Capital Markets

2022 Capital Markets and Corporate Governance Regulatory Review

Skadden

Final Rules

SEC Partially Rescinds Certain Rules Governing Delivery of Proxy Advice
(17 CFR Parts 240 and 276)

Final Rule
Prior Partially Rescinded Rule

- A prior July 2020 order had:
  - required proxy advisors to disclose material conflicts of interest and the steps taken to address them; and
  - promulgated certain requirements for proxy advisors engaged in giving proxy voting advice to qualify for an exemption from otherwise applicable information and filing requirements.
- Though the material conflicts disclosure requirement remains, the conditions for the exemptions — involving the proxy advisor timely informing the company of its advice to clients and alerting its clients of the company's response to that advice — were rescinded.
- The 2022 order also rescinded an explanatory note setting forth non-exclusive examples where failure to disclose certain information in proxy voting advice may be considered misleading.

Effective Date:
July 13, 2022

More Analysis:
SEC Rescinds Certain 2020 Amendments to Rules Governing Proxy Advisors

Listing Standards for Erroneously Awarded Compensation
(17 CFR Parts 229, 232, 240, 249, 270 and 274)

Final Rule
Proposed Rule

- The SEC adopted rules requiring stock exchanges to establish listing standards that will require companies to provide for recovery of erroneously paid incentive-based compensation.
- Companies will be required to "claw back" compensation for the immediately prior three completed fiscal years in which the company is required to prepare an accounting restatement due to material noncompliance with financial reporting requirements.
- Payments must be recovered even if there was no misconduct or failure of oversight on the part of an individual executive officer.
- Listing standards will require companies to file their clawback policies, indicate whether the financial statements contain a corrected error that requires recovery of incentive-based compensation and disclose how they have applied their clawback policies. Issuer non-compliance may impact continued stock exchange listing eligibility.
- The rules apply to almost all listed companies, including foreign private issuers, controlled companies, smaller reporting companies and emerging growth companies.

Effective Date:
January 27, 2023, is the deadline for stock exchanges to propose new listing standards, which must be effective within a year after they are proposed.

More Analysis:
SEC Adopts Final Clawback Rules and Disclosure Requirements

Pay Versus Performance Disclosures
(17 CFR Parts 229, 232 and 240)

Final Rule

Proposed Rule

- Seven years after initially proposing the rules, the SEC implemented the pay-versus-disclosure requirements mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), though the final rules differ materially from those initially proposed.
- Key disclosures in a proxy or information statement now include:
  - A summary compensation table presenting the total compensation of the CEO and the average total compensation of other named executive officers (NEOs).
  - Compensation "actually paid" to the CEO and average total compensation "actually paid" to other NEOs.
  - Cumulative total shareholder return for both the company and its peer group.
  - Net income of the company.
  - A single company-selected financial performance measure that the company used to link compensation actually paid to company performance.
  - Supplemental financial performance measures to the extent marked as such, and not misleading or presented with greater prominence than the required company selected measure.
  - An unranked tabular list of three-to-seven financial performance measures used by the company to link compensation to company performance.
  - A narrative/graphical description of the relationship between executive compensation "actually paid" to the company's total shareholder return, net income and the company-selected financial performance measure, as well as the relationship between the company's total shareholder return and those of its peers.
- Covered time periods generally range from three-to-five years, with first-time reporters and smaller reporting companies allowed to report fewer time periods. Emerging growth companies, foreign private issuers and registered investment companies are exempt from pay-for-performance disclosures.

Effective Date:
October 11, 2022
(will be required in proxy statements of calendar-end companies in 2023)

More Analysis:
SEC Adopts Long-Awaited Final Pay Versus Performance Disclosure Rules

SEC Proposes New Rules for Pay-Versus-Performance Disclosure

Inflation Adjustments Under Titles I and III of the JOBS Act
(17 CFR Parts 227, 230, 239 and 240)

Final Rule

- The SEC changed the maximum annual gross revenue threshold to qualify as an emerging growth company from $1.07 billion to $1.235 billion.
- The SEC also adjusted certain thresholds applicable to fundraising under Regulation Crowdfunding upwards to reflect inflationary adjustments.

Effective Date:
September 20, 2022

Rule 10b5-1 and Insider Trading
(17 CFR Parts 229, 232, 240 and 249)
Final Rule
Proposed Rule

The SEC adopted several amendments designed to address the risks of insider trading in 10b5-1 plans, though stopped short of imposing additional limitations on issuers. Some of the key changes include:

- Imposing cooling off periods on directors and other non-issuer persons. Directors may not trade until the greater of (i) 90 days following plan adoption or modification or (ii) two business days following the company's periodic filing for the fiscal quarter in which the plan was adopted or modified (in no case to exceed 120 days). Other non-issuers will need to wait 30 days before trading can commence.
- Requiring directors and officers to provide a written certification stating that they are not aware of any material nonpublic information about the company or its securities and are acting in good faith in adopting or modifying a plan.
- Eliminating (with limited exceptions) the ability to have multiple Rule 10b5-1 plans that trade in the same class of securities.
- Limiting single-trade arrangements to one per 12-month period.
- Requiring that individuals enter into and operate Rule 10b5-1 plans in good faith.

Companies also would be subject to enhanced disclosure requirements, including:

- Annual disclosures of whether (and if not, why not) the company has adopted insider trading policies and procedures, along with a description of those policies and procedures. Issuers also would attach insider trading policies to annual reports.
- Quarterly disclosures regarding adoption/termination of Rule 10b5-1 plans, and the material terms of such plans.
- Issuers will provide certain tabular and narrative disclosures regarding option awards close in time to the release of material nonpublic information and related policies and procedures.
- When filing Forms 4 and 5 pursuant to Section 16, individuals will need to disclose whether the trade was pursuant to a 10b5-1 plan and, if so, indicate the date of the plan's adoption. Gifts of securities also will need to be reported within two business days.

Effective Date:
Amendments to 10b5-1 plans and the ability to trade them in take effect 60 days after publication in the Federal Register.

Disclosure requirements applicable to Forms 10-Q, 10-K and 20-F and in any proxy or information statements in the first filing that covers the first full fiscal period that begins on or after April 1, 2023 (October 1, 2023, for smaller reporting companies).

Additional Materials:
SEC Announces Proposals Relating to Rule 10b5-1, Share Repurchases and Other Matters

Proposed Rules

Shortening the Securities Transaction Settlement Cycle
(17 CFR Parts 232, 240 and 275)
Proposed Rule

- The SEC proposed shortening the settlement cycle for most broker-dealer transactions from two business days after the trade date (T+2) to one business day after the trade date (T+1), and proposed process requirements to facilitate the transition.

Comment period is closed.

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Modernization of Beneficial Ownership Reporting
(17 CFR Parts 232 and 240)
Proposed Rule

- The SEC proposed deeming owners of certain cash-settled derivative securities as beneficial owners of the referenced equity securities and also clarified the disclosure requirements of Schedule 13D with respect to derivatives.
- Under the proposed rules, the filing deadlines for Section 13D and 13G reports would be accelerated.
- The proposal also clarifies when two or more persons may communicate with each other and with an issuer without concern that they will be subject to regulation as a group with respect to the issuer's equity securities.

Comment period is closed.

Additional Materials:
SEC Proposes Changes to Beneficial Ownership Reporting

Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure
(17 CFR Parts 229, 232, 239, 240 and 249)
Proposed Rule

- The SEC proposed requiring disclosure of "material cybersecurity incidents" on Form 8-K, which would then be updated on periodic reports.
- Disclosures would include company policies and procedures to identify and manage cybersecurity risks and management's role in implementing cybersecurity policies and procedures and the board's oversight of cybersecurity risks on Form 10-K.
- Companies also would disclose, in proxy statements and annual reports, the extent to which any board member has expertise in cybersecurity.

Comment period is closed.

Additional Materials:
SEC Proposes New Rules for Cybersecurity Risk Management, Strategy, Governance and Incident Disclosure

The Enhancement and Standardization of Climate-Related Disclosures for Investors
(17 CFR 210, 229, 232, 239 and 249)
Proposed Rule

- The SEC proposed rules that would significantly enhance the scope of companies' required climate-related disclosures.
- Proposed disclosure items include, among other things, climate-related risk oversight and governance, the impact of climate-related risks on business strategy and outlook, Scopes 1 and 2 GHG (greenhouse gases) emissions and, for certain companies, Scope 3 GHG emissions. Some larger companies would need independent, third-party verification of the GHG standards.
- Audited financial statements would need to include a note addressing climate-related impacts on financial statement line items.
- Once adopted, the proposed rules would be phased in over years, depending on filing status.

Comment period is closed.

Additional Materials:
SEC Proposes New Rules for Climate-Related Disclosures

Special Purpose Acquisition Companies, Shell Companies, and Projections

(17 CFR Parts 210, 229, 230, 232, 239, 240, 249 and 270)

Proposed Rule

The SEC proposed a swath of new rules that, if adopted, would significantly impact SPACs. Key changes include:

- Mandating comprehensive new disclosure requirements on dilution and conflict of interest, and disclosure of any outside report, opinion or appraisal received by the SPAC or its sponsor.
- Requiring the SPAC to conduct a fairness determination related to a de-SPAC and any related financing.
- Aligning SPAC disclosures and protections with those of traditional IPOs regarding: removing access to the liability safe harbor for forward-looking statements, deeming any SPAC underwriter an underwriter in the subsequent de-SPAC if the underwriter takes steps to facilitate the de-SPAC or any financing transaction, and deeming the private operating company a co-registrant when a SPAC files a Securities Act registration statement for a de-SPAC transaction.
- Requiring that disclosure documents for a de-SPAC be disseminated to investors at least 20 calendar days in advance of a shareholder meeting or the earliest date of action by consent.
- Deeming a business combination involving a SPAC and a non-shell company to constitute a sale of securities to the SPAC shareholders for the purpose of the Securities Act.
- Updating guidance as to the use of projections generally and in SPAC documents specifically.

Comment period is closed.

Additional Materials:
SEC Proposes Significant Changes to Rules Affecting SPACs

Substantial Implementation, Duplication and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8

(17 CFR Part 40)

Proposed Rule

The SEC proposed rules that would narrow certain grounds under which companies may exclude shareholder proposals from their proxy statements. In particular, the rules would permit exclusion of a proposal when:

- The company has already implemented all of its essential elements.
- The proposal substantially duplicates another proposal, defined narrowly as when it "addresses the same subject matter and seeks the same objective by the same means."
- A proposal "substantially duplicates" another proposal that was previously submitted at a recent shareholder meeting, and which received below a certain threshold of support on the most recent vote.

Comment period is closed.

Additional Materials:
SEC Proposes Amendments to the Shareholder Proposal Rules

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Key Guidance

Sample Letter to Companies Regarding Disclosures Pertaining to Russia's Invasion of Ukraine and Related Supply Chain Issues

Guidance/Sample Letter

The Division of Corporate Finance provided guidance to companies regarding disclosure of Russia/Ukraine-related risk factors, suggesting that companies should disclose:

- Direct or indirect exposure to Russia, Belarus or Ukraine through operations, employee base, investments, securities, sanctions, or legal or regulatory uncertainty associated with operating in or exiting from the region.
- Direct or indirect reliance on goods or services sourced in Russia or Ukraine or (in some cases) countries supportive of Russia.
- Actual or potential disruptions in the company's supply chain.
- Business relationships, connections to or assets located in Russia, Belarus or Ukraine.
- Other risks, such as those relating to cybersecurity, volatility of commodity pricing or the impact to management's assessment of the effectiveness of internal control over financial reporting or the board's risk oversight.

To facilitate evaluation by the company, the Division provided a sample questionnaire that companies can use as a non-exhaustive starting point to determine risks and disclosure obligations.

Published:
May 3, 2022

Sample Letter to Companies Regarding Recent Developments in Crypto Asset Markets

Sample Letter

- The Division of Corporate Finance advised companies to evaluate disclosures with a view to advising investors about the company's exposure to crypto-related risks and potential impacts.
- To facilitate an evaluation by the company, the Division provided a sample questionnaire that companies can use as a non-exhaustive starting point to determine risks and disclosure obligations.

Published:
December 8, 2022

Non-GAAP Financial Measures
Guidance

The SEC Staff updated non-GAAP CDIs to emphasize that:

- Whether a measure is misleading depends on facts and circumstances (*e.g.*, operating expenses that occur repeatedly, even if irregularly, should be viewed as recurring and therefore not adjusted for).
- Individually tailored accounting principles are prohibited, including non-GAAP measures that are inconsistent with GAAP.
- Non-GAAP measures must be clearly labeled and should not use the names of other GAAP measures or technical accounting terms, such as "pro forma."
- Certain measures may be so inherently misleading that even extensive, detailed disclosure about the nature and effect of each adjustment would not prevent it from being materially misleading.
- A reconciliation should not begin with a non-GAAP metric.

Published:
December 8, 2022

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