

TIME TO GET READY FOR THE 2024 REPORTING SEASON

Oct 02, 2023

As companies look ahead to the upcoming proxy and annual report season, the SEC has generated a number of new items to add to your compliance checklist – in addition to those covered in [last year's list](#). Those items, along with a few other “hot topics,” are set forth below.

To streamline this list, we include links to our earlier posts or other materials for detailed descriptions and recommendations, so that you can focus on what matters most to you.

NEW 10-K/PROXY STATEMENT TABULAR AND RELATED DISCLOSURES

Annual cybersecurity disclosures – As discussed in our [July 27, 2023](#) post, companies (including smaller reporting companies (SRCs)) must describe in their 2024 annual reports details regarding their cybersecurity risk management, strategy and governance. This supplements the new 8-K requirement to disclose incidents effective December 18, 2023, or June 15, 2024 in the case of SRCs.

10b5-1 plan quarterly disclosures – Calendar year companies (other than SRCs, as discussed below) must include quarterly disclosure in their 2024 annual reports on Form 10-K about Rule 10b5-1 trading plans that were adopted, modified or terminated on or after April 1, 2023 by the company's officers or directors and the material terms of such plans, other than price, as reported in our [December 15, 2022](#) As discussed by the SEC staff in [CDI 120.26](#), the following compliance dates apply (except for SRCs):

- December 31 fiscal year-end company – Quarterly disclosures should be provided in the Form 10-Q for the period ended September 30, 2023 and the Form 10-K for the fiscal year ended December 31, 2023.
- June 30 fiscal year-end company – Quarterly disclosures must first be provided in the Form 10-K for the fiscal year ended June 30, 2023.

CDI 120.26 also sets forth the delayed schedule for SRCs, requiring disclosure of plan adoptions, modifications or terminations that occur on or after October 1, 2023; quarterly disclosures beginning

with the quarter ending December 31, 2023; and annual disclosures beginning with the fiscal year ended December 31, 2024 (for calendar year companies).

As discussed in our [Aug. 31, 2023](#) post, the staff has addressed several questions regarding 10b5-1 plan disclosures, including:

- No need to disclose plan expirations or completions.
- The scope of disclosable insider plans includes any plans in which an officer or director has a direct or indirect pecuniary interest reportable under Section 16.

Companies should develop procedures to identify the adoption or termination of D&O 10b5-1 or similar trading arrangements. Although this may be contemplated by existing insider trading policies, it may be prudent to query insiders by email or otherwise to reinforce the awareness of the disclosure requirement.

Clawback policy disclosures – The deadline for listed companies to adopt clawback policies is December 1, 2023. Additionally, companies must provide the required disclosures in Form 10-Ks filed on or after October 2, 2023, including:

- Filing the policy with the SEC as an exhibit to its annual report
- Providing detailed disclosures related to the policy
- Providing a recovery analysis where a recovery is triggered or appropriate disclosure if a determination was made that recovery was not required.

We described the rules in our [Feb. 27, 2023](#) and [May 3, 2023](#) posts.

Share repurchase disclosures – As discussed in our [May 4, 2023](#) post, most companies (including SRCs) will need to comply with the new share repurchase disclosure rules in Forms 10-Q and 10-K beginning with the first filing that covers the first full fiscal quarter that begins on or after October 1, 2023 (or later, in the case of foreign private issuers). The disclosures include:

- Tabular disclosure of a company's repurchase activity aggregated on a daily basis with the detail "filed" as an exhibit to periodic reports.
- New checkbox in share repurchase exhibit for trading by insiders, indicating whether certain officers and directors purchased or sold shares that are the subject of an issuer share repurchase plan or program within four business days before or after the announcement of that plan or program (including any increase in an existing plan).
- Narrative disclosures about the company's repurchase programs and practices in its periodic reports, as well as specified data about publicly announced or non-publicly announced

repurchase plans or programs.

- Information about 10b5-1 plans comparable to that required with respect to those adopted by directors or officers, as discussed above.

ADDRESS HOT TOPIC DISCLOSURES

Pay versus performance. Calendar year companies included the pay versus performance (PvP) table last proxy season for the first time. As companies prepare for next proxy season, they should consider reviewing disclosures by peers to benchmark their practices. In addition, the SEC staff recently issued additional interpretations of the PvP rule in [CDI Section 128D](#) (which now covers 22 topics), as well as [CDI 118.08](#) (requiring compliance with the non-GAAP rules for compensation-related information, except for target levels and the Company-Selected Measure or additional financial performance measures disclosed under the PvP rule).

Legal proceeding disclosures. As discussed in our [August 7, 2023](#) post, companies should think twice before describing a lawsuit as “without merit.”

Perquisites and related party transactions. As discussed in our [July 7, 2023](#) post, and in light of recent SEC enforcement actions, companies should refresh their controls or policies to identify or track perquisites and related person transactions.

DEI-related litigation. In light of [affirmative action and other DEI litigation](#), carefully review disclosures regarding employment and other human capital topics, including DEI metrics used in compensation programs.

Climate change disclosure. With respect to climate change, the SEC has not yet taken action to finalize the proposed climate rules. See our [March 22, 2022](#) post. Companies should also consider prior SEC guidance on the issue including SEC’s [2010 guidance](#). See our [October 23, 2021](#) post .

Risk factors. Consider whether any material updates to risk factors are appropriate, such as:

- Effect of the Ukraine war, including any direct or indirect effects on a company’s business, including the possible areas of disclosure covered in SEC guidance and the sample comment letter (see our [May 20, 2022](#) post).
- Developments in China, including its economic slowdown, pandemic challenges and U.S. relations, including supply chain implications.
- Effect of U.S. political developments on stock market and U.S. economy, including potential implications of possible future U.S. government budget disagreements, criminal indictments, political elections, etc.

- COVID-19, including possible deletion of references or revisions since the public health emergency was declared finished in May 2023, as well as remote-hybrid work issues and continued supply chain pressures.
- Volatile market conditions, including banking failures, potential recessionary pressures, inflation, interest rate changes, and their impact on customers and capital markets.
- Artificial intelligence, as discussed in our [May 24, 2023](#)

Additional reminders for risk factors:

- As discussed in our [July 13, 2021](#) post, recent court and, as previously noted, SEC decisions make clear that companies can face liability for presenting risks as “hypothetical” when, in fact, a material adverse event has actually occurred, such as a material cybersecurity breach.
- Include a summary (concise, bulleted or numbered, and not more than two pages) where the risk factors section exceeds 15 pages.
- Move risks that are not specific to the company to a “General Risk Factors” sub-section.

DISCLOSURE PROCEDURES AND MISCELLANEOUS

XBRL data tagging. Most of the new disclosures require XBRL data tagging, as discussed in our respective posts. The SEC staff recently published a [sample comment letter](#), as a reminder for companies to take appropriate steps to ensure that disclosures and data are properly tagged.

Refresh CEO/CFO certifications procedures. As discussed in our [September 5, 2023](#) and [Feb. 8, 2023](#) posts, companies should evaluate their disclosure controls and procedures and consider potential enhancements.

Filing status and public float day. Companies with a calendar year end should prepare to conduct their public float calculation as of June 30, 2023, to determine their filing status for next year.

New checkbox for restatements or clawbacks. The covers of Forms 10-K, 20-F, and 40-F must include a checkbox as to:

- Whether the financials included in the filing reflect correction of an error to previously issued financials; and
- Whether any of those error corrections are restatements that required a recovery analysis of incentive-based compensation received by any of the company’s executive officers during the relevant recovery period.

Recently, the SEC staff reportedly provided [informal guidance](#) that the box need not be checked in the case of “[t]he retrospective correction of a material error in a registrant’s previously filed interim financial statements . . . within an unaudited note to the annual financial statements included in a Form 10-K [where] . . . those financial statements [do] not disclose the correction of an error to any annual periods as the error being corrected only existed in the interim periods.”

Possible future government shutdown. A future federal government shutdown should not have significant effects on SEC reporting by public companies, as Edgar will remain operational. However, the activities of the Division of Corporation Finance will be “extremely limited.” For example, the SEC staff will not review proxy statements, Rule 14a-8 shareholder proposals or provide guidance so long as the shutdown continues. The SEC has posted [guidance, including FAQs](#), which focus primarily on the 1933 Act registration process, as the staff will not be able to accelerate effectiveness of filings.

2025 FILINGS

Additional disclosures will be required in 2025 filings (depending on the company’s fiscal year-end and filer status, as discussed following these two bullets):

Annual insider trading policy disclosures. Beginning in 2025 for calendar year companies, as discussed in our [December 15, 2022 post](#), Form 10-Ks must address (1) whether or not (and if not, why not) the company has adopted insider trading policies and procedures and (2) if adopted, such trading policies and procedures. Additionally, companies will need to file their insider trading policies and procedures as exhibits to the 10-K.

New equity grant policy disclosures. Beginning in 2025 for calendar year companies, as discussed in our [December 15, 2022 post](#), Form 10-Ks and proxy/ information statements will need to disclose grant policies and practices for options, SARs and similar instruments. Additionally, if, during the last fiscal year, the company has made grants to NEOs within four business days before or one business day after the release of material non-public information – e.g., the filing of a periodic report or the filing or furnishing of a current report on Form 8-K that contains material nonpublic information – the company must disclose specified details about those grants in tabular format, including the percentage change in the market value of the securities underlying the award between those dates.

The compliance dates vary depending on the company’s fiscal year end and filer status. As discussed by the SEC staff in [CDI 120.26](#), for companies other than SRCs:

- December 31 fiscal year-end – Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended December 31, 2024.
- June 30 fiscal year-end – Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended June 30, 2024.

For SRCs, the following dates apply:

- December 31 fiscal year-end– Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended December 31, 2024.
- June 30 fiscal year-end – Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended June 30, 2025.

Similarly, [CDI 120.27](#) explains that the new disclosures for proxy or information statements is required for annual meetings after completion of the first full fiscal year beginning on or after April 1, 2023 (or October 1, 2023 in the case of SRCs).

RELATED PRACTICE AREAS

- Securities & Corporate Governance

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