

SEC in Focus

Quarterly summary of current SEC activities

In this issue:

SEC requires pay versus performance disclosures	1
Trends in 2022 SEC staff comment letters	2
Other SEC rulemaking and staff initiatives	2
SEC adopts amendments to electronic filing requirements ..	2
SEC amends whistleblower rules to incentivize whistleblowers	3
SEC adopts inflation adjustments under the JOBS Act	3
2022 Q3 supplemental GAAP taxonomy available for use.....	3
SEC proposes amendments to enhance private fund reporting	3
SEC releases draft five-year strategic plan	4
Personnel changes	4
Two new SEC commissioners sworn in	4
Thompson appointed to second term on PCAOB	4
Enforcement activities	4
Construction company, former executive charged with financial reporting fraud	4
Community bank, former CEO charged with failing to disclose related party loans	4
SEC charges companies with inappropriate revenue recognition practices.....	5

SEC requires pay versus performance disclosures

The Securities and Exchange Commission (SEC or Commission) adopted **final amendments** to Regulation S-K requiring registrants to disclose the relationship between their executive compensation and financial performance in proxy or information statements in which executive compensation disclosures are required under Item 402. The disclosures were mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act and originally proposed by the SEC in 2015.

The rules apply to all reporting companies except emerging growth companies, foreign private issuers and registered investment companies other than business development companies. Smaller reporting companies are permitted to provide scaled disclosures.

After an initial phase-in period, registrants are required to provide the disclosures for the last five years (or the last three years for smaller reporting companies).

Registrants are required to provide a pay versus performance table for up to five years that includes the following information:

- ▶ Total executive compensation reported in the summary compensation table for the principal executive officer (PEO) and the average total compensation for the other named executive officers (NEOs)
- ▶ The “actual” compensation paid to the PEO and the average “actual” compensation paid to the other NEOs, based on total compensation disclosed in the summary compensation table under Item 402(c) in the proxy or information statement, with certain adjustments for pensions and equity awards
- ▶ Total shareholder return (TSR) of the registrant and its peer group, both calculated as the value of an initial \$100 investment

- ▶ The registrant's net income
- ▶ The most important financial performance measure the registrant uses to link compensation paid to its NEOs to company performance for the most recently completed fiscal year

How we see it

Although the data used to determine the executive compensation actually paid is derived from the GAAP financial statements and subject to internal control over financial reporting, registrants should start establishing a process to compile the new disclosures.

In addition to providing the new table, registrants are required to describe the relationship between the actual executive compensation they paid and each of the financial performance measures included in the table, as well as the relationship between the company's TSR and the TSR of its selected peer group. Registrants are also required to disclose three to seven of the most important financial performance measures they use to link executive compensation actually paid to company performance for the most recent fiscal year.

Registrants must begin providing these disclosure in proxy and information statements that are required to include Item 402 executive compensation disclosure for fiscal years ending on or after 16 December 2022 (i.e., in early 2023 for calendar-year registrants).

Trends in 2022 SEC staff comment letters

The topics that the SEC staff addressed most frequently in comment letters for the year ended 30 June 2022 were non-GAAP financial measures, management's discussion and analysis (MD&A) and segment reporting. During the year, the SEC staff also issued a significant number of comments addressing climate-related disclosures and the effects of macroeconomic factors.

In our review of SEC staff comment letters on periodic reports, we also found that the volume of letters increased 10% from the previous year, reversing the downward trend of the past 11 years. However, the SEC staff still issued fewer comment letters than it did in 2020, and therefore, we have not seen a return to prior levels.

Our [SEC Reporting Update: Highlights of trends in 2022 SEC comment letters](#) provides examples of the SEC staff's comments, discusses considerations for navigating the comment letter process and highlights areas we expect the SEC staff to focus on in the coming year.

Other SEC rulemaking and staff initiatives

SEC adopts amendments to electronic filing requirements

The SEC **adopted** amendments to require the electronic submission or filing of certain documents, such as Form 11-K and so-called glossy annual reports, that registrants previously could submit or file in paper format. In addition, registrants can no longer submit glossy annual reports by posting them to their corporate website. The amendments also revise certain forms, including Form 11-K, to require the presentation of financial information in Inline XBRL. The rules were effective 11 July 2022, with a six-month transition period for the electronic filing requirements and a three-year transition period for the Inline XBRL requirements.

The SEC also **adopted** amendments to require certain documents filed by investment advisers, institutional investment managers and certain other entities to be filed or submitted electronically. The rules revise Form 13F to enhance the information provided. Except for the amendments to Form 13F, the rules are effective 29 August 2022, subject to a six-month transition period. The amendments to Form 13F are effective 3 January 2023.

EY resources

- ▶ [To the Point, SEC requires disclosures about the relationship between executive pay and financial performance](#)
- ▶ [SEC Reporting Update: Highlights of trends in 2022 SEC comment letters](#)

SEC amends whistleblower rules to incentivize whistleblowers

The SEC **adopted** amendments to the rules governing its whistleblower program to (1) expand the circumstances under which the Commission can pay whistleblowers for their information and assistance in connection with non-SEC actions and (2) affirm the Commission's authority to consider the dollar amount of a potential award for the limited purpose of increasing an award and eliminate its authority to decrease an award.

SEC adopts inflation adjustments under the JOBS Act

The SEC **adopted** final rules implementing inflation adjustments required by the Jumpstart Our Business Startups (JOBS) Act. The rules increase (1) the annual gross revenue amount used to determine emerging growth company status to \$1,235,000,000 from \$1,070,000,000 and (2) certain dollar amount thresholds used for registration exemptions for crowdfunding transactions. The rules became effective 20 September 2022.

2022 Q3 supplemental GAAP taxonomy available for use

The SEC has accepted the **2022 Q3 supplemental GAAP taxonomy** (made up of improvements to the GAAP financial reporting taxonomy and the SEC reporting taxonomy) and released it for public use. It contains updates for new requirements and other improvements since earlier this year, including:

- ▶ The requirement that a business development company submit financial statement information using Inline XBRL, based on the SEC's final rule on securities offering reform for closed-end investment companies (SEC Release Nos. 33-10771, 34-88606 and IC-33836)
- ▶ The tagging of disclosures discussed in SEC Staff Accounting Bulletin No. 121, which addresses the accounting for obligations to safeguard crypto assets an entity holds for platform users

SEC proposes amendments to enhance private fund reporting

The SEC **proposed** amendments to Form PF, the confidential reporting form for certain SEC-registered investment advisers to private funds. The amendments would require more disclosures about the operations and strategies of advisers and their private funds partly attributable to additional strategy categories, including "digital assets" as a newly defined term.

The proposal also would, among other things:

- ▶ Enhance reporting by large hedge fund advisers on qualifying hedge funds (those with a net asset value of at least \$500 million), such as reporting on investment exposures, borrowing and counterparty exposure, and market factor effects
- ▶ Enhance reporting on basic information about advisers and their private funds, such as assets under management, withdrawal and redemption rights, and fair value hierarchy
- ▶ Require more detailed information about hedge fund investment strategies, counterparty exposures, and trading and clearing mechanisms, while removing duplicative questions from the form
- ▶ Generally require advisers to separately report each component fund in complex fund structures (e.g., master-feeder arrangements, parallel fund structures)
- ▶ Remove aggregate reporting for large hedge fund advisers

Comments are due on 11 October 2022.

SEC releases draft five-year strategic plan

The SEC released a draft of its five-year **strategic plan** for public comment. The SEC said the plan would focus on protecting working families against fraud, manipulation and misconduct in capital markets, developing and maintaining a regulatory framework that keeps pace with evolving markets, business models and technologies, and supporting a skilled and diverse workforce to advance agency objectives. The SEC said it also intends to enhance the use of market and industry data to prevent, detect and prosecute improper behavior.

Personnel changes

Two new SEC commissioners sworn in

Mark Uyeda and Jaime Lizárraga have been sworn in to serve as SEC Commissioners, meaning all five seats on the Commission have been filled.

Commissioner Uyeda, whose term expires in June 2023, had served on the SEC staff since 2006, including as senior adviser to former SEC Chairman Jay Clayton. Commissioner Lizárraga, whose term expires in June 2027, most recently served as senior adviser to House Speaker Nancy Pelosi.

Thompson appointed to second term on PCAOB

The SEC appointed Anthony C. Thompson to a second term as a board member of the Public Company Accounting Oversight Board (PCAOB). He joined the board earlier this year, filling a term that expires on 24 October 2022. His new term expires on 24 October 2027.

Enforcement activities

Construction company, former executive charged with financial reporting fraud

The SEC charged a provider of construction services and materials and its former senior vice president with fraud for allegedly inflating the financial performance of a major subdivision by manipulating profit margins and improperly deferring costs. The company restated its historical financial statements to correct revenue and profit margin errors that the SEC alleges were caused by this misconduct. Without admitting or denying the SEC's findings, the company agreed to pay a civil penalty of \$12 million, subject to court approval.

The SEC filed a separate complaint alleging fraud against the company's former senior vice president, who did not settle the charges. In addition, the company's former chief executive officer (CEO) and former chief financial officers, while not charged with misconduct, agreed to return a total of more than \$1.9 million in bonuses and compensation to the company as a result of the restatement.

Community bank, former CEO charged with failing to disclose related party loans

The SEC charged a community bank and its former chairman and CEO with negligently making false and misleading statements regarding related party loans provided by the bank to the former executive's family trusts.

The SEC's order alleges that the bank failed to reflect loans of up to about \$90 million in the related party loan balances included in its annual reports and proxy statements over a three-year period. The SEC alleges that the bank also improperly omitted related party disclosures for loans to its directors and their family members. The SEC also alleges that the bank and the former chairman and CEO made false public statements in response to a short seller's report about undisclosed loans to the executive's family trusts.

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Adequate disclosures of related party transactions are essential to enable investors to evaluate an issuer's corporate governance

— Deputy Director of the SEC's Division of Enforcement Sanjay Wadhwa

Without admitting or denying the SEC's findings, the bank agreed to cease and desist from future violations and pay a civil penalty of \$10 million, as well as disgorgement and interest. The former chairman and CEO, without admitting or denying the allegations, agreed to a permanent injunction and a two-year officer and director bar, as well as agreeing to pay disgorgement, interest and a monetary penalty totaling more than \$400,000. The settlement is subject to court approval.

SEC charges companies with inappropriate revenue recognition practices

The SEC charged a medical technology company and two former executives with masking actual financial performance and, in some cases, violating GAAP by shipping future orders ahead of schedule to accelerate revenue and failing to disclose this practice. The company restated its financial statements for multiple years to correct errors allegedly caused by this practice. Without admitting or denying the findings, the company and one of its former executives agreed to cease and desist from future violations and to pay civil penalties. The former executive also agreed to return certain compensation. The SEC continues to seek civil penalties and the return of compensation from the other executive, in addition to other relief.

Separately, the SEC charged a technology company with misleading investors about its order backlog management practices. The order alleges that the company delayed delivery on some sales orders until just after quarter end so that it could recognize revenue from the corresponding sales in the following quarter. In addition, the SEC alleged that the company did not adequately disclose to investors how the practice impacted its revenue recognition and related trends. Without admitting or denying the findings, the company agreed to a cease-and-desist order and to pay an \$8 million penalty.

What's next at the SEC?

The SEC may finalize a number of proposed rules (e.g., climate-related disclosures, clawbacks of incentive-based compensation) and propose additional rules (e.g., human capital management disclosures) by year end or shortly thereafter.

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