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2023 IN REVIEW

Securities Practice

Paul, Weiss, Rifkind, Wharton & Garrison LLP

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Securities Practice: 2023 in Review

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2023 was a busy year at the SEC as it continued to implement Chair Gensler’s ambitious agenda. The SEC finalized several significant rulemakings: new cybersecurity disclosure requirements for public companies, amendments to beneficial ownership reporting on Schedules 13D and 13G and amendments to share repurchase disclosures (though the U.S. Court of Appeals for the Fifth Circuit has undone this last rulemaking). This update covers six rules finalized by the SEC in 2023, the effectiveness of the clawback listing standards and the pending implementation of trading plan and equity issuance disclosures, four pending SEC rule proposals, certain SEC disclosure review initiatives, statements from the Office of the Chief Accountant and other developments affecting public reporting companies. Looking forward to 2024, as indicated in its most recent [agenda](#), the SEC is expected to finalize its climate disclosure rules and other pending proposed rules, and issue proposals for new disclosure rules regarding human capital and board diversity, revisions to the Rule 144 holding periods and revisions to the definition of securities held of record under Section 12(g) of the Exchange Act.

Company Disclosure Developments

2023 saw the finalization of the new cybersecurity disclosure requirements and the implementation of clawback listing standards. The SEC also finalized additional share repurchase disclosure requirements; however, this rulemaking was vacated by the U.S. Court of Appeals for the Fifth Circuit. The SEC’s Division of Corporation Finance continues its robust disclosure review process, with a continued focus on non-GAAP measures, MD&A and climate disclosures.

Cybersecurity

In July, the SEC finalized new [cybersecurity disclosure requirements](#) (see our [client memo here](#)). These rules focus on two main areas:

- Current reporting on Form 8-K of material cybersecurity events: as of *December 18, 2023 (except for smaller reporting companies, which have until June 15, 2024 to comply)*, companies must disclose material cybersecurity incidents on Form 8-K (under new Item 1.05 thereof) within four business days of such materiality determination; and
- Annual disclosure of risk management, strategy and governance on Form 10-K: in annual reports on Form 10-K *for fiscal years ending on or after December 15, 2023*, companies are required to provide annual disclosure regarding their processes to assess, identify and manage cybersecurity risks, their board oversight of cybersecurity risk (including identification of any board committee responsible for such oversight and describing the process by which the board or any committee is informed about cybersecurity risks) and management’s role and expertise in assessing and managing material risks from cybersecurity threats.

The SEC adopted corresponding amendments to Form 20-F to require annual disclosure of risk management, strategy and governance by foreign private issuers, and amended Form 6-K to require foreign private issuers to disclose on Form 6-K any material cybersecurity incident they are required to disclose pursuant to the law of their jurisdiction of domicile or incorporation, or file with their stock exchange or distribute to security holders.

The new cybersecurity rules allow issuers to delay making the Item 1.05 Form 8-K filing if the Attorney General determines that the disclosure poses a substantial risk to national security or public safety and notifies the SEC of such determination in writing. In December, the DOJ, FBI and SEC issued further guidance regarding the process by which issuers may request such a delay ([see our client memo here](#)).

Clawbacks

In 2022, the SEC adopted [final rules](#) to implement the clawback provisions of the Dodd-Frank Act ([see our client memo here](#)). *The NYSE and Nasdaq's listing standards became effective on October 2, 2023, and required listed companies to have adopted compliant clawback policies by December 1, 2023.*

In connection with these new listing standards, the SEC amended Form 10-K to include new additional check-boxes on the cover regarding error corrections and restatements in the filing.

Trading Plan, Trading Policy and Equity Award Disclosures

In December 2022, in connection with its amendments to Rule 10b5-1, the SEC adopted [enhanced disclosure requirements](#) ([see our client memo here](#)), pursuant to which companies must disclose:

- on a quarterly basis in their Form 10-Q or Form 10-K, information regarding the adoption and termination of 10b5-1 trading plans and other trading plans by its officers and directors;
- annually, in their Form 10-K and proxy statement, whether they have adopted an insider trading policy and if not, why not, and to file such policy as an exhibit to their annual report;
- annually, in their Form 10-K or proxy statement, their policies and practices on the timing of certain equity grants (stock options, SARs or similar instruments with option-like features) in relation to the disclosure of material nonpublic information; and
- annually, in their Form 10-K or proxy statement, quantitative information regarding equity award grants made within the period commencing four business days prior to and ending the business day after the company's disclosure of material nonpublic information (including earnings releases, quarterly reports on Form 10-Q, annual reports on Form 10-K and other current reports on Form 8-K).

While these rules became effective in 2023 and quarterly disclosures have been required for several fiscal quarters now, the annual disclosures are required only for annual reports and proxy statements covering fiscal years commencing on or after April 1, 2023, or October 1, 2023 for smaller reporting companies (for calendar year end companies, disclosure will be required in their Annual Reports on Form 10-K for the year ended December 31, 2024, to be filed in 2025).

Share Repurchases

In May, the SEC finalized [amendments](#) to share repurchase disclosures that would have required companies to provide, on a quarterly basis, disclosures about daily share repurchases conducted during the quarter, as well as greater detail about the structure of the repurchase program, and to disclose whether any directors or executive officers effected trades in the company's securities within four business days before or after a share repurchase announcement. The amendments also would have required companies to include quarterly disclosure regarding their adoption, termination or modification of any Rule 10b5-1 trading plans ([see our client memo here](#)). In October, the U.S. Court of Appeals for the Fifth Circuit held that the SEC's rulemaking violated the Administrative Procedure Act and remanded the matter to the SEC and directed it to correct the noted

deficiencies within 30 days ([see our client memo here](#)). The Fifth Circuit vacated the rules on December 19 after the SEC advised the court that it was unable to address the deficiencies within the 30-day time period ([see our client memo here](#)). As a result, issuers will not be required to comply with the amended disclosures in their upcoming reports.

Disclosures by Resource Extraction Issuers

In 2020, the SEC finalized rules requiring resource extraction issuers to disclose payments made to the U.S. federal government or foreign governments for the commercial development of oil, natural gas or minerals ([see our client memo here](#)). *These disclosures must be made on Form SD for fiscal years ending on or after March 16, 2023, within 270 days of the end of the fiscal year (for companies with a December 31 year end, Form SD will be due September 30, 2024).* Canadian companies may file the disclosures they already provide under Canada's Extractive Sector Transparency Measures Act.

SEC Disclosure Review Program Initiatives

The SEC remains focused on non-GAAP measures. The staff's comments in this area have focused on the use of individually tailored accounting principles, adjustments (especially for taxes, COVID-19, and the Russia/Ukraine conflict); segment profitability disclosure; mixing liquidity and performance measures; non-standard definitions of terms; and failure to give equal or greater prominence to GAAP measures. In December 2022, the SEC updated its [compliance and disclosure interpretations regarding the use of non-GAAP financial measures](#). Those updates focus on adjustments to exclude normal, recurring operating expenses (which could cause a non-GAAP measure to be misleading), misleading presentations of non-GAAP measures, examples where non-GAAP measures are presented more prominently than comparable GAAP measures, examples where the reconciliation presented the non-GAAP measures more prominently than comparable GAAP measures, and what constitutes a non-GAAP income statement (which give undue prominence to non-GAAP measures in the SEC's view).

The SEC also continues to scrutinize MD&A disclosures, particularly in light of the [amendments to MD&A disclosures](#) adopted by the SEC in November 2020 ([see our client memo here](#)). The SEC's comments have focused on the results of operations discussion (including requiring more detailed descriptions and quantifications of material factors and offsetting factors, unusual events, and economic developments), the presentation and calculation of metrics used by management, disclosure of known trends and uncertainties reasonably likely to impact near- and long-term results, liquidity and capital resources disclosures, and critical accounting estimates.

While its climate disclosure rules are still pending, the SEC continues to issue comments on climate disclosures in line with its previously issued [sample climate disclosure comments](#) issued September 2021 ([see our client memo available here](#)).

As XBRL tagging requirements take effect, the SEC is monitoring compliance, and in September, the SEC's Division of Corporation Finance issued a sample comment letter regarding [company XBRL tagging](#).

Statements from the Office of Chief Accountant

The SEC's Office of Chief Accountant issued a [statement](#) in August emphasizing the importance of comprehensive risk assessments by management and auditors. The OCA noted its concern that companies' management and auditors can be "too narrowly focused on information and risks that directly impact financial reporting, while disregarding broader, entity-level issues that may also impact financial reporting and internal controls." The OCA reminded companies that risk assessment processes must be comprehensive and continual, and management must be alert to new or changing business risks. The OCA noted that when evaluating non-financial reporting control deficiencies, management and auditors should also consider the root cause of the deficiency and whether it impacts the issuer's internal control over financial reporting conclusions. The OCA further emphasized that when assessing the severity of any control deficiencies identified as a result of a misstatement, management and auditors should consider not only the actual misstatement, but also the magnitude of a potential misstatement.

In December, the OCA issued a [statement](#) regarding the quality of cash flow information provided to investors. The OCA noted its concern that despite their importance to investors, not only are cash flow statements a leading area of financial statement restatements and a source of many material weaknesses in internal control over financial reporting, but that restatements of

cash flows are often “little r” restatements reflecting a determination by the company that the errors do not constitute a material error in prior periods. The OCA expressed skepticism that errors in classification are not material, since “classification is the foundation of the statement of cash flows.” The OCA emphasized that companies and their auditors must conduct an objective analysis from the perspective of a reasonable investor when evaluating the materiality of misstatements and the impacts on internal control over financial reporting, and consider all relevant facts and circumstances. The OCA further reminded issuers that the requirement to disclose significant accounting policies includes those affecting the determination of cash flow classification, and that they must also supplement the statement of cash flows with disclosure of their noncash investing and financing activities. Finally, the OCA encouraged companies to consider their presentation of this information to better facilitate investors’ understanding.

Investor Disclosure Developments

In 2023, the SEC finalized a number of rule changes that will significantly impact investor disclosures: amendments to beneficial ownership reporting on Schedules 13D and 13G, as well as new share lending and short sale disclosure requirements. In addition, the Corporate Transparency Act’s beneficial ownership reporting rule, which requires certain non-exempt entities to disclose previously unrequired information to the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (or face potential civil and criminal penalties), took effect on January 1, 2024.

Beneficial Ownership Reporting

In October, the SEC finalized [amendments](#) to beneficial ownership reporting under Section 13(d) of the Exchange Act ([see our client memo here](#)). The amendments accelerate the deadlines for both initial filings of, and amendments to, Schedule 13D (shortening the period for initial filings from 10 calendar days to five business days) and Schedule 13G filings, and will require filers to disclose derivative securities positions on Schedule 13D under Item 6. The SEC declined to adopt its proposals that beneficial ownership include cash-settled swaps acquired with a control intent and to define “groups” to include those acting together, even without an agreement to do so, though it did issue a series of Q&As confirming (as it had proposed) that tippees to a Schedule 13D filing who purchase securities are deemed to be in a group with the tipper filing the Schedule 13D, and articulating the general concept that shareholder communication and engagement involving an exchange of ideas and views (alone and without more) would not form a group.

The new rules will take effect on Monday February 6, 2024, though Schedule 13G filers will have until September 30, 2024 to comply with the accelerated filing deadlines.

Share Lending Reporting

In October, the SEC adopted [new Rule 10c-1a](#), which will require disclosure to a registered national securities association (“RNSA” – currently FINRA is the only RNSA) of specified details regarding securities loans on a same day basis ([see our client memo here](#)). The RNSA will then publish certain information regarding such loans. *These disclosures will be required commencing January 2, 2026.*

Short Sale Disclosures

Also in October, the SEC adopted [new Rule 13f-2](#) which will require institutional investment managers to confidentially disclose their short positions and net monthly activity in equity securities to the SEC monthly on new Form SHO ([see our client memo here](#)). Based on these reports, the SEC will then publish, on an aggregated basis per security, the gross short position and net activity. *Compliance with these disclosure requirements will be required commencing January 2, 2025.*

Corporate Transparency Act Disclosures

In September 2022, the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”) issued a final rule implementing Section 6403 of the Corporate Transparency Act ([see our client memo here](#)). This rule requires legal entities formed or registered to do business in the United States that do not fall into one of the Corporate Transparency Act’s enumerated exemptions to file certain information about the legal entity (e.g., address, jurisdiction of incorporation) and the

entity's beneficial owners and/or any individual who files the document that creates the entity (or is primarily responsible for directing or controlling such filing) with FinCen.

Public reporting companies are exempt from these requirements, as are registered investment companies and certain registered investment advisers, venture capital fund advisers, certain pooled investment vehicles that are operated or advised by a bank, a credit union, a broker-dealer, a registered investment company, a registered investment adviser or a venture capital fund adviser, certain tax-exempt entities and entities that assist tax-exempt entities, large operating companies and subsidiaries of certain exempt companies.

Existing companies (created or registered to do business in the United States before January 1, 2024) must file this information with FinCen by January 1, 2025; companies that are created or registered to do business in the United States in 2024 have 90 days after receiving actual or public notice of the effectiveness of their company's creation or registration to file.

Rule 15c2-11 Update

In 2020, the SEC amended Rule 15c2-11 under the Exchange Act to prohibit broker-dealers from providing price quotations in over-the-counter securities unless certain information about the issuer of the securities is current and publicly available (i.e., not in a password-protected website). In a series of no-action letters issued in 2021, the SEC took the novel position that Rule 15c2-11 also applies to debt securities (including those issued in private offerings pursuant to Regulation 144A and Regulation S), and issued temporary relief from the application of Rule 15c2-11 under the Exchange Act until January 4, 2025 for certain fixed income securities (including debt issued pursuant to Rule 144A).

On October 30, 2023, the SEC issued an [exemptive order](#) permanently exempting fixed income securities sold in compliance with Rule 144A from Rule 15c2-11.

Amendment to NYSE Shareholder Approval Requirements

In December, the SEC approved an [amendment](#) to the New York Stock Exchange's shareholder approval requirements in the case of certain issuances to substantial security holders. Under amended Section 312.03(b)(i) of the NYSE Listed Company Manual, listed companies will no longer be required to get shareholder approval for issuances to substantial security holders in excess of 1% which are below the "Minimum Price" where such substantial security holders are not "Active Related Parties" – i.e., controlling stockholders or members of a control group or have an affiliated person serving as an officer or director of the listed company ([see our client memo here](#)). Issuances to substantial security holders (regardless of whether they are Active Related Parties or not) remain subject to other NYSE shareholder approval requirements.

Annual Meeting Matters

ISS Voting Policies

In December, ISS announced its [benchmark policy changes](#) to its proxy voting guidelines for the 2024 proxy season. ISS made only one change to its U.S. voting policies for 2024, to codify its case-by-case approach when analyzing shareholder proposals requiring that executive severance arrangements or payments be submitted for shareholder ratification. ISS notes that its updated policy (i) harmonizes the factors used to analyze both regular termination severance as well as change-in-control related severance (golden parachutes) and (ii) clarifies the key factors considered in such case-by-case analysis.

Glass Lewis Voting Policies

In November, Glass Lewis issued its [U.S. benchmark voting policies](#) for the 2024 proxy season ([see our client memo here](#)). Key updates relate to:

- board oversight of environmental and social issues;
- board accountability for climate-related issues;

- board oversight of cyber risk;
- net operating loss (NOL) pills;
- control share statutes;
- clawback policies;
- executive stock ownership guidelines;
- proposals for equity awards to shareholders; and
- material weaknesses.

Glass Lewis also issued its 2024 [Shareholder Proposals and ESG-Related Issues policies](#). Key updates applicable to U.S. companies relate to board accountability for climate-related issues and Glass Lewis's consideration of stockholder engagement in its voting analyses.

Shortened Securities Settlement Cycle

In February, the SEC adopted [amendments](#) to Rule 15c6-1 under the Exchange Act to shorten the securities settlement cycle for most transactions to T+1 (from T+2), and for firm commitment offerings priced after 4:30 p.m. to T+2 (from T+4) (**see our client memo [here](#)**). The SEC has also amended Rule 15c6-1(b) to exempt security-based swaps from the Rule 15c6-1 settlement deadlines (contracts involving the purchase or sale of unlisted/unquoted limited partnership interests will continue to be exempt from these settlement deadlines as well). *The amendments exempting security-based swaps from the Rule 15c6-1 settlement deadlines became effective May 5, 2023. Compliance with the shortened settlement cycle will be required as of May 28, 2024.*

California Climate Disclosure Updates

While public reporting companies await the SEC's finalization of its climate disclosure rules, the State of California has adopted a trio of legislative initiatives that will require significantly expanded climate disclosures by companies doing business in or operating in California (**see our client memo [here](#)**):

- the Climate Corporate Data Accountability Act, which will require U.S. companies that satisfy monetary thresholds and do business in California to publicly disclose their direct and indirect greenhouse gas (GHG) emissions;
- the Climate-Related Financial Risk Act, which will require U.S. companies that satisfy monetary thresholds and do business in California to publicly disclose climate-related financial risks; and
- the Voluntary Carbon Market Disclosures Act, which will require all companies operating in California that make claims about net zero, carbon neutrality, significant GHG reductions or the purchase or use of carbon offsets to publicly disclose substantiation for any such claims.

Significant Pending SEC Proposals

Climate Disclosure

In March 2022, the SEC proposed [climate disclosure rules](#) (**see our client memo [here](#)**). Most recently, the SEC has indicated it expects to issue final rules in spring 2024 (though the SEC has pushed back its adoption of these rules several times now).

The disclosure requirements are modeled on the Task Force on Climate Related Financial Disclosure and the Greenhouse Gas Protocol emissions reporting framework, and focus on three main disclosure areas:

- climate-related risks (including risk identification/impact, oversight and governance, risk management and mitigation);

- greenhouse gas emissions (including required Scope 1 and Scope 2 emissions disclosures, Scope 3 disclosures where material or the subject of climate targets set by the company, and, in the case of large accelerated filers and accelerated filers, an attestation report on Scope 1 and Scope 2 emissions); and
- climate-related financial metrics.

Shareholder Proposals (Rule 14a-8)

In July 2022, the SEC proposed [amendments to Rule 14a-8](#) under the Exchange Act (see our client memo [here](#)). The SEC has indicated that it expects to issue final rules in spring 2024.

The proposed amendments would narrow the circumstances under which companies may exclude shareholder proposals on the grounds that they are “substantially implemented,” “substantially duplicate” another proposal or constitute a resubmission that did not meet specified approval rates in prior years. This proposal is the most recent move by the SEC to limit exclusion of shareholder proposals, following [Staff Legal Bulletin 14L](#) (see our client memo [here](#)) and other policy changes.

Securities-Based Swap Reporting

In December 2021, the SEC proposed [rules regarding the disclosure of security-based swap positions](#). The SEC has indicated that it expects to issue final rules in spring 2024.

Under the proposed rules, holders would be required to publicly report large security-based swap positions (persons having acquired a security-based swap position exceeding specified reporting thresholds would be required to file a Schedule 10B with the SEC via EDGAR disclosing certain information related to the position by the end of the following business day, and to promptly file amendments disclosing any material changes to a previously filed Schedule 10B):

- for credit default swaps, the reporting threshold would be the lower of: a long notional amount of \$150 million, a short notional amount of \$150 million, or a gross notional amount of \$300 million;
- for security-based swaps based on other debt securities, the reporting threshold would be a gross notional amount of \$300 million; and
- for security-based swaps based on equity securities, the reporting threshold would be the lesser of a gross notional amount of \$300 million, or a position representing more than 5% of a class of equity securities (which calculations may include other equity securities of the class if the amounts exceed \$150 million or 2.5%).

SPACs

In March 2022, the SEC proposed significant [new SPAC rules](#) (see our client memo [here](#)). The SEC adopted [final rules](#) on January 24, 2024 (see our forthcoming client memo).

The proposed new rules would:

- impose new liabilities in connection with de-SPAC transactions (including on SPAC underwriters and de-SPAC targets and their management);
- modify the scope of the safe harbor of the Private Securities Litigation Reform Act of 1995 for forward-looking statements so that projections and other forward-looking information used in de-SPAC registration statements would not be eligible for safe harbor protections conventionally given to such disclosure outside of the traditional IPO context;
- require enhanced disclosures at the SPAC IPO and de-SPAC stages (including requiring a fairness determination by the SPAC regarding the de-SPAC transaction); and

- create a new, non-exclusive safe harbor from registration under the Investment Company Act of 1940 for SPACs that would accelerate most SPAC timelines.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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