11 January 2024

SEC in Focus

Quarterly summary of current SEC activities

In this issue:

SEC staff discusses the accounting profession and transparent financial reporting communication

The annual AICPA & CIMA Conference on Current SEC and PCAOB Developments in December 2023 in Washington, D.C. covered a broad range of emerging issues and financial reporting topics.

The speakers and panelists included representatives of the Securities and Exchange Commission (SEC or Commission), the Financial Accounting Standards Board (FASB), the Public Company Accounting Oversight Board (PCAOB) and the International Accounting Standards Board (IASB), who shared their views on various accounting, financial reporting, auditing and regulatory issues.

Highlights from representatives of the SEC included:

The importance of the accounting profession — Both the SEC staff and other regulators highlighted the importance of the accounting profession in promoting public trust in the capital markets and serving the public interest.

Communication — Regulators, standard setters and other speakers emphasized that financial reporting is a communication activity at its core, and the accounting profession plays a key role in providing investors with the information they need to understand an investment's risks and price those risks into their capital allocation decisions. They emphasized the importance of robust communication, particularly in the current macroeconomic environment.

Stakeholder engagement — SEC representatives and other speakers discussed the importance of seeking and receiving feedback in rulemaking and standard setting. They highlighted that engagement across the spectrum of stakeholders, especially investors, is critical to achieve the appropriate balance between requiring companies to provide useful information and addressing the challenges companies face in gathering and synthesizing that information.

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- *2023 AICPA & CIMA Conference on Current SEC and PCAOB Developments*

Accounting updates — SEC and FASB representatives discussed ways to provide investors with decision-useful and transparent disclosures. The SEC staff said if registrants choose to disclose additional measures of segment profit or loss under the FASB's new guidance on segment reporting in Accounting Standards Update (ASU) 2023-07 that are not calculated in accordance with US GAAP, they would be considered non-GAAP financial measures. The SEC staff also said when a registrant has a single reportable segment that is managed on a consolidated basis, it would expect the registrant to conclude that the segment measure of profit or loss required to be disclosed is consolidated net income.

How we see it

The SEC staff's remarks highlighted the challenges companies will face in disclosing more than a single measure of segment profit or loss under ASU 2023-07 and the SEC rules and staff guidance on non-GAAP financial measures. Registrants that are considering early adoption of ASU 2023-07 and disclosing additional measures of segment profit or loss that are not calculated in accordance with GAAP should proceed with caution, including engaging with advisers. We also encourage registrants to monitor developments, which may include further guidance from the SEC staff before the ASU's effective date.

Other financial reporting matters — The SEC staff provided financial reporting reminders throughout the conference on topics such as management discussion and analysis and risk factor disclosures, critical accounting estimates, and non-GAAP financial measures. The SEC Chief Accountant discussed his recent statement on the statement of cash flows (discussed further below). The staff also addressed the implementation of finalized rules, including those on clawbacks and pay versus performance.

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- *Technical Line:* ***A Closer look at the SEC's new rules on cybersecurity disclosures***
- *Technical Line:* ***How to apply the SEC's new pay versus performance disclosure requirements***

SEC rulemaking and staff guidance updates

Appeals court vacates the SEC's share repurchase disclosure rule

The US Court of Appeals for the Fifth Circuit vacated the SEC's share repurchase disclosure rule in December 2023, after the SEC failed to correct the defects the court had identified in the rule. In response to a lawsuit by the US Chamber of Commerce, the court had issued an opinion in October 2023 directing the SEC to fix the defects by 30 November 2023.

As a result, registrants should continue to follow the legacy repurchase disclosure requirements in Item 703 of Regulation S-K. The vacated rule would have required most issuers to disclose daily quantitative share repurchase information on a quarterly basis, among other information.

SEC staff issues statement and publishes guidance on final cybersecurity rule

Erik Gerding, Director of the SEC's Division of Corporation Finance, issued a **statement** discussing the cybersecurity disclosure requirements that took effect in December 2023. The statement highlighted the changes the Commission made from the proposal and emphasized the key components and mechanics of the rule, including the national security delay provision.

The SEC staff also **published** new compliance and disclosure interpretations (C&DIs) on the required cybersecurity incident disclosures on Form 8-K. The C&DIs clarify the filing deadlines that apply when a registrant requests the Attorney General to determine that disclosure of the incident on Form 8-K poses a substantial risk to national security or public safety. The final rule allows a registrant to delay reporting a cybersecurity incident on Form 8-K if the Attorney General makes that determination.

SEC staff publishes additional guidance on the pay versus performance rules

The SEC staff **published** new and revised C&DIs on the pay versus performance rules and related disclosures. The C&DIs address various questions regarding the application of the rule, including the determination of a registrant's peer group, the calculation of total shareholder return of a registrant's peer group and executive compensation actually paid, and the impact to disclosures when a company loses its status as a smaller reporting company (SRC) or an emerging growth company (EGC).

SEC issues final rules on modernization of beneficial ownership reporting

The SEC **adopted** amendments to certain rules that govern reporting by investors who beneficially own more than 5% of a covered class of equity securities. The amendments shorten the filing deadlines for initial and amended beneficial ownership reports filed on Schedules 13D and 13G, clarify the disclosure requirements of Schedule 13D with respect to derivative securities and require filings to be made using a structured, machine-readable data language, among other things. The amendments are effective 5 February 2024, except for the new Schedule 13D filing deadlines, which are effective 30 September 2024, and the structured data requirement, which is effective 18 December 2024.

> "Investor protection and enhancing public trust in our markets requires that we work with a sense of urgency, using all the tools in our toolkit.
>
> — Director of the SEC's Division of Enforcement, Gurbir S. Grewal

Other SEC matters

SEC Chief Accountant Munter addresses importance of cash flow reporting

SEC Chief Accountant Paul Munter issued a **statement** highlighting the statement of cash flows (SOCF) as a critical component of high-quality financial reporting for investors. He emphasized that the SOCF, a primary financial statement, should be subject to the same level of due professional care, effective internal controls, and robust, high-quality audit procedures as other financial statements.

In the statement, Mr. Munter reminded preparers and auditors about their professional responsibilities over the SOCF, including the importance of objectively evaluating the materiality of the impacts of an error in the SOCF on both the financial statements taken as whole and internal control over financial reporting. He also encouraged issuers to carefully consider how to best present cash and noncash information and whether additional information is necessary to facilitate an investor's understanding of the SOCF and financial statements as a whole.

SEC approves PCAOB budget and accounting support fees

The SEC approved the PCAOB's fiscal year 2024 budget of $384.7 million, up 10.1% from 2023. It also approved annual accounting support fees of $358.8 million, up 8.9% from 2023. Public company issuers will be assessed $331 million of the accounting support fees, and registered broker-dealers will be assessed $27.8 million.

Uyeda sworn in for second term as SEC Commissioner

Mark Uyeda was sworn in as SEC Commissioner for a second term expiring in 2028. Mr. Uyeda has served as Commissioner since June 2022.

Enforcement activities

SEC brought 784 enforcement actions in 2023

The SEC **announced** its Division of Enforcement results for the fiscal year ended 30 September 2023. The report stated that the division:

- Brought 784 enforcement actions, including 501 standalone actions, up 3% from the prior year,
- Ordered more than $3.4 billion in disgorgement, up 50% from the prior year
- Obtained civil penalties of nearly $1.6 billion, the second-highest amount on record

Enforcement actions continued to focus on cryptocurrency, cybersecurity, and environmental, social and governance matters, among other areas. Individual accountability also remained central to the SEC's enforcement program. In addition, the SEC issued nearly $600 million in whistleblower awards, the highest amount ever awarded in one year, including a record-breaking $279 million awarded to one whistleblower.

SEC charges company, chief information security officer with fraud over cybersecurity practices

The SEC charged a software company and its chief information security officer (CISO) with fraud and internal control failures related to its cybersecurity practices and a failure to disclose known risks. The complaint alleges the company's public statements about its cybersecurity practices and risks contradicted its own internal assessments.

The SEC's complaint also alleges that the company made materially false and misleading statements and omissions in a Form 8-K filed with the SEC related to a cybersecurity incident.

The issuer and its CISO are litigating the SEC's charges. The SEC's complaint seeks permanent injunctive relief, disgorgement with prejudgment interest, civil penalties, and an officer and director bar against the CISO.

SEC settles charges with company for stock buyback control violations

The SEC settled charges against a broadband connectivity and cable operator related to alleged internal control violations relating to stock buybacks under Exchange Act Rule 10b5-1. The SEC's order alleged that the company did not maintain reasonably designed controls over its trading plans, which, as a result, did not meet the conditions of Rule 10b5-1 and consequently were not authorized by the board.

Without admitting or denying the SEC's findings, the company consented to cease and desist from further violations and pay a $25 million penalty.

SEC charges company with accounting internal controls deficiencies

The SEC charged a bank with accounting internal control deficiencies related to the accounting for internally developed software. The SEC's order alleges that the company did not maintain a reliable methodology for determining capitalizable costs, resulting in the capitalization of costs that were ineligible under the appropriate accounting methodology.

Without admitting or denying the findings, the company consented to the SEC's order and agreed to pay a $6 million civil penalty. The SEC considered the company's remedial acts in its decision to accept the settlement.

What's next at the SEC?

We expect an active regulatory environment in 2024 as the SEC continues to advance its rulemaking priorities, focus on robust oversight and seek high-profile enforcement cases. We expect the SEC to finalize a number of rules this year, including a rule on climate-related disclosures, and propose additional rules on human capital and board diversity disclosures that would impact periodic reporting requirements.

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