



Securities Quarterly Update

April 2021 | Spring Edition

Welcome to the spring edition of Securities Quarterly Update, a publication that provides updates and guidance on securities regulatory and compliance issues. In this edition, we look at ongoing disclosure developments related to Climate Change and ESG, as well as other general updates in securities laws and regulations.

SEC Sustainability Reporting: Climate and ESG Information

During March 2021, the SEC made several announcements indicating a new focus on climate and environmental, social and corporate governance (“ESG”) disclosure. On [March 4](#), the SEC announced the formation of a Climate and ESG Task Force in the Division of Enforcement. Soon thereafter, on March 15, the SEC [announced](#) a blueprint for reinvigorating climate and ESG-related disclosures in light of investor demand, followed by the creation of a new ESG-focused webpage collecting the recent ESG-related actions. While the SEC has yet to initiate any definitive rule changes, the SEC’s recent actions demonstrate a clear direction toward heightened sustainability reporting.

Request for Comment on Climate Disclosure

In conjunction with this announcement, the SEC asked the public to comment on its disclosure rules and guidance related to climate change while the SEC’s staff reviews the extent to which public companies have followed its 2010 guidance on climate-change disclosure requirements. Acting SEC Chair, Allison Herren Lee, envisions developing a “consistent, comparable, and reliable” climate disclosure regime and has called on all market participants to weigh in on answering questions regarding how to achieve that goal. For specific questions posed by the SEC, see the [Public Statement – Public Input Welcomed on Climate Change Disclosures](#).

In the meantime, the SEC has not announced any specific plans to bring new ESG factors into its integrated disclosure regime. Instead, the SEC plans to take standalone initiatives in advancing certain ESG disclosures, such as offering guidance on human capital disclosure to encourage the reporting of specific metrics such as workforce diversity and introducing a more specific guidance or rulemaking on board diversity.

Shareholder Proposals

To ensure that shareholder proposals relating to climate change are not excluded from the ballot, the SEC is looking into revising its guidance on the no-action process. The SEC is also contemplating the possibility of updating its shareholder-proposal rules under Rule 14a-8, which may involve reversing last year’s amendment, which established certain eligibility and resubmission thresholds on shareholder proposals, or reaffirming that proposals concerning “socially significant issues,” such as climate change, cannot be excluded solely because they may also contain components that concern “ordinary business.” Congressional actions are also pending in this area.

Political Spending Disclosures

In March 2021, the Senate reintroduced the Shareholder Protection Act of 2021, which would, among other things, require companies to publicly disclose information regarding their political spending and obtain shareholder approval authorizing a political activities budget.

Climate and ESG Task Force

The SEC also created a new [Climate and ESG Task Force in the Division of Enforcement](#). The Task Force will initially focus on “identify[ing] any material gaps or misstatements in issuers’ disclosure of climate risks under existing rules,” “analyz[ing] disclosure and compliance issues relating to investment advisers’ and funds’ ESG strategies” and pursuing whistleblower tips on ESG-related issues.

For more information on the SEC’s response to climate and ESG matters, or to submit a comment on climate change disclosures, see the [SEC’s new “Climate and ESG Risks and Opportunities” page](#).

Next Steps for Companies

When preparing their SEC filings, companies should take another look at the SEC’s 2010 [interpretive guidance](#) regarding disclosure related to climate change, carefully review their current climate- and other ESG-related disclosures, including risk factor and MD&A disclosures, and consider if any additions or updates are necessary. Consider also if a proxy statement should be updated to add or expand risk oversight disclosures as they relate to ESG, committee responsibilities and any committee charter and/or policy changes relating to ESG, and shareholder communication and other ESG disclosures. For example, in addition to providing descriptions of their human capital resources in annual reports as now required by the SEC, this year more companies are also including similar disclosures in their proxy statements.

Note also that, based on recent SEC staff statements and as described above, ESG-related shareholder proposals may be more difficult to exclude from company proxy statements than in previous years.

Litigation challenges are likely if the SEC proceeds with certain ESG rule-making.

Universal Proxy Cards

The SEC has proposed re-opening its [2016 universal proxy rule proposal](#) for public comments to account for recent market developments. If approved in its current form,

companies would be required to use universal proxy cards in contested director elections, which are designed to better replicate in-person voting.

Nasdaq’s Proposal to Adopt Listing Requirements for Board Diversity

On February 26, [Nasdaq filed an amendment to its December 2020 proposal to adopt listing rules related to board diversity](#) based on comments submitted to the SEC. If approved, Nasdaq-listed companies would be required to disclose board diversity statistics. The proposal also calls for most boards to maintain at least two diverse directors, including one who self-identifies as female and another who identifies as either an underrepresented minority or LGBTQ+. Following transition periods, Nasdaq-listed companies would need to meet this objective or explain their reasons for not doing so.

The amendment proposes to provide companies with boards of five or fewer directors with certain leeway in satisfying Nasdaq’s diversity requirement, and companies that no longer satisfy that objective as a result of vacancies in their boards would have a one-year grace period.

On March 10, the SEC released [an order instituting proceedings to determine whether to approve or disapprove proposed rule changes](#) relating to this proposal, as amended, which effectively delays any SEC decision on the proposal.

SEC’s Recent Regulation FD Enforcement Action

In March, the SEC [announced](#) that it had filed a (relatively rare) complaint against a public company and its Investor Relations (“IR”) executives alleging violations of Regulation FD. The complaint alleges that when the company learned that its first quarter revenues would substantially fall short of analysts’ estimates due to a steep decline in sales, its IR executives individually made private calls to analysts at approximately 20 separate firms whose estimates were too high to “walk” them down. The SEC charged the company with selective disclosures in violation of Regulation FD and the IR executives with aiding and abetting the company’s violations and is seeking injunctive relief and civil monetary penalties.

It is a reminder to review Regulation FD policies and practices and to determine if any additional training is necessary.

SEC Guidance on Confidential Treatment Applications

On March 9, the SEC provided additional [guidance on procedures for utilizing Securities Act Rule 406 and Exchange Act Rule 24b-2](#) to exclude confidential information from SEC filings. These rules provide for exclusive means to protect confidential commercial or financial information included in certain SEC filings, such as in material contracts filed as exhibits. The additional guidance provides more specificity on how to handle expiring confidential treatment orders.

Reminder Regarding SEC Rule Amendments to MD&A and Financial Disclosures Under Regulation S-K

The SEC's amendments to MD&A and financial disclosure requirements under Regulation S-K became effective in February 2021, and companies are required to comply with these amendments beginning with the first fiscal year that ends after August 9, 2021. As such, December 31 year-end companies will not be required to comply with the amended rules until their Form 10-K for the year ending December 31, 2021. Early voluntary compliance is permitted after the effective date as long as the company complies with the amended disclosure item in its entirety and in all applicable filings going forward. To date, for example, some companies have already chosen not to include selected financial data disclosures, as permitted by the amendments. For a summary of these changes, see our [January 2021 edition](#) of *Securities Quarterly Update*.

Inline XBRL Reminder

Pursuant to the SEC's [Phase-In of the Inline XBRL Requirements](#), non-accelerated filers will be required to provide Inline XBRL tagging in reports for fiscal periods ending on or after **June 15, 2021**. Companies should remember to update exhibit indexes in quarterly and annual reports and tag cover pages of subsequently filed current reports on Form 8-K (and, if any other exhibits are being filed with the Form 8-K, also including Exhibit 104

referencing Inline XBRL tags on the cover page in the exhibit index).

Holding Foreign Companies Accountable Act

On March 24, the SEC adopted [interim final amendments](#) to implement the congressionally mandated disclosure requirements of the Holding Foreign Companies Accountable Act. The amendments will apply to companies that the SEC identifies as having filed an annual report with an audit report issued by a foreign accounting firm that the Public Company Accounting Oversight Board (PCAOB) is unable to inspect completely because of a position taken by a governmental authority in that jurisdiction. The amendments will become effective 30 days after publication in the Federal Register. However, before any company will have to comply with the amendments, the SEC will first have to implement a process for identifying such companies.

More technically, to implement the amendments, Item 9C (Disclosure Regarding Foreign Jurisdictions that Prevent Inspections) will be added to Part II of Form 10-K.

OTC-Quoted Companies – Current Public Information

To remain quoted on OTC Pink, OTC-quoted companies will need to provide current public information, effective September 28, 2021, per amended SEC Rule 15c2-11. The OTC Markets [expects](#) companies to comply with the minimum disclosure requirements of the amended rule by June 30, 2021. OTC Pink companies that do not comply with the rule will be removed from OTC Pink as of September 28, 2021. The changes are significant as they impact trading.

Newly Public Companies – Business Combinations with SPACs

On March 31, the SEC's Division of Corporation Finance issued [Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies](#), with reminders for companies that are going public through business combinations with SPACs. The guidance provides an overview of disclosure controls and procedures and stock exchange listing requirements and includes the following

reminders relating to a SPAC's status as a "shell company" under the SEC's rules:

- Financial statements for the acquired business are required to be filed within four business days of the completion of the business combination pursuant to Item 9.01(c) of Form 8-K. In this case, there is no 71-day extension;
- The combined company will not be eligible to incorporate Exchange Act reports, or proxy or information statements filed pursuant to Section 14 of the Exchange Act, by reference on Form S-1 until three years after the completion of the business combination;
- The combined company will not be eligible to use an equity plan registration statement on Form S-8 for the registration of compensatory securities offerings until at least 60 calendar days after the combined company has filed current Form 10 information; and
- The combined company will be an "ineligible issuer" under Securities Act Rule 405 for three years following the completion of the business combination, which has capital raising consequences during that period, including that the combined company:
 - cannot qualify as a well-known seasoned issuer;
 - may not use a free writing prospectus;
 - may not use a term sheet free writing prospectus available to other ineligible issuers;
 - may not conduct a roadshow that constitutes a free writing prospectus, including an electronic roadshow; and
 - may not rely on the safe harbor of Rule 163A from Securities Act Section 5(c) for pre-filing communications.

In addition, on March 31, the SEC's Acting Chief Accountant issued [Financial Reporting and Auditing Considerations of Companies Merging with SPACs](#). The statement reviews audit committee and corporate governance considerations, internal control considerations, auditor considerations, timing considerations and financial reporting considerations, including the following non-exclusive areas that may require significant judgment:

- Public company disclosure requirements, including issues related to the identification of the predecessor entity, the form and content of financial statements, and the preparation of pro-forma financial information;

- Identification of the entity in the merger that should be treated as the acquirer for accounting purposes, including variable interest entity considerations, and whether the transaction is a business combination or reverse recapitalization;
- Determination of whether financial statements should be prepared in accordance with U.S. GAAP or alternatively may be prepared in accordance with International Financial Reporting Standards (*e.g.*, if the combined public company will be eligible to report on forms applicable to foreign private issuers);
- Accounting for earn-out or compensation arrangements and complex financial instruments;
- Application of GAAP for public business entities (*e.g.*, earnings per share, segment disclosures, and expanded disclosure requirements for certain topics such as fair value measurements and post-retirement benefit arrangements) and the related reversal of any previously-elected Private Company Council accounting alternatives available to private companies; and
- Determination of the effective dates of recent accounting standards (*e.g.*, leases and current expected credit losses), the preparation for any potential acceleration of adoption of those standards, and the required disclosure of the impact of those standards upon adoption.

FOR MORE INFORMATION

For more information, please contact [a member of our Corporate Transactions & Securities group](#).

2021 Editions of Securities Quarterly Update

- [Q1 | January 2021 Edition](#)

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