listed on the New York Stock Exchange or NASDAQ; or trigger a default under the company's debt or other agreements. While a company can plan in advance to meet the filing deadlines for Form 10-Q and Form 10-K, Form 8-Ks, which typically are due within four business days from the applicable triggering event, often can be problematic. Each company must have a process in place to ensure that it can identify when a Form 8-K triggering event occurs and is able to draft and file the report (including any necessary exhibits) by the reporting deadline. Equally important is the ability of outside counsel to quickly advise on (and often flag for the company) triggering events and the correlating reporting requirements.

2 Stay informed on rule changes, Securities and Exchange Commission (SEC) initiatives, and accounting developments.

Staying abreast of the latest rule changes, SEC initiatives, and accounting developments is key for providing effective advice on periodic reporting. Identifying changes to the rules is clearly important and timely conveying these changes to relevant parties in the disclosure process is vital. Equally important is staying informed on current SEC initiatives or areas with heightened SEC focus. Staying informed on SEC initiatives and areas of focus will enable your client to address any such changes proactively, avoid SEC scrutiny, and improve the quality of the company's reports. Staying up-to-date can be a challenge, but there are many ways that you can stay current, including reviewing publications by law firms and accounting firms and attending relevant conferences. Finally, changes in accounting rules can affect a company's report beyond the financial statements. Therefore, it is important for counsel to stay current on recent accounting developments and not merely rely on the company's accountants and accounting personnel.

3 Know your company's business and stay abreast of developments affecting the company.

The most effective disclosure lawyers have a deep understanding of the company's business and industry. An understanding of the business is important to effectively assist in assessing materiality of business developments and identifying material trends and uncertainties in the business that should be disclosed. Developing a process to stay current in developments within the company and its business is critical to ensuring that the company's reports are accurate and complete. Many companies have a disclosure committee that consists of officers and employees who know the company and its business best. For outside lawyers, when reviewing disclosure in periodic reports, it is a good idea to include diligence questions in your comments to the report to elicit information and prompt discussion. In addition, staying current with political and

macroeconomic events is important, as the effect of such events may be material on a company and should be disclosed.

4 Identify in advance any difficult disclosure issues.

Periodic reports on Forms 10-K and 10-Q must include not only all required line item disclosures, but also all information otherwise necessary to make required statements not misleading. In addition, Form 8-K disclosure is triggered by unquestionably or presumptively material events that require real-time disclosure. Determining materiality is a facts and circumstances analysis and can be difficult in many instances. In addition, there may be ongoing corporate transactions, regulatory inquiries, or other corporate developments that are sensitive in nature, requiring that the disclosure be carefully crafted or that may not be ripe for disclosure. Identifying difficult disclosure issues and analyzing them without undue time pressure will make it easier to reach the appropriate conclusion on whether disclosure is required and improve the quality of any necessary disclosure.

5 Review disclosure practices of other companies in the same industry.

You should look at reports filed by comparable companies in the same industry, as they may provide you with valuable insights into how others are addressing the disclosure issues that the company faces. In addition, reviewing the disclosure of others can help identify points of interests for investors, including financial metrics that investors focus on when comparing companies in a particular space. Knowing what a company's competitors are saying about their business and the industry is an important benchmark and can be a very helpful tool in advising a company in its reporting.

6 Involve specialists inside and outside the organization as necessary.

Certain disclosures included in the company's reports may address topics that are beyond the expertise of the individuals having primary responsibility for preparing and reviewing the reports. For example, if there is a summary of a regulatory regime applicable to the company, it would be prudent to have the company's regulatory experts review the disclosure. In addition, if the company is involved in a material litigation or a material corporate transaction, the company should share the description of the litigation or transaction with the law firm representing them in the matter. This will help to ensure that the disclosure is accurate and complete.

7 Make sure reports reflect the results of any previous comment letters from the SEC.

The SEC staff is tasked with reviewing each public company's periodic reports at least once every three years pursuant to a Sarbanes-Oxley mandate. As a result of such review, the staff may request changes to the company's disclosure in future filings. Make sure that the staff's comments continue to be reflected in future reports.

8 Create a reporting calendar and communicate the calendar with the relevant participants in the process.

A reporting calendar can be a useful tool to help management, the company's board of directors (including relevant committees), employees, auditors, and other outside service providers to allocate the necessary resources to the reporting process. In addition to the filing dates, the calendar should include dates for expected distributions of drafts and the dates on which comments are due from the various participants.

9 Plan ahead for obtaining any necessary auditor consents.

Auditors are not required to consent to the inclusion of their audit report in a periodic report. However, when the company has an effective registration statement on file that forward-incorporates the company's periodic and current reports (such as a Form S-3 or a Form S-8), the company will need to obtain an auditor's consent to incorporate the relevant financial statements by reference into the registration statement. If necessary, the consent typically would be filed as an exhibit to the applicable report. You should work with the company's auditors well in advance to ensure that the consent will be delivered timely.

10 Don't forget to update the exhibit list.

A common mistake companies often make is failing to update the exhibit list. In connection with the company's annual report, the exhibit list should be updated to remove agreements that are no longer in effect or material to the company and to add any agreements that may not have previously been material but became material or that were entered into in the period covered by the filing. Companies may elect not to file certain agreements as an exhibit to Form 8-K and instead file these agreements with their next periodic report. When electing to do so it is important to remember to file the agreement(s) at the appropriate time. L

David J. Goldschmidt and Michael J. Schwartz are partners in the New York office of Skadden, Arps, Slate, Meagher & Flom LLP. ***Mr. Goldschmidt*** *represents investment banks and U.S. and international issuers in a variety of financing matters, including public offerings and private placements of debt and equity securities, and international securities offerings. He counsels U.S. and international clients on an ongoing basis, including advising on corporate governance, SEC filings, and disclosure issues. Mr. Goldschmidt also serves on Skadden's Policy Committee. Mr. Goldschmidt is very active in representing and advising real estate investment trusts (REITs) in connection with capital market transactions, including many initial public offerings and general corporate matters.* ***Michael Schwartz*** *represents U.S. and international issuers, private equity and hedge fund sponsors, REITs, and underwriters in a wide variety of public and private finance transactions. He has worked on numerous high-yield and investment grade debt offerings, initial public offerings, spin-offs, and other public and private equity and equity-hybrid securities offerings, as well as debt tender offers, exchange offers, and other refinancing transactions. Mr. Schwartz also counsels corporate clients on an ongoing basis, assisting with the review and preparation of SEC filings, corporate governance matters, and interactions with security holders, stock exchanges, and other regulatory bodies.*

Related Content

For an overview on the major items of disclosures for Form 10-K, see

> DRAFTING AND REVIEWING FORM 10-K

RESEARCH PATH: Capital Markets & Corporate Governance > Public Company Reporting > Periodic Reports > Practice Notes

For guidance on preparing Form 10-Q, see

> DRAFTING AND REVIEWING FORM 10-Q

RESEARCH PATH: Capital Markets & Corporate Governance > Public Company Reporting > Periodic Reports > Practice Notes

For more information on seeking extensions for filings and the consequences of late filings of periodic reports, see

> PREPARING A LATE PERIODIC REPORT

RESEARCH PATH: Capital Markets & Corporate Governance > Public Company Reporting > Periodic Reports > Practice Notes

For additional details on the periodic and current reporting obligations of public companies, see

> PERIODIC AND CURRENT REPORTING RESOURCE KIT

RESEARCH PATH: Capital Markets & Corporate Governance > Public Company Reporting > Periodic Reports > Practice Notes

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