SEC & FASB Developments

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Agenda

- Holding Foreign Companies Accountable Act, Disclosure and Implementation by SEC and PCAOB
- SEC amendments to Form 10-K, including an overview of new Item 9C of the Holding Foreign Companies Accountable Act and data tagging, and disclosure practices
- SEC statements on the FASB's agenda consultation and the evaluation of the materiality of errors
- SEC proposal on climate change disclosures and related financial statement proposed disclosures
- SEC proposal on SPAC rules and related financial statement proposed disclosures
- SEC proposal on beneficial ownership reporting
- SEC proposal on cybersecurity disclosures
- Filing Fee Disclosure and Payment Methods Modernization
- Universal Proxy
- SEC proposal on shortening the securities transaction settlement cycle

The Holding Foreign Companies Accountable Act and Materiality

REPORTING AUDIT FIRM INFORMATION

- **Final Rule** to implement auditor disclosures under the Holding Foreign Companies Accountable Act effective January 10, 2022

- **Objective:** Identify registrants who have filed an annual report with an audit report issued by an accounting firm that is located in a foreign jurisdiction and that the PCAOB is unable to inspect or investigate because of government restrictions ("SEC-identified issuers")

- To facilitate the identification process of such issuers:
  - PCAOB Rule 6100 established a framework to identify accounting firms it is unable to inspect or investigate ("PCAOB-Identified Firm")
  - New Inline-XBRL tagging requirements introduced for annual reports for FYE after December 15, 2021
    - (1) Audit Firm Name, (2) Audit Firm PCAOB Number, and (3) Location
    - Location for domestic is City/State but for non-US auditors it is City/Country
  - Observations on registrant placement of the Inline-XBRL tags
    - Audit report face, Table of Contents of Audited FS, Part II Item 14 of 10-K
  - Inline-XBR tagging for **principal registered public accounting firm** of the registrant only

REPORTING AUDIT FIRM INFORMATION

- The earliest the Commission could identify "Commission-Identified Issuers" would be after registrants file their annual reports for 2021 with the three pieces of audit firm information

- A "Commission-identified issuer" with a "PCAOB-Identified Auditor" in the 2021 annual report will have to provide the following in its annual report for FY 2022:
  - The additional disclosures described on the next slide
  - Submit documentation to the SEC establishing it is not owned or controlled by a governmental entity in the relevant foreign jurisdiction through EDGAR on or before the due date of the annual report

REPORTING AUDIT FIRM INFORMATION

- All “SEC-identified issuers” (domestic, FPI, and investment management companies) that have an audit report issued by a “PCAOB-Identified Firm” will have to provide additional disclosures, beginning with FY 2022
  - Form 10-K, Part II Item 9C and Form N-CSR, Item 4(j)
  - Form 20-F, Part II, Item 16I and Form 40-F, Paragraph B.18

- Additional disclosures for all “SEC-identified issuers”:
  - That the issuer uses a “PCAOB-Identified Firm” during the period covered by the annual report
  - The % of shares of the issuer owned by governmental entities in the applicable foreign jurisdiction where incorporated
  - Whether government entities in the applicable foreign jurisdiction for the “PCAOB-Identified Firm” have a controlling financial interest with respect to the issuer
  - The name of each official of the CCP who is a member of the BOD of the issuer or the operating entity controlled by the issuer
  - Whether the articles of incorporation of the issuer contain any charter of the CCP and text of such charter

REPORTING AUDIT FIRM INFORMATION

- **Future SEC Steps under HFCA Act:**
  - The SEC will identify and report on its website all "SEC-Identified issuers" along with the number of years audited by a principal registered public accounting firm that is a "PCAOB-Identified firm" at www.sec.gov/HFCA
  - The SEC will initiate trading prohibitions on any exchanges within its jurisdiction of any issuers that have stayed on this list for three consecutive years
  - An issuer can end the trading prohibition by retaining a principal registered public accounting firm that is not an "PCAOB-Identified firm" and is being inspected by the PCAOB

SEC STAFF FOCUS ON NON-GAAP AND KPI

SEC Staff Guidance on Key Performance Indicators (KPIs)

- Applies to KPIs and other metrics in MD&A, for example:
  - *Examples*: total customers or subscribers, revenue per store, average revenue per user
- Differentiate KPI from a non-GAAP Measure
  - US GAAP revenue per store is a KPI using a GAAP metric
  - "Cash-basis revenue" per store (a revenue measure excluding estimated returns and allowances) is a non-GAAP measure as it does not use GAAP revenue
- For each KPI disclose for all periods:
  - Definition of the metric and how it is calculated
  - Reasons the metric is useful to investors
  - How management uses the metric in managing or monitoring the performance of the business
- Disclose when the method used to calculate or present the metric changes:
  - Differences in how the metric is calculated or presented
  - Reasons for the change
  - Effect on KPIs or metric amounts disclosed or previously reported
  - Other relevant differences in methodology and results

SEC STAFF FOCUS ON NON-GAAP AND KPI

Non-GAAP Measures: Areas of Staff Frequent Comments

- Excluding normal recurring cash operating expenses from performance measures
  - *e.g.*, Restructuring activities that recur more than 2 years in a row
- Tailoring GAAP recognition and measurement principles
  - A "gross revenue" measure before discounts or other incentives that reduce revenue under US GAAP would not be appropriate
  - Net revenue" or contribution margin measures that arrive at non-GAAP gross margin
    - Should make clear that it is a measure of margin and not use the term "revenue"
    - Reconcile non-GAAP measure to gross margin
- ASC 280, Segment Reporting only permits one measure of segment profit:
  - Additional measures of segment profit could be presented outside the financial statements subject to non-GAAP disclosure requirements

FINANCIAL STATEMENT MATERIALITY

Statement on Assessing Materiality of Misstatements to Financial Statements

- Statement by Chief Accountant Paul Munter on March 9, 2022
- The determination of whether an error is material to the financial statements is an objective assessment focused on whether there is a substantial likelihood it is important to the reasonable investor
  - Quantitative Factors
  - Qualitative Factors
- Both Big R and little r restatements should provide ASC 250 disclosures
  - Staff noted relative increase in "little r" restatements that do not lead to amending SEC filings
- SAB 99 covered circumstances where a quantitatively small error may be material due to qualitative factors (not the other way around)
- Arguing the reverse, that a quantitatively material error is immaterial on the basis of qualitative factors, should be challenging and would apply different qualitative factors than in SAB 99

Proposed Climate Change Disclosure Rules

Overview of the Proposed Rule

- March 21, 2022: SEC approved, on a 3:1 vote, its proposed rule "The Enhancement and Standardization of Climate-Related Disclosures for Investors"
- Proposed rule includes extensive required reporting by covered companies of climate-related financial and non-financial disclosures and related attestation
- Notably, and subject to certain exceptions and transitional provisions, the proposed SEC rules would require that covered companies disclose:
    1. Direct greenhouse gas (GHG) emissions (Scope 1) and indirect GHG emissions from purchased electricity and other forms of energy (Scope 2); and
    2. Indirect emissions from upstream and downstream activities in a company's value chain (Scope 3), if material, or if the company has set a GHG emissions target or goal that includes Scope 3 emissions
- Requires "short-, medium-, and long-term" climate-related risk assessments

Overview of the Proposed Rule *(cont'd)*

- Includes amendments to Regulations S-K (Non-Financial Statement Disclosures) as well as Regulations S-X (Financial Statement Disclosures)
- Treats required climate-related disclosure as "filed" rather than "furnished"
- Includes potentially significant practical consequences for corporate governance, business strategy, and risk management
- Includes proposed phase-in and transition
- Extends Private Securities Litigation Reform Act ("PSLRA") "forward-looking" safe harbor to such assessments, if applicable

Companies Covered by the Proposed Rule

- Proposal **applies to**:
  - Companies with reporting obligations pursuant to Sections 13(a) or 15(d) of the Securities Exchange Act of 1934 ("Exchange Act")
  - Companies that file a registration statement under the Securities Act or the Exchange Act
  - Foreign private issuers that file annual reports on Form 20-F
  - Emerging growth companies and business development companies
- Proposal **does not apply to**:
  - Canadian issuers that file on Form 40-F
  - "Asset-backed issuers"

SEC RULEMAKING

Proposed Climate Change Disclosures

- Separate "Climate-Related Disclosure" section immediately before MD&A:
  - Quantified GHG for each annual period in the filing
    - Scope 1 GHS emissions – direct emissions from operations that are controlled by the registrant
    - Scope 2 GHG emissions – indirect emissions from the generation (by others) of energy consumed by operations controlled by the registrant
    - Scope 3 GHS emissions – indirect emissions , which occur in the upstream and downstream activities of a registrant's value chain
      - Most subjective category that would require novel assumptions like estimated emissions from business travel and commuting by employees, transportation of goods from vendors (upstream) and to customers (downstream)
      - SRCs would be exempt from quantifying and disclosing their Scope 3 GHG emissions
  - Climate related risks and opportunities
  - Climate risk management process
  - Any climate targets/goals and discussion of progress towards such targets
  - Governance and oversight of climate-related risks

SEC RULEMAKING

Proposed Climate Change Disclosures

- Disclosures in the Audited Financial Statements (Proposed Rule 14-02 of Regulation S-X)
- In the aggregate and for each financial statement line item that is impacted by more than 1% by the sum of the absolute value of all impacts
- Financial impacts of:
  (a) severe weather events and other natural conditions, and
  (b) transition activities (these are efforts to reduce GHG emissions, like development of new technologies)
- Expenditures (expensed separately from capitalized):
  (a) to mitigate risks of material weather events and other natural conditions
  (b) transition activities to reduce GHG emissions (like the purchase of new low-emissions equipment)
- Impact of identified climate-related risks, separately for physical risks and transition risks:
  - Company to identify its risks early in the implementation in order to establish accounting processes for accumulating costs (impacts) of each risk for each annual period for each metric above

SEC RULEMAKING

Proposed Climate Change Disclosures

- Example of Financial Impact Disaggregated by Climate Event and Transition Activity

FS Line Item	Consolidated Balance 20X5	Event A	Event B	Transition Activity 1	Absolute Value of Total	Percentage Impact
Revenue	$100m		$2			2%
Cost of Sales	$55m	($3)	$1	($4)	$8	14.5%
SG&A	$25m	($1)	($3)	($1)	$5	20%

- Subject to independent audit by the company's principal accountant (PCAOB standards)
- Subject to registrant ICFR and management SOX certifications

SEC RULEMAKING

Proposed Climate Change Disclosures

Registrant Type	All Disclosures Except Scope 3	Scope 3 GHG emissions	Attestation on FS Disclosures	Attestation on GHG Scope 1&2
Large accelerated	FY 2023	FY 2024	FY 2023	Limited – 2024 Reasonable - 2026
Accelerated	FY 2024	FY 2025	FY 2024	Limited – 2025 Reasonable 2027
Non-accelerated	FY 2024	FY 2025	FY 2024	Exempt
SRC	FY 2025	Exempt	FY 2025	Exempt

The attestation provider on the GHG emission metrics would have to be (1) expert in GHG emissions that performs work in accordance with professional standards and (2) independent from the registrant. Registrant to disclose attestation provider's licensure or accreditation and whether the engagement is subject to an "oversight inspection program".

SEC proposed amendments and new proposed rules relating to SPACs, shell companies and projections

Overview and Additional Disclosure Requirements

- On March 30, 2022, the SEC proposed amendments and new proposed rules relating to SPACs, shell companies and projections
- Among other things, the proposed amendments would require additional disclosure
  - New Item 1603(a) of Reg S-K about a SPAC's sponsor, its affiliates, and any promotors relating to their experience, roles, responsibilities, agreements, compensation, etc.
  - New Item 1603(b) of Reg S-K(b) about actual or potential conflicts of interest between sponsors, directors and officers, on the one hand, and SPAC unaffiliated stockholders, on the other hand
  - New Item 1603(c) about the fiduciary duties of each officer and director to other companies
  - New Item 1602(c) regarding future dilution

Overview and Additional Disclosure Requirements *(cont'd)*

- New Item 1602(a)(4) presenting a tabular dilution disclosure of pro forma net tangible book value per share under a range of potential redemption levels
- New Item 1604(c) disclosing each material potential source of additional dilution that non-redeeming shareholders may experience in de-SPACs
- New Item 1604(c)(1) presenting a sensitivity analysis
- New Item 1605 discussing the background of the transaction
- New Item 1606 requires significant new disclosures regarding the fairness from a financial point of view to the SPAC's unaffiliated securityholders of the de-SPAC and the related financing transaction
    - Substantially similar to the requirements in Item 1014 of Regulation M-A applicable to "going private" transactions under Rule 13e-3 of the Exchange Act

Overview and Additional Disclosure Requirements *(cont'd)*

  - New Item 1607 would require disclosure of any fairness opinion
- Non-financial statement disclosure requirements would be aligned with IPOs

Other Aspects of the Proposed Amendments

- The amendments also address:
  - A minimum dissemination period for de-SPAC proxy materials
  - Status of target company as co-registrant
  - Re-determination of smaller reporting company status
  - Inapplicability of PSLRA to projections
  - Investment Company Act safe harbor

SEC RULEMAKING

Proposed SPAC Rule-making: Financial Statements

- Proposed Article 15 of Regulation S-X will spell out the age, form and content of financial statements for a private operating company that is the Target (and reporting predecessor) of the SPAC in the de-SPAC transaction
  - Consistent with current practice
  - "Acquiree" significance tests to be performed against the "Predecessor" historical financial statements
- Post-merger company to re-determine SRC status within 4 business days of merger and prepare its first periodic report subsequent to the merger consistent with new status
- RS after first periodic report of a non-SRC issuer but before its next annual report

SEC RULEMAKING

Proposed SPAC Rule-making: Projections

- Amend the definition of “blank check company” to remove the safe harbor from liability for forward-looking statement like financial projections for SPACs
- Item 10(b) of S-K, Commission policy on Projections: distinguish PFI based on historical results from PFI from other PFI
  - Present the historical results next to the PFI based on historical results
- Item 1609 of S-K would require disclosure of the party who prepared the projections, material assumptions underlying the projections and whether as of the date of filing the projections continue to reflect the view of the board of the company preparer

Proposed Changes to Beneficial Ownership Reporting Rules

Overview

- The Exchange Act, Section 13(d), was originally enacted to address the increasing use of cash tender offers in corporate takeovers. Section 13(g) permits short-form disclosure by certain passive or early investors that hold or obtain significant positions in the voting stock of public companies
- February 10, 2022: SEC proposed amendments to Schedules 13D and 13G relating to beneficial ownership reports ("Proposed Amendments")
- Proposed Amendments intended to modernize the rules that govern reporting on Schedules 13D and G by:
  - Making information available to the public in a more timely manner,
  - Deeming holders of certain cash-settled derivative securities to be beneficial owners of the reference equity securities, and
  - Clarifying the disclosure requirements in respect of derivative securities.

Filing Deadlines, Amendments and Formats

- Proposed changes:
  - **Rule 13d-1(a)** – an investor that exceeds 5 percent of a covered class of equity (generally, a "covered class" means a voting class of equity securities registered under Section 12 of the Exchange Act) would need to file within five days instead of 10 days
  - **Rules 13d-1(e), (f), and (g)** – an investor who forfeits eligibility to report on Schedule 13G instead of 13D would need to file a Schedule 13D within five days after the event causing ineligibility instead of 10 days
  - **Rule 13d-2(a)** – amendments to Schedule 13D for material changes would need to be filed one business day after the occurrence of the material change (currently "promptly")
  - **Rules 13(d)-1(b) and (d)** – the initial Schedule 13G filing deadline for Qualifying Institutional Investors ("QIIs") and Exempt Investors would be within five business days after the month in which beneficial ownership first exceeds 5 percent of a covered class instead of within 45 days after calendar year-end
  - **Rule 13d-1(c)** – Passive Investors would need to file a Schedule 13G within five days of exceeding 5 percent of a covered class instead of 10 days

Filing Deadlines, Amendments and Formats *(cont'd)*

- **Rule 13d-2(b)** – amendments to Schedule 13G would need to be filed five business days after the month in which a reportable change occurs instead of 45 days after calendar year-end (but the Proposed Amendments raise the threshold for what constitutes a reportable change from "any change" to a "material change")
- **Rule 13d-2(c)** – QIIs would need to amend a Schedule 13G within five days of exceeding 10 percent of a covered class instead of 10 days after the month in which such change occurred
  - New five-day deadline would apply for any additional deviation of more than 5 percent of a covered class (deadlines would apply to such percentage changes at any time during the month)
- **Rule 13d-2(d)** – Passive Investors would need to amend a Schedule 13G one business day after exceeding 10 percent of a covered class instead of "promptly" after the ownership change
  - The new one business day deadline would apply for any additional deviation of more than 5 percent of a covered class
- Extending "cut-off" time for filing Schedules 13D and 13G and any amendments from 5:30 pm ET to 10:00 pm ET on a business day
- Schedules 13D and 13G be filed using a structured, machine-readable data language (*i.e.,* filed with XML-based language for ease of investor access)

Filing Deadlines, Amendments and Formats *(cont'd)*

Issue	Current Schedule 13D	Proposed New Schedule 13D	Current Schedule 13G	Proposed New Schedule 13G
Initial Filing Deadline	Within 10 days after acquiring beneficial ownership of more than 5 percent or losing eligibility to file on Schedule 13G. Rules 13d-1(a), (e), (f) and (g).	Within 5 days after acquiring beneficial ownership of more than 5 percent or losing eligibility to file on Schedule 13G. Rules 13d-1(a), (e), (f) and (g).	QIIs & Exempt Investors: 45 days after calendar year-end in which beneficial ownership exceeds 5 percent. Rules 13d-1(b) and (d). Passive Investors: Within 10 days after acquiring beneficial ownership of more than 5 percent. Rule 13d- 1(c).	QIIs & Exempt Investors: 5 business days after month-end in which beneficial ownership exceeds 5 percent. Rules 13d-1(b) and (d). Passive Investors: Within 5 days after acquiring beneficial ownership of more than five percent. Rule 13d-1(c).
Amendment-Triggering Event	Material change in the facts set forth in the previous Schedule 13D. Rule 13d-2(a).	No amendment proposed – material change in the facts set forth in the previous Schedule 13D). Rule 13d-2(a).	All Schedule 13G Filers: Any change in the information previously reported on Schedule 13G. Rule 13d-2(b). QIIs & Passive Investors: Upon exceeding 10 percent beneficial ownership or a 5 percent increase or decrease in beneficial ownership. Rules 13d-2(c) and (d).	All Schedule 13G Filers: Material change in the information previously reported on Schedule 13G. Rule 13d-2(b). QIIs & Passive Investors: No amendment proposed – upon exceeding 10 percent beneficial ownership or a 5 percent increase or decrease in beneficial ownership. Rules 13d-2(c) and (d).
Amendment Filing Deadline	Promptly after the triggering event. Rule 13d-2(a).	Within one business day after the triggering event. Rule 13d-2(a).	All Schedule 13G Filers: 45 days after calendar year-end in which any change occurred. Rule 13d-2(b). QIIs: 10 days after month-end in which beneficial ownership exceeded 10 percent or there was, as of the month-end, a 5 percent increase or decrease in beneficial ownership. Rule 13d-2(c). Passive Investors: Promptly after exceeding 10 percent beneficial ownership or a 5 percent increase or decrease in beneficial ownership. Rule 13d-2(d).	All Schedule 13G Filers: 5 business days after month-end in which a material change occurred. Rule 13d-2(b). QIIs: 5 days after exceeding 10 percent beneficial ownership or a 5 percent increase or decrease in beneficial ownership. Rule 13d-2(c). Passive Investors: 1 business day after exceeding 10 percent beneficial ownership or a 5 percent increase or decrease in beneficial ownership. Rule 13d-2(d).
Filing "Cut-Off" Time	5:30 pm ET. Rule 13(a)(2) of Regulation S-T.	10:00 pm ET. Rule 13(a)(4) of Regulation S-T.	All Schedule 13G Filers: 5:30 pm ET. Rule 13(a)(2) of Regulation S-T.	All Schedule 13G Filers: 10:00 pm ET. Rule 13(a)(4) of Regulation S-T.

Change Beneficial Ownership Status of Holders of Certain Cash-Settled Derivatives

- Currently, under Rule 13d-3, holders of derivatives that are settled "in kind" or that otherwise convey a right to acquire a covered class are considered "beneficial owners" of the covered class
- A holder of a derivative that provides nothing more than economic exposure to the reference security has generally not been considered a beneficial owner of the reference security
- Proposed Rule 13d-3(e) would deem certain holders of cash-settled "derivatives" to have beneficial ownership of the reference equity securities, causing the derivatives position to be counted toward the reporting thresholds of Section 13(d)
- Definition of "derivative security" is definition used for Section 16 purposes, which is very broad
  - Rule 16a-1(c) – a "derivative security" generally means any option, warrant, convertible security, stock appreciation right, or similar right, with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an "equity security"
- Derivative securities with a floating exercise price excluded from definition of derivative security

Change Beneficial Ownership Status of Holders of Certain Cash-Settled Derivatives *(cont'd)*

- Proposed Rule 13d-3(e)(1) would provide that a holder of a cash-settled derivative security, other than a security-based swap, will be "deemed" the beneficial owner of the reference equity securities if the derivative is held:
  - With the purpose or effect of changing or influencing the control of the issuer of the reference securities, or
  - In connection with or as a participant in any transaction having such purpose or effect
- Disclosure of large positions in security-based swaps would be addressed under a proposal issued in December 2021 relating to a new Rule 10B-1

Acting as a Group Under Rule 13d-5

- Currently, the term "group" is not defined
  - The level of coordinated activity by two or more persons that would render them a "group," and, thus, subject them to regulation as a "person," has been a factual question
  - Many courts have determined that an agreement among group members to act together is a prerequisite to a finding that there is a "group"
- SEC proposed to amend Rule 13d-5 to clarify that forming a group does not require an agreement
  - A person who shares information about such person's upcoming Schedule 13D filing, to the extent that this information is not yet public and is communicated with the purpose of causing others to make purchases, and a person who subsequently purchases the issuer's securities based on this information would be deemed to have formed a group within the meaning of Section 13(d)(3)
  - A group will be deemed to have acquired beneficial ownership of the securities of any market participant with whom the large blockholder communicates material information regarding the impending filing obligation

Exemptions From the Application of Sections 13(d) and 13(g)

- Two or more persons will not be deemed to have acquired beneficial ownership of, or otherwise beneficially own, an issuer's equity securities as a group solely because of their concerted actions related to an issuer or the issuer's equity securities, including engagement with one another, provided:
  - Communications among or between such persons are not undertaken with the purpose or effect of changing or influencing control of the issuer, and are not made in connection with or as a participant in any transaction having such purpose or effect, and
  - Such persons, when taking such concerted actions, are not directly or indirectly obligated to take such actions
- Two or more persons (including financial institutions acting as derivatives counterparties) will not be deemed to have formed a group solely by virtue of their entrance into an agreement governing the terms of a derivative security. Exemption is only available:
  - If entered into in the ordinary course of business, and
  - If the agreement is a bona fide purchase and sale agreement not entered into with the purpose or effect of changing or influencing control of the issuer or in connection with or as a participant in any transaction having such purpose or effect

Proposed Rules on Cybersecurity Disclosures

Proposed Amendments on Cybersecurity Reporting and Disclosure

- March 9, 2022: SEC proposed new rules to enhance and standardize disclosures re cybersecurity risk management, strategy, governance and incident reporting by public companies subject to Exchange Act
- Follows 2011 Corp. Fin guidance and 2018 SEC guidance on public company cybersecurity disclosures
- Proposal would require:
  - Current reporting about material cybersecurity incidents on Form 8-K
  - Periodic reporting on: registrant's policies and procedures to identify and manage cybersecurity risks; management's role in implementation; Board's cybersecurity expertise, if any, and oversight of cybersecurity risk; updates about previously reported material cybersecurity incidents
  - Require Inline XBRL presentation of cybersecurity disclosures

Proposal – New Item 1.05 of Form 8-K

- Disclose information about a material cybersecurity incident on Form 8-K within 4 business days after registrant determines it has experienced an incident:
  - When the incident was discovered and whether it is ongoing;
  - A brief description of the nature and scope of the incident;
  - Whether any data was stolen, altered, accessed or used for any other unauthorized purpose;
  - The effect of the incident on the registrant's operations; and
  - Whether the registrant has remediated or is currently remediating the incident
- Trigger: Date registrant determines that cybersecurity incident it has experienced is material
- Apply existing standard of materiality under federal securities laws
  - if "there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision or it would have "significantly altered the total mix of information available" [*TSC Industries vs Northway; Basic, Inc v Levinson; Matrixx Initiatives vs Siracusano*]

Reporting of Material Cybersecurity Incidents

- Examples of cybersecurity incidents that may, if determined to be material by registrant, trigger disclosure in Form 8-K:
  - An unauthorized incident that has compromised the confidentiality, integrity, or availability of an information asset (data, system, or network); or violated registrant's security policies or procedures. Incidents may stem from accidental exposure of data or from a deliberate attack to steal or alter data
  - An unauthorized incident that has caused degradation, interruption, loss of control, damage to or loss of operational technology systems
  - An incident in which a malicious actor has offered to sell or has threatened to publicly disclose sensitive company data
- Form 6-K amendment for FPIs: adds "cybersecurity incidents" as a reporting topic
- Periodic Reporting: provide updates in Forms 10-Q/10-K/20-F of previously disclosed cybersecurity incidents (*e.g.*, material impact on operations and financial condition; remediation) and disclose when "a series of previously undisclosed immaterial cybersecurity incidents has become material in the aggregate"

Proposed Disclosures – Risk Management, Strategy and Governance Disclosure

New Item 106 of Reg. S-K would require detailed disclosures re:

- (i) policies and procedures, if any, for identifying and managing cybersecurity risks and company's cybersecurity governance:
  - Whether registrant has a cybersecurity risk assessment program, and if so, description
  - Whether registrant engages assessors, consultants, auditors or third parties in connection with any cybersecurity risk assessment program
  - Whether registrant has business continuity, contingency and recovery plans
- (ii) board of directors' role in oversight of cybersecurity risks
  - Whether entire board, specific board members or committee is responsible for oversight
  - Process by which board is informed about cybersecurity risks, and frequency of discussions;
  - Whether and how board considers cybersecurity risks as part of its business strategy, risk management and financial oversight

Proposed Disclosures – Risk Management, Strategy and Governance Disclosure *(cont'd)*

- (iii) management's role in managing cybersecurity-related risks and implementing company's cybersecurity policies and procedures.
  - Whether certain management positions or committees are responsible for managing cybersecurity risk, and relevant expertise of such persons;
  - Whether registrant has a designated chief information security officer, and if so, to whom that individual reports and the relevant expertise of any such persons
  - Whether and how frequently such persons or committees report to the board of directors or a committee of the board of directors on cybersecurity risk.
- New Item 407 of Reg. S-K would require registrants to disclose whether any board member has "cybersecurity expertise" and, if so, the nature of such expertise
  - "cybersecurity expertise" not defined, but includes a non-exclusive list of criteria that should be considered, including prior work experience, possession of a cybersecurity certification or degree or other knowledge, skills or background in cybersecurity
  - person who is determined to have expertise in cybersecurity will not be deemed an expert for any purpose, including for purposes of Section 11 of Securities Act

SEC RULEMAKING

Proposed Cybersecurity Disclosures

- **Objective**: to enhance and standardize disclosures about cybersecurity incidents
- Incident disclosures in Item 1.05 Form 8-K
  - Within 4 business days of registrant conclusion that the incident is "material"
  - When discovered and whether it is still going on (or has been remediated)
  - Nature and scope of the incident
  - Whether data was stolen, altered, accessed or used for unauthorized purposes
- No disclosure of specific technical information that would impede the Company's remediation
- Timely Form 8-K required even when the issuer is conducting internal or external investigation
- New Item 106(d) of Regulation S-K to require updates in 10-Q and 10-K
  - Material impact on the issuer's financial condition, results of operations or potential future impact
  - Changes in the issuer's cybersecurity policies and procedures due to the incident

SEC RULEMAKING

Proposed Cybersecurity Disclosures

- Risk Management & Strategy
  - Consider all cybersecurity threats: operational, IP, theft, fraud, extortion, harm to employees or customers, violation of privacy laws
- Governance
  - Board's role and oversight
  - Protocols for informing Board
  - Management's role: CISO?
- Cybersecurity Expertise
  - Names and description of relevant experience, including certifications or degree, work experience

Filing Fee Disclosures and Payment Methods Modernization

Filing Fee Disclosures and Payment Methods

- October 13, 2021: SEC adopted amendments to modernize filing fee disclosure and payment methods
- Adds option for fee payment via Automated Clearing House ("ACH") payments and debit and credit cards issued by US financial institutions, retains payment via wire transfers, eliminates options for fee payment via paper checks and money orders
- Amends most fee-bearing forms, schedules, statements and rules to require each filing fee table and accompanying disclosure to include all required information for fee calculation in a structured format (inline XBRL reporting)
  - Requirement to provide information in Inline XBRL structured format – to be phased in based on filer status. Large accelerated filers must comply for filings submitted on or after July 31, 2024; all other filers, July 31, 2025.
- Forms affected:
  - Forms S-1, S-3, S-4, S-8, S-11, F-1, F-3, F-4, F-10, N-14, SF-1 and SF-3 under Securities Act
  - Schedules 13E-3, 13E-4F, 14A, 14C, TO and 14D-1F under Exchange Act
  - Forms 24F-2 and N-2 under the Investment Company Act

Filing Fee Disclosures - New Rules

- Filing fee-related info to appear in a separate filing fee exhibit instead of cover page
- Columns added to basic filing fee table for registration statements, to indicate:
  - type of security being newly registered or carried forward;
  - registration form type, file number, and initial effective date of previously filed registration statement associated with any unsold securities registrant is carrying forward;
  - fees paid; entries for total offering amounts, total amount of fee offsets and total fee due net of fee offsets and any previously paid amounts
  - current SEC "fee rate"
- General Instructions to Forms S-3 and F-3 revised (i) to require that filing fee information appear in a filing fee exhibit to a post-effective amendment or 424(b) or (h) prospectus rather than in a periodic report incorporated by reference into registration statement
- Add new tables to disclose any fee offsets and reliance on Rule 429
- Additional changes made to filing fee tables and instructions to require additional detail about filing fee calculations in tabular format (see examples in next two slides)

Filing Fee Tables: Examples – Form S-1

- For example, for Form S-1, there will be a basic table: "Table 1: Newly Registered and Carry Forward Securities," and two other tables to disclose the additional detail needed to calculate the filing fee.

Table 1: Newly Registered and Carry Forward Securities

	Security Type	Security Class Title	Fee Calculation or Carry Forward Rule	Amount Registered	Proposed Maximum Offering Price Per Unit	Maximum Aggregate Offering Price	Fee Rate	Amount of Registration Fee	Carry Forward Form Type	Carry Forward File Number	Carry Forward Initial effective date	Filing Fee Previously Paid In Connection with Unsold Securities to be Carried Forward
Newly Registered Securities												
Fees to Be Paid	X	X	X	X	X	X	X	X				
Fees Previously Paid	X	X	X	X	X	X		X				
Carry Forward Securities												
Carry Forward Securities	X	X	X	X		X			X	X	X	X
	Total Offering Amounts					X		X				
	Total Fees Previously Paid							X				
	Total Fee Offsets							X				
	Net Fee Due							X				

Filing Fee Tables: Examples – Form S-1 *(cont'd)*

- New "Table 2: Fee Offset Claims and Sources" will provide more detail regarding any fee offsets, and new "Table 3: Combined Prospectuses" will be included if the company is relying on Rule 429

Table 2: Fee Offset Claims and Sources

	Registrant or Filer Name	Form or Filing Type	File Number	Initial Filing Date	Filing Date	Fee Offset Claimed	Security Type Associated with Fee Offset Claimed	Security Title Associated with Fee Offset Claimed	Unsold Securities Associated with Fee Offset Claimed	Unsold Aggregate Offering Amount Associated with Fee Offset Claimed	Fee Paid with Fee Offset Source
Rules 457(b) and 0-11(a)(2)											
Fee Offset Claims		X	X	X		X					
Fee Offset Sources	X	X	X		X						X
Rule 457(p)											
Fee Offset Claims	X	X	X	X		X	X	X	X	X	
Fee Offset Sources	X	X	X		X						X

Table 3: Combined Prospectuses

Security Type	Security Class Title	Amount of Securities Previously Registered	Maximum Aggregate Offering Price of Securities Previously Registered	Form Type	File Number	Initial Effective Date
X	X	X	X	X	X	X

Universal Proxy Amendments

Universal Proxy Rules

- On November 17, 2021, SEC adopted mandatory universal proxy rules that apply to all contested director elections
- Each universal proxy card must list all management and dissident nominees for director, enabling shareholders voting by proxy to pick and choose among the different slates of candidates
- Each party (company and dissidents) in a contested election would distribute its own universal proxy card
- Universal proxy card must clearly distinguish between management and dissident nominees. All nominees to be presented in same font type, style and size on card
- Rules apply to shareholders meetings held after August 31, 2022

Universal Proxy Rules *(cont'd)*

- Universal proxy rules contain notice, timing and solicitation requirements for contested director elections
  - Dissident must provide registrant notice of its intent to solicit proxies and provide names of its director nominees no later than 60 calendar days before the anniversary of the previous year's annual meeting
    - Notice requirement is in addition to any advance notice requirements in governing documents
  - Company must notify dissident of names of company's' director nominees no later than 50 calendar days before the anniversary of the previous year's annual meeting
  - Dissident must file its definitive proxy statement by the later of 25 calendar days before the shareholder meeting or five calendar days after registrant files its definitive proxy
  - Dissident must solicit holders of shares representing at least 67% of the voting power of the shares entitled to vote at the meeting

Amendments Applicable to All Director Elections

- Proxy cards for all director elections must include an "against" option instead of a "withhold authority to vote" if governing law gives legal effect to a vote "against" nominee
- When applicable state law does not give legal effect to votes cast "against" a nominee, the form of proxy:
  - may not provide a means to vote against any nominee, and
  - must clearly provide specified means to withhold authority to vote for each nominee
- If a majority voting standard applies to director elections, shareholders must be given the opportunity to "abstain"
- Proxy statements must disclose methods by which votes will be counted, including treatment and effect of a "withhold" vote in an election of directors
- New proxy rules do not apply to: registered investment companies, business development companies, foreign private issuers; solicitations not related to director elections

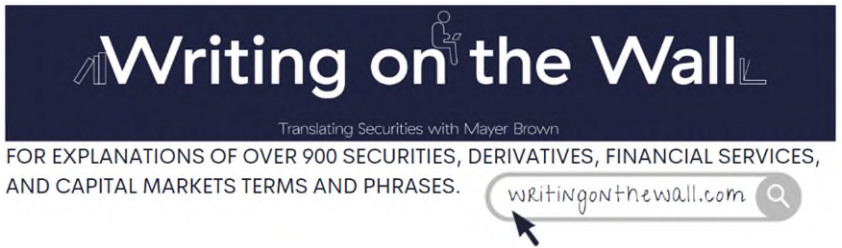
Proposal to Shorten Securities Transaction Settlement Cycle

Proposed Amendments to Shorten Standard Securities Transaction Settlement Cycle to "T+1"

- February 9, 2022: SEC proposed to shorten the standard 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")
- If approved, the proposal would take effect beginning March 31, 2024
- SEC also proposed to eliminate Exchange Act Rule 15c-6-1(c) which provides a T+4 settlement cycle for firm commitment offerings priced after 4:30 pm ET
- Still allows for "override provision" in Exchange Act Rule 15c-6-1(a) for parties to agree on extended settlement, but SEC notes this is intended to apply only to "unusual transactions"
- SEC also proposed new Exchange Act Rule 15c6-2, a "same-day affirmation rule" requiring broker-dealers and institutional customers to allocate, confirm and affirm trade details by the end of the trade date
- SEC noted it is "actively assessing" the objective of moving towards same-day standard settlement cycle ("T+0"), although it is not proposing rules to require the same at this time. Requested comments re potential pathways to T+0 and challenges to implement the same

Additional Resources

- **Read more** | *Mayer Brown Legal Updates*:
  - SEC Proposes Climate Change Disclosure Rules Applicable to Public Companies
  - Market Trends 2020/21: Disclosure Related to Climate Change
  - SEC Proposes New Rules on Public Company Cybersecurity Disclosures
  - US SEC Issues SAB 121: Accounting for Custody of Crypto-Assets
  - SEC Proposes Amendments to Schedules 13D and 13G
  - SEC Adopts Universal Proxy Rules
  - SEC Proposes To Rescind Recently Adopted Proxy Voting Advice Rules



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