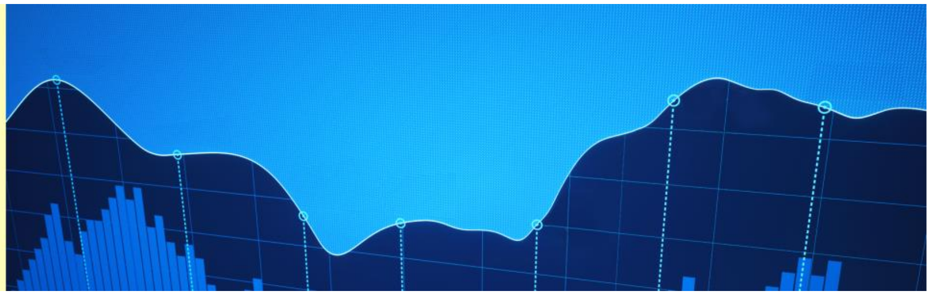

Securities Quarterly Update

October 2022 | Fall Edition

Welcome to the fall edition of Securities Quarterly Update*, a publication that provides updates and guidance on securities regulatory and compliance issues. This edition includes reminders for the 2023 proxy season, some considerations for the next quarterly report on Form 10-Q, ESG preparedness suggestions, and other SEC-related updates.*

2023 Proxy Season

With the 2023 proxy season around the corner, below are a few considerations to keep in mind.

Changes to Delaware General Corporation Law (DGCL)

Officer exculpation. Delaware corporations may want to consider whether to amend their certificate of incorporation to provide for officer exculpation in accordance with the recent amendments to the DGCL. Amendments to the certificate of incorporation would require shareholder approval and a preliminary proxy statement, which could be subject to the SEC's review, thus further impacting the proxy timeline. It is not certain at this time how proxy advisors and investors will view such proposed amendments.

Shareholder meetings. Delaware corporations should also review their bylaws in light of the recent amendments to the DGCL relating to requirements for availability of shareholder lists at shareholders' meetings (which changes are particularly helpful for virtual meetings) and shareholder meeting adjournment provisions. Many companies might be able to amend their bylaws without shareholder approval.

Equity grants. The DGCL amendments also included some changes relating to delegation provisions for equity grants. Companies should consider reviewing board resolution templates and existing grant practices.

Universal Proxy

With the universal proxy rules now in effect for contested director elections, companies should consider if any bylaws amendments are advisable, update disclosure committee practices for the new rules, and review directors' skills and related proxy disclosures.

Pay for Performance

Pay for performance disclosures will be required in the 2023 proxy statement. For more information, see "Complying with the SEC's New Pay Versus Performance Disclosure Rules," Thompson Hine *Executive Compensation Update*, August 30, 2022. The new disclosures will take some work; consider getting started early and creating a template based on prior years.

Executive Compensation Clawbacks

Compensation clawback disclosure rules may also be approved prior to the 2023 proxy season. Consider reviewing the company's clawback practices and disclosures. Note also that the SEC has been more active in seeking enforcement of CEO and CFO clawbacks under the existing rules.

Say-on-Pay and Say-When-on-Pay

Review if a say-on-pay vote on executive compensation is required this proxy season. Many companies will also be required to include their say-when-on-pay vote this year, allowing shareholders to vote on whether advisory votes on executive compensation should be held every one, two or three years. When drafting resolutions and otherwise preparing for board meetings, companies should keep in mind that the board's determination of the frequency with which it intends to conduct the say-on-pay vote (in light of the results of the shareholders' say-when-on-pay vote) will need to be included in the Form 8-K announcing annual meeting voting results or an amendment to the Form 8-K filed within 150 calendar days of the annual meeting of shareholders.

Environmental, Social and Governance (ESG)

ESG disclosures. More companies are including or expanding ESG-related disclosures in their SEC filings and other public disclosures, from risk factors to information about climate- and other ESG-related risks and opportunities, ESG governance, and human rights and sustainability in supply chains. It may be helpful to take a look at the SEC's climate and cybersecurity disclosure guidance, such as its sample comment letter regarding climate change disclosures and its proposed new rules regarding cybersecurity disclosures (discussed in our update). Companies should also review their ESG disclosures for greenwashing concerns, as well as for consistency among various ESG disclosures in ESG reports, SEC filings, websites, press releases, investor presentations, marketing materials, customer communications, board materials and other internal communications, and submissions to third parties, such as ESG rating agencies and regulators. Disclosures about engagement with shareholders on ESG issues also remain important.

ESG programs. With the SEC's climate change disclosure proposal (reviewed here), the EU's proposed corporate sustainability reporting and due diligence directives, and the International Sustainability Standards Board's proposals in the works, and with some large banks set to undergo a climate scenario analysis pilot program with the Federal Reserve in 2023, companies should review their ESG programs, ESG data controls, related contractual provisions, and readiness assessments.

Board Leadership and Risk Oversight Disclosures

Companies should revisit their board leadership and risk oversight disclosures in light of climate change, human rights, sustainability, and other issues. Some companies also reported receiving SEC comments regarding their board leadership structure, exact roles, and how and when changes would be considered, as well as the board's risk oversight role.

Other SEC Rulemakings

The SEC is working on various rulemakings that could affect disclosures in annual reports and proxy statements, including rules regarding insider trading policies, climate change, board diversity, stock repurchases, and shareholder proposals. Proposals on talent management/human capital disclosures are also expected.

Glossy Annual Reports

Companies will be required to submit their glossy annual report to shareholders to the SEC on EDGAR in PDF format (retaining color and graphics), as opposed to only posting it on the company's website or sending paper copies to the SEC. This requirement is in addition to filing the annual report on Form 10-K via EDGAR. The glossy annual report is required to be submitted via EDGAR not later than the later of (i) the date on which the report is first sent or given to shareholders or (ii) the date on which preliminary copies, or definitive copies, if preliminary filing was not required, of the proxy materials are filed with the SEC.

D&O Questionnaires

With the increasing global focus on ESG issues, as well as the associated expanding greenwashing risks, companies should consider if their D&O questionnaires require any updates to obtain or confirm diversity, expertise, and ESG-related statements. Companies should also assess whether directors' nomination consent is broad enough in light of the new universal proxy rules. In addition, companies should ensure that D&O questionnaires or other questionnaires for obtaining quarterly information in connection with the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA) are updated to include applicable Russian parties. Companies may also want to confirm that there are no interlocking directorships under the Clayton Act, as regulatory attention to these issues is expanding beyond the merger review process.

Form 10-K and 10-Q Disclosures

Form 10-K Risk Factors

As always, risk factors should be updated to address recent developments with respect to the company and its strategy, industry trends, and emerging risk areas. Additionally, to the extent any risks have already materialized, companies will need to ensure their risk factors reflect such event, as hypothetical disclosures will be inadequate.

Addressing Emerging Issues

Companies should consider the financial reporting implications related to the changing economic and geopolitical landscape, including any impact on estimates and assumptions. To the extent companies are changing calculations for non-GAAP financial measures or including new non-GAAP measures, they should revisit the SEC's guidance.

On May 3, 2022, the SEC's Division of Corporation Finance issued a sample comment letter outlining public company disclosure requirements relating to the business impact of Russia's invasion of Ukraine and related sanctions, which we reviewed in the summer 2022 edition of *Securities Quarterly Update*. Many of those considerations remain applicable.

Disclosures around emerging risks are subject to the SEC's heightened scrutiny, including actual and potential impacts and risks relating to supply chain and logistics challenges, the Russia-Ukraine conflict, trends in product demand and costs, inflation, interest rate changes, changes in general economic conditions and credit markets, market volatility, and any liquidity issues. Cybersecurity and data privacy, dependence on emerging technologies, climate change, and other ESG issues also remain on the SEC's radar. Companies should also monitor peer disclosures for industry trends.

In addition, SEC enforcement activity continues around revenue management where revenue is allegedly improperly pulled into current periods or impermissibly delayed.

Supply Chain Financing

The SEC has been commenting on disclosures regarding supplier financial arrangements. On September 29, 2022, the Financial Accounting Standards Board (FASB) announced the issuance of an Accounting Standards Update (ASU) regarding supplier finance programs. The ASU will require disclosure of supplier finance programs, including the key terms of the program, such as a description of payment terms and assets pledged as security or other guarantees provided to the finance provider or intermediary, activity during the period, changes from period to period, and potential magnitude. The ASU will be effective for fiscal years beginning after December 15, 2022, including interim periods, other than the amendment relating to certain rollforward information, which will become effective a year later.

Other SEC-Related Updates

New SEC Filing Fee Rate

Effective October 1, 2022, the SEC's fee rate increased to $110.20 per million dollars. See the fee rate advisory for additional details. SEC filing fees can now be paid by a credit card, debit card, or ACH, with more details regarding how to pay the fees here.

Inflation Adjustments for Emerging Growth Company Status

Following the SEC's inflation adjustments effective September 20, 2022, the annual gross revenue threshold to qualify as an emerging growth company (EGC) increased from $1.07 billion to $1.235 billion. As adjusted, a company that qualifies as an EGC continues to be an EGC for the first five fiscal years following the completion of its initial public offering, unless (a) its total annual gross revenues are $1.235 billion or more; (b) it has issued more than $1 billion in non-convertible debt in the past three years; or (c) it becomes a "large accelerated filer." EGCs can take advantage of scaled-down disclosures.

Companies should assess their SEC filer status at least annually.

Electronic Filing of Form 144

SEC rules require company affiliates (such as executive officers, directors, and larger shareholders) to file a notice of proposed sale on Form 144 when an affiliate is selling shares in reliance on Rule 144 and the amount to be sold under Rule 144 during any three-month period is greater than (a) 5,000 shares or (b) $50,000 in aggregate sales price.

The SEC's rule amendments will require Forms 144 to be filed electronically via EDGAR. An online fillable Form 144 is now available. The compliance deadline is currently estimated to be in March or April 2023. At that time, submitting a paper copy of Form 144 will no longer be an option, and all filers will need EDGAR codes to submit their Forms 144 electronically. Companies should confirm with affiliates' brokers in advance affiliates' EDGAR codes, filing processes, and who will retain control of the EDGAR codes so they are not reset without the company's knowledge.

Visit the SEC's Form 144 resources page as needed for updated information.

Reopened Comment Period for SEC Rulemakings Due to Technological Error

On October 7, 2022, the SEC announced that it is reopening public comment periods on certain proposed releases due to a technological error that led to the SEC not receiving a number of public comments submitted online through its comment form. The SEC is reopening the comment periods for the impacted releases until 14 days following publication of the reopening release in the *Federal Register*. The impacted releases include, among others, Share Repurchase Disclosure Modernization, Release Nos. 34-93783, IC-34440; Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, Release Nos. 33-11038, 34-94382, IC-34529; Enhancement and Standardization of Climate-Related Disclosures for Investors, Release Nos. 33-11042, 34-94478; and Special Purpose Acquisition Companies, Shell Companies, and Projections, Release Nos. 33-11048, 34-94546, IC-34549.

If you submitted a comment letter through the SEC's internet comment form between June 2021 and August 2022, check the applicable comment file on sec.gov and resubmit your comment letter if it is not yet posted there.

FOR MORE INFORMATION

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Previous Editions of *Securities Quarterly Update*

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