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SEC in Focus

Quarterly summary of current SEC activities

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SEC plans to issue climate and cybersecurity rules by year end

The Securities and Exchange Commission (SEC or Commission) updated its regulatory **agenda** in June, indicating it plans to issue a number of highly anticipated final rules and proposals by the end of the year. They include final rules to require climate and cybersecurity-related disclosures and a proposal to require more disclosures on human capital management.

While the SEC has delayed issuing these final rules and proposals several times and the timeline could slip further, their inclusion in the latest regulatory agenda suggests that Chair Gary Gensler remains committed to delivering on these key priorities.

SEC rulemaking updates

SEC amends rules on share repurchase disclosures

The SEC **adopted** amendments to require most issuers to disclose daily quantitative share repurchase information quarterly. Issuers are required to provide, for each day on which a repurchase was conducted, the following information in a tabular format:

- Class of shares repurchased
- Average price paid per share
- Total number of shares purchased, including those purchased as part of a publicly announced plan
- Aggregate maximum number of shares (or approximate dollar value) that are expected to be purchased under a publicly announced plan

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- Total number of shares purchased on the open market
- Total number of shares purchased that are intended to qualify for the safe harbor from liability for market manipulation in Exchange Act Rule 10b-18, when certain criteria are met
- Total number of shares purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c) with respect to insider trading

Issuers are also required to indicate whether certain officers and directors traded shares within the four business days of the announcement of a repurchase plan. These disclosures must be filed quarterly as an exhibit to Forms 10-Q and 10-K for issuers that file on domestic forms, on Form N-CSR semi-annually for listed closed-end funds and on a newly created quarterly Form F-SR for foreign private issuers (FPIs).

The amendments expanded the narrative disclosure requirements in Regulation S-K, Form 20-F and Form N-CSR to discuss share repurchase objectives, criteria used to determine the amount of the repurchase, and any policies and procedures related to the trading of securities by officers and directors during a repurchase program. Issuers are also required to include quarterly disclosure in periodic reports on Forms 10-Q and 10-K about an issuer's adoption and termination of Rule 10b5-1 trading arrangements.

Issuers other than listed closed-end funds and FPIs are required to comply with amendments beginning with the first Form 10-Q or Form 10-K that covers the first full fiscal quarter beginning on or after 1 October 2023. FPIs that file on foreign private issuer forms are required to file the new Form F-SR that covers the first full fiscal quarter beginning on or after 1 April 2024 and include narrative disclosures in the first annual report filed after that. Listed closed-end funds will comply with the amendments beginning with the Form N-CSR that covers the first six-month period beginning on or after 1 January 2024.

How we see it

Companies should establish a process to monitor daily share repurchase information and identify controls over the information to meet the new disclosure requirements.

Companies that have existing share repurchase policies and insider trading policies for their executives and directors should review the terms of these policies and consider whether any changes are necessary to comply with the new rules.

EY resources

- *To the Point, **SEC adopts rules to require 'clawback' policies and disclosures***

SEC approves listing standards requiring registrants to adopt clawback policies by December

The SEC approved listing standards for the **New York Stock Exchange** (NYSE) and **Nasdaq** that require listed companies to recover or "claw back" incentive-based compensation erroneously received by current and former executive officers in the event of a required accounting restatement. The standards are effective on 2 October 2023, and registrants listed on those exchanges are required to adopt compliant clawback policies by 1 December 2023.

The NYSE and Nasdaq were required to establish these listing standards under the SEC's clawback rules adopted in October 2022.

SEC adopts amendments to enhance private fund reporting

The SEC **adopted** amendments to Form PF, the confidential reporting form for certain SEC-registered investment advisers to private funds, that will require more frequent and more detailed disclosures to help the Financial Stability Oversight Council monitor systemic risks and help the SEC oversee private fund advisers and protect investors.

The amendments require reporting of certain events indicating significant stress at a fund that could harm investors or signal risk in the broader financial system in the following manner:

- Large hedge fund advisers are required to file a current report as soon as practicable but no later than 72 hours after the occurrence of reportable events, such as extraordinary investment losses, significant margin and default events, and large withdrawals and redemptions.
- Private equity fund advisers are required to file an event report within 60 days of each fiscal quarter end after the occurrence of reportable events, such as the execution of an adviser-led secondary transaction or the removal of a fund's general partner.
- Large private equity fund advisers are required to file an annual report after the implementation of general or limited partner clawbacks.

The amendments also require large private equity advisers to report more information regarding the activities of private equity funds, certain of their portfolio companies and creditors involved in financing transactions.

The amendments to Form PF sections 5 and 6 are effective 1 December 2023, and the other amendments are effective 1 June 2024.

SEC amends money market fund rules and Form PF reporting requirements for large liquidity fund advisers

The SEC **amended** certain rules that govern money market funds under the Investment Company Act of 1940. The amendments are designed to improve the resilience and transparency of money market funds primarily by:

- Increasing the daily and weekly minimum liquidity requirements to 25% of a fund's total assets and 50% of a fund's total assets, respectively
- Removing provisions that previously permitted a money market fund to temporarily suspend redemptions and tied the imposition of liquidity fees to a fund's liquidity level
- Requiring institutional prime and institutional tax-exempt money market funds to impose liquidity fees when they experience daily net redemptions that exceed 5% of net assets, unless the fund's liquidity costs are de minimis
- Allowing retail and government money market funds to handle a negative interest rate environment by either converting to a floating share price or reducing the number of shares outstanding to maintain a stable net asset value per share
- Requiring additional information about large private liquidity funds on Form PF

The rule amendments will be effective 60 days after publication in the Federal Register, with a tiered transition period for compliance. The reporting form amendments will be effective 11 June 2024.

Stakeholders weigh in on SEC's proposal on safeguarding advisory client assets

The SEC has received more than 160 comment letters on its proposed rules related to safeguarding of customer assets managed by registered investment advisors.

In our **comment letter**, we recommend that the SEC broaden or add certain control objectives for qualified custodians' internal control reports and clarify the service(s) that would satisfy asset verification requirements of privately offered securities and physical assets. We also recommend that the SEC clarify the scope of surprise examination procedures relevant to any new rule. In addition, we recommend that the SEC clarify the definition of the term "material discrepancy," allow foreign entity financial statements to be audited in accordance with the

International Standards on Auditing and require the registered investment adviser, rather than the independent public accountant, to notify the SEC of certain events, such as the issuance of a modified opinion or termination of an engagement, among other things.

Enforcement activities

SEC issues its largest whistleblower award

The SEC issued a $279 million award to a whistleblower whose information and assistance led to the successful enforcement of SEC and related actions. The award was more than double the $114 million that was previously the largest whistleblower award by the SEC. Payments made by the SEC's whistleblower program are from an investor protection fund established by Congress and financed through monetary sanctions paid to the SEC for securities act violations.

> "As this award shows, there is a significant incentive for whistleblowers to come forward with accurate information about potential securities law violations.
>
> — Gurbir S. Grewal, Director of the SEC's Division of Enforcement

SEC charges nutritional supplement company's former executives with accounting and disclosure fraud

The SEC charged the former executives of a nutritional supplement company with engaging in improper revenue recognition practices that materially inflated the quarterly revenues and gross profits the company reported. The order alleged that the former executives prematurely recognized revenue for orders that remained in the company's control and overstated other revenue by misclassifying customer credits as advertising expenses rather than reductions to revenue.

Without admitting or denying the SEC's findings, the former executives consented to the entry of judgments, subject to court approval, that permanently enjoin them from violating the antifraud provisions and other provisions of the federal securities laws, require them to pay disgorgement and/or a civil penalty, and bar one of the executives from serving as an officer or director of a public company for five years.

In a separate order, the SEC alleged that the company's former chief executive officer (CEO) misled investors about the impact of a debt default and falsely certified that he evaluated the company's internal controls. The SEC also charged the former CEO with violating and/or aiding and abetting violations of the antifraud provisions and other provisions of the federal securities laws. The former CEO did not settle these charges; the SEC is seeking injunctive relief, civil penalties, reimbursement to the company, and an officer and director bar.

SEC charges manufacturer and distributor with accounting fraud

The SEC charged a manufacturer and distributor of cashless payment devices for improperly recognizing revenue, which resulted in materially misstated annual and quarterly financial statements for multiple periods.

The SEC's order alleged that the misstatements resulted from the company's attempts to maximize end-of-quarter revenue and meet its internal sales targets in two ways: (1) by entering into purported bill-and-hold sales transactions that did not satisfy US GAAP criteria or the company's revenue recognition policies and (2) by inflating quarterly sales revenue by deliberately shipping devices to customers that they had not ordered.

Without admitting or denying the allegations, the company agreed to a cease-and-desist order and a $1.5 million civil penalty. The SEC indicated that these sanctions reflect consideration of the company's cooperation and remediation of the matter.