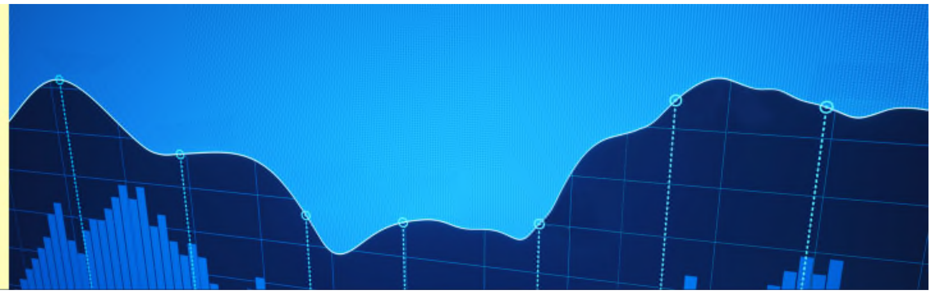
THOMPSON HINE



Securities Quarterly Update

July 2023 | Summer Edition

Welcome to the summer edition of Securities Quarterly Update*, a publication that provides updates and guidance on securities regulatory and compliance issues. In this edition, we look at the SEC's recent rulemaking, certain enforcement activity, recent ESG regulatory activity, and recent developments impacting quarterly and other SEC reports.*

Recent Rule Changes

10b5-1 Trading Plan Disclosures

On December 14, 2022, the U.S. Securities and Exchange Commission (SEC) adopted several amendments with respect to Rule 10b5-1 trading plans and the new disclosure requirements associated with such plans. As part of the amendments, companies will be required to provide quarterly disclosures on Form 10-Q and Form 10-K regarding the adoption, termination or modification, and certain material terms of, any Rule 10b5-1 or certain other trading arrangements by their directors and officers. These disclosures are required to be iXBRL-tagged. Non-smaller reporting companies with calendar year-ends are required to provide these disclosures in their Form 10-Q filings for the quarter ended June 30, 2023, while smaller reporting companies with calendar year-ends will first be required to provide these disclosures in their Form 10-K filings for the year ending December 31, 2023. For additional information, see our alert dated December 15, 2022.

New CDIs

On May 25, 2023, the SEC issued three Compliance and Disclosure Interpretations (CDIs) related to new SEC rules, two of which focus on the transition timing for compliance with the new quarterly and annual disclosure requirements for Rule 10b5-1, insider trading and certain compensation disclosures. The third CDI discusses one of the exceptions for overlapping Rule 10b5-1 plans.

New Stock Repurchase Rules

On May 3, 2023, in light of ongoing increases in company share repurchases, the SEC adopted amendments intended to modernize how public companies disclose such repurchases. Among other changes, the monthly repurchase table currently required in Form 10-Q and Form 10-K filings will be eliminated and replaced with a new exhibit to such filings disclosing daily repurchase activity, including the number of shares repurchased and the average price paid for those shares. The new table requires substantially the same information as the table currently required, plus new disclosures regarding the class of shares purchased and total number of shares purchased (i) on the open market, (ii) in reliance on the Rule 10b-18 safe harbor for buybacks, and (iii) pursuant to a Rule 10b5-1 plan. Companies will also be required to check a box if any officers or directors sold or bought securities subject to a repurchase program within four business days before or after the company's announcement of such program or of an increase in an existing repurchase program. Companies with calendar year-ends will be required to provide these disclosures in their Form 10-K filings for the year ending December 31, 2023. For additional information, see our alert dated May 3, 2023.

In addition to the new disclosures, the SEC's Enforcement Division is also focusing on stock repurchase disclosures.

Form 10-Q Heading Change

In connection with the new SEC rules regarding company share repurchases, the heading of Part II, Item 2 of Form

10-Q will change to "Unregistered Sales of Equity Securities, Use of Proceeds, and Issuer Purchases of Equity Securities," effective July 31, 2023.

SEC Approval of New Clawback-Related NYSE and Nasdaq Listing Standards

In October 2022, the SEC adopted rules requiring NYSE and Nasdaq to propose new listing standards related to the erroneous awarding of executive compensation by companies and the subsequent recovery of such awards (i.e., clawbacks). For more information, see our alert dated November 8, 2022.

On June 9, 2023, the SEC approved the new listing standards proposed by NYSE and Nasdaq, which require listed companies to adopt a written clawback policy; failure to do so, or to enforce any required clawback, could result in delisting from the stock exchange. The new clawback listing standards become effective for incentive compensation received on or after October 2, 2023, and listed companies are required to adopt a compliant clawback policy by December 1, 2023. In adopting a clawback policy, companies should consider related contractual and enforceability issues, the scope of the policy in light of any existing policies that the company may have and the guidelines and pilot program issued by the Department of Justice and corresponding changes to the compensation committee charter and related policies.

SEC Comment Period for Beneficial Ownership Rule Amendments (Schedules 13D/G)

On April 28, 2023, the SEC announced the reopening of the comment period for proposed amendments to Regulation 13D-G through June 27, 2023, while simultaneously releasing a memo providing additional information related to the proposed amendments' economic effects. Among other proposed rule changes, the filing deadlines for beneficial ownership filings on Schedule 13D would be halved, from ten to five calendar days, and amendments to such filings would be required to be filed within one business day, rather than "promptly" after the trigger event.

Filing deadlines for initial Schedule 13G filings and amendments would also be shortened:

i. initial filings by qualified institutional investors and exempt investors would be due five business days after the last day of the month in which such investors exceed 5% ownership;
ii. initial filings by passive investors would be due five days after exceeding 5% ownership; and
iii. amendments by all Schedule 13G filers would be due five business days after the month in which a material change occurred.

The adoption of the SEC's final rules on modernization of beneficial ownership reporting has been delayed and is currently tentatively scheduled for October 2023.

Recent SEC Enforcement Actions

Disclosure Controls and Procedures and Non-GAAP Financial Measures

Revenue recognition-related SEC enforcement actions continue, as well as enforcement related to non-GAAP financial measures. One of the recent actions specifically focused on separate disclosure controls and procedures for non-GAAP financial measures. Companies should consider revisiting their procedures in that regard and determine whether to adopt a policy for adoption and approval of non-GAAP financial measures and key performance indicators.

Insider Trading

The SEC has also continued focusing on insider trading enforcement actions, including using sophisticated data analytics tools to uncover such activity. For example, on June 29, 2023, the SEC brought charges against 13 defendants related to four separate insider trading occurrences and released a related statement indicating that it intends to continue to these enforcement activities.

Say-on-Pay Frequency Vote: Disclosing the Board's Determination on Form 8-K

Many annual shareholder meetings this year included an advisory vote on the frequency of the say-on-pay vote. This frequency vote is required every six years and is intended to provide shareholders with the opportunity to express a view on how often (i.e., every one, two or three years) shareholder advisory votes on executive officers' compensation should be held. Companies are required to disclose the result of this frequency vote, as well as the board's determination of the frequency adopted by the company, on Form 8-K. Many companies include the board's determination in the Form 8-K describing the annual meeting results, which is required to be filed within four business days of the annual meeting; if not, an amendment to the Form 8-K reporting the board's determination is required by the earlier of 150 days after the annual meeting date or 60 days prior to the Rule 14a-8 deadline for shareholder proposals for the following year's annual meeting.

New SEC CDIs Addressing Tender Offer Issues

On March 17, 2023, the SEC published new CDIs regarding tender offers, many of which summarize the SEC's staff positions from recent comment letters. These CDIs should be reviewed for any type of tender offer, including stock option exchange offers.

ESG Update

The SEC's final climate disclosure rules have been delayed and are currently anticipated in October 2023. Other ESG-related rules, including final rules relating to cybersecurity risk governance and disclosures and additional human capital disclosures, have similarly been delayed. In the meantime, there is some pending legislation relating to climate disclosures at the state level.

On a global level, ESG legislation and standards are continuing to advance, impacting U.S. companies. The International Sustainability Standards Board (ISSB) issued its final sustainability- and climate-related standards, along with illustrative guidance. Among other things, these standards require Scope 3 greenhouse gas disclosures (without the limitations included in the SEC's proposed rule) and climate scenario analysis (which would then trigger the same disclosures under the SEC's proposed rule). While not legally binding, these standards are expected to be influential throughout the world and to serve as a foundation block for ESG legislation. In addition, the OECD guidelines, which, among other things, are used to develop supply chain diligence on human rights and environmental issues, have recently been updated, with new recommendations related to climate change, biodiversity, carbon offsets, and scope of human rights due diligence, among other topics. Company processes may need to be updated accordingly.

FOR MORE INFORMATION

For more information, please contact:

Jurgita Ashley
216.566.8928
Jurgita.Ashley@ThompsonHine.com

Julia Miller
216.566.5831
Julia.Miller@ThompsonHine.com

Joseph Nunziata
212.908.3921
Joseph.Nunziata@ThompsonHine.com

or another member of our Securities, Capital Markets & Corporate Governance team. For ESG matters, please contact a member of our ESG Collaborative.

Previous Editions of Securities Quarterly Update

- Q2 | Spring 2023
- Q1 | Winter 2023
- Q4 | Fall 2022
- Q3 | Summer 2022