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Quarterly Perspectives: SEC 2Q 2024 Registrants

This paper provides an overview of standard-setting activity by the SEC's Division of Corporate Finance from April to June 2024, reminders on newly effective rules, updates on the SEC's regulatory agenda, and a spotlight on commercial real estate (CRE).

A. On the Radar

1. Reporting Cybersecurity Incidents

On May 21, 2024, the Division of Corporate finance issued a statement clarifying what should be disclosed in the newly created Item 1.05 in Form 8-K. Item 1.05 requires the disclosure of a cybersecurity incident "that is determined by the registrant to be material." It could be confusing for investors if companies disclose either immaterial cybersecurity incidents or incidents for which a materiality determination has not yet been made in Item 1.05. A voluntary disclosure for cybersecurity incident for which a materiality determination has not been made or an incident that was determined to be immaterial should rather be filed under Item 8.01.

If a company discloses an immaterial incident (or one for which it has not yet made a materiality determination) in Item 8.01, and then subsequently determines that the incident is material, it should file an Item 1.05 within four business days of the materiality determination. That Form 8-K may refer to the earlier Item 8.01 Form 8-K, but the company would need to ensure that the disclosure in the subsequent filing satisfies the requirements of Item 1.05.

In determining whether a cybersecurity incident is material, and in assessing the incident's impact (or reasonably likely impact), companies should assess all relevant qualitative and quantitative factors and that assessment should not be limited to the financial impacts. Examples of qualitative factors noted in the final rule include harm to a company's reputation, customer or vendor relationship, or the possibility of litigation or regulatory actions.

If a cybersecurity incident is so significant that a company determines it to be material even though the company has not yet determined its impact, the company should disclose the incident in an Item 1.05 Form 8-K, including a statement that the company has not yet determined the incident's impact (or reasonably likely impact), and amend the Form 8-K to disclose the impact once that information is available. The initial Form 8-K filing should provide investors with information necessary to understand the material aspects of the nature, scope, and timing of the incident, notwithstanding the company's inability to determine the incident's impact (or reasonably likely impact) at that time.

2. Climate Disclosures

SEC's Final Rule Stayed

The SEC issued its long-awaited final rule on climate disclosures for registrants in March. Not surprisingly, several lawsuits were almost immediately filed to challenge the new guidance in multiple circuit courts. On April 5, 2024, the SEC stayed the rule to avoid regulatory uncertainty for companies that might have been subject to the rule as litigation proceeds. The rule is pending review in the U.S. Court of Appeals for the Eighth Circuit. The SEC said it would continue "vigorously defending" its climate rule and believes that it had acted within its authority to require

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disclosures important to investors. A stay would “allow the court of appeals to focus on deciding the merits,” the SEC said in a statement.

Forvis Mazars will continue to monitor these legal developments. Given the implementation time frame, companies should begin to educate themselves on these new requirements and begin a gap analysis against existing voluntary climate reporting disclosures.

Federal Reserve Scenario Results

On May 9, 2024, the Fed released the results of its 2023 climate scenario analysis exercise with six large banks to assess their ability to identify and manage climate-related financial risks. The study was exploratory and does not have consequences for bank capital or supervisory implications. Study highlights include:

- The banks took a wide range of approaches to consider the resiliency of their business models to various climate scenarios driven by their business model, views on risk, access to data, and participation in previous foreign scenario analysis.
- Banks reported significant data and modeling challenges in estimating climate-related financial risks, including a lack of comprehensive and consistent data, insurance coverage, and counterparties’ plan to manage climate-related risks. In many cases, participants relied on external vendor data.
- Banks suggested that climate-related risks are highly uncertain and challenging to measure, especially the timing and magnitude of climate-related risks and incorporation into risk-management frameworks.
- Banks highlighted the critical role of insurance in mitigating risks. Changes in the insurance costs and coverage could impact consumer and business behaviors in the future.
- Additional investment and analysis could improve participants’ risk-management capabilities.

3. PCAOB – CRE Spotlight

In May, the PCAOB, the regulatory oversight group for public company accounting firms, issued special audit considerations for the CRE market.

“Financial statements of public companies with exposure to CRE, including owners, lenders, lessors, holders of CRE-backed securities, mortgage servicers, property managers, and others in the ecosystem, may have a risk of material misstatement as a result of these (market) conditions.”

The spotlight contains a list of questions that your auditor may be asking in your upcoming meetings:

- How have interest rates affected the ability of the borrower to make repayment?
- Would lower occupancy rates affect the ability of the borrower to make repayment?
- Does the property depend on a limited number of tenants?

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- Are significant tenants experiencing financial difficulties or deciding not to renew their leases or deciding to reduce the square footage they are leasing?
- How have interest rates affected the mortgaged property's value?
- Would lower occupancy rates affect the mortgaged property's value?
- Do advances in technology, such as e-commerce and self-service, impact the property's value or desirability to lessees and, as such, the marketability of the commercial space as currently configured? Can the property be economically reconfigured for other purposes?
- Will evolving real estate needs and lessee preferences affect lease renewals?
- Are significant portions of the property's tenants reaching lease maturity? If so, what are the prospects for renewals or new tenants?
- Have there been significant lease terminations?
- Have assumptions regarding lease renewals changed?
- Have current conditions decreased the value of collateral?
- Are borrowers either not meeting, or at risk of not meeting, covenant requirements?
- Are borrowers able to refinance without a significant capital investment?
- Have collectability issues concerning lease payments increased?
- Is a lender's allowance for credit losses still reasonable given changes in the market?
- Has CRE distress in the borrower's market resulted in tightened credit availability?
- Could the lender's exposure to CRE result in liquidity issues and a reduction in CRE lending and/or refinancing should the CRE slowdown persist or worsen?
- Is the ability of the public company to continue as a going concern at risk?
- How have pricing and trading volume of commercial mortgage-backed securities (CMBS) affected investments held by the public company?
- How have defaults on underlying mortgages impacted CMBS investments?
- If the public company is a real estate investment trust (REIT), do conditions subject the public company to any tax-related risks or impair its ability to preserve its qualification as a REIT?

4. Regulatory Agenda

The most recent reg flex agenda was published in the **Federal Register** in December. The SEC is not precluded from considering or acting on any matter not included in the agenda, and an agency is not required to consider or act on any matter that is included in the agenda.

SEC observers expect the SEC to issue the human capital proposal next. Given that this is an election year, any final rules issued by the SEC after May would be subject to the *Congressional Review Act* and subject to being overturned depending on voting outcomes.

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Fall Reg Flex Agenda – Division of Corporate Finance	
Planned Proposals	**Planned Final Rules**
Corporate board diversity	Shareholder proposals (Rule 14a-8)
Human capital management disclosure	
Resource extraction issuers' payment disclosure	
Incentive-based compensation	

B. Final Rule Partially Effective 2Q 2024

1. Cybersecurity Disclosures

On July 26, 2023, the SEC standardized disclosures about cybersecurity risk management, strategy, governance, and material cybersecurity incidents by public companies subject to the reporting requirements of the *Securities Exchange Act of 1934*. Highlights include:

- **New Item 1.05 of Form 8-K:** Registrants will be required to disclose on this item any cybersecurity incident they determine to be material and to describe the material aspects of the incident's nature, scope, and timing, as well as its material impact or reasonably likely material impact on the registrant. This will generally be due four business days after a registrant determines that a cybersecurity incident is material. The disclosure may be delayed if the U.S. attorney general determines that immediate disclosure would pose a substantial risk to national security or public safety with written notification to the SEC.
- **New Regulation S-K Item 106:** Will require registrants to describe—on an annual basis—their processes for assessing, identifying, and managing material risks from cybersecurity threats, as well as the material effects or reasonably likely material effects of risks from cybersecurity threats and previous cybersecurity incidents. Item 106 requires registrants to describe the board of directors' oversight of risks from cybersecurity threats and management's role and expertise in assessing and managing material risks from cybersecurity threats. These disclosures are required in the 10-K.

Resources:
Details on SEC's New Cybersecurity Disclosures
SEC's New Cyber Disclosure Rule: Answering Your Top Questions (Webinar)

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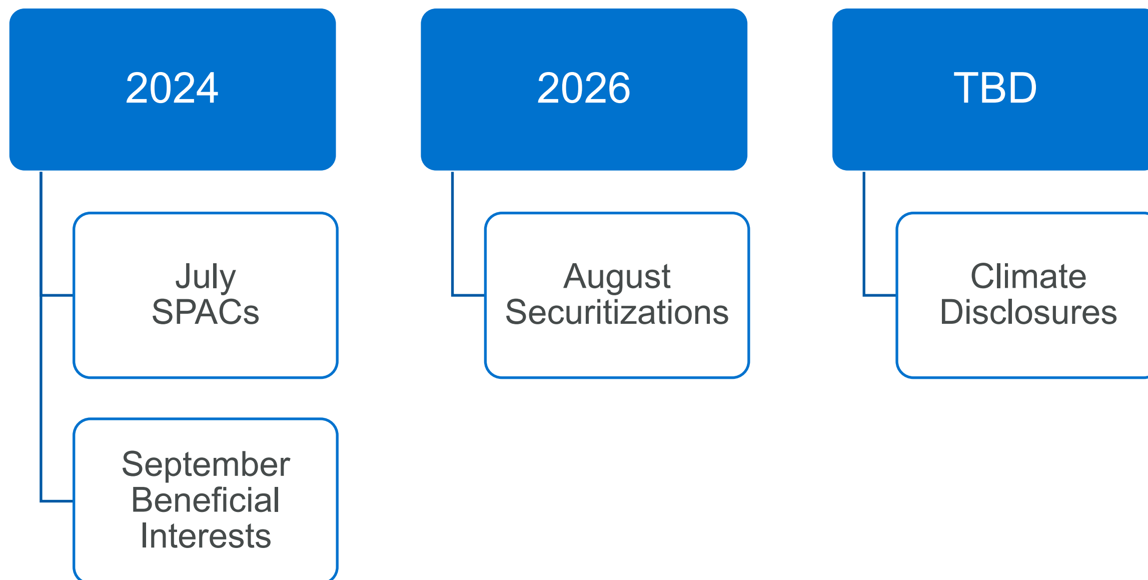
C. Final Rules on the Horizon



1. Special Purpose Acquisition Companies (SPACs)

On January 24, 2024, the SEC approved—in a 3-to-2 vote along party lines—a **final rule** increasing SPAC disclosures for initial public offerings (IPOs) and business combinations with private operating companies (de-SPAC transactions). The rule would better align requirements for de-SPAC transactions and IPOs and enhances investor protections. The rule also covers shell companies and projections.

Resource: SEC Finalizes New SPAC Regulations

2. Beneficial Ownership

On October 10, 2023, the SEC issued a final rule modernizing beneficial ownership reporting rules. An investor with control intent files Schedule 13D, while exempt investors and investors without a control intent, such as qualified institutional investors and passive investors, file Schedule 13G. These rules were last updated in 1968 and 1977, respectively. Highlights include:

- Shortened deadlines for initial and amended Schedule 13D and 13G filings as follows:

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- Schedule 13D – Cut the initial filing deadline once a 5% interest is acquired to five business days (from 10 days) and amendment filing deadline within two days.
- Schedule 13G – For qualified institutional investors, the initial filing deadline is now 45 days after the end of the **calendar quarter** in which the investor beneficially owns more than 5% of the covered class (up from 45 days after the end of a **calendar year**). For other Schedule 13G filers, *i.e.*, passive investors, the rule shortens the initial filing deadline from 10 days to five business days. For all Schedule 13G filers, an amendment must be filed 45 days after the **calendar quarter** in which a material change occurred rather than 45 days after the **calendar year** in which any change occurred. The rule also accelerates the Schedule 13G amendment obligations for qualified institutional investors and passive investors when their beneficial ownership exceeds 10% or increases or decreases by 5%.

- Disclosures on Schedule 13D must include interests in all derivative securities (including cash-settled derivative securities) that use the issuer's equity security as a reference security. (Currently, investors are considered beneficial owners of a security if they have voting and/or investment power and no one is included with a purely economic security interest, *e.g.*, cash-settle equity swaps.)
- Require that Schedule 13D and 13G filings use a structured, machine-readable data language.

3. Conflicts of Interest – Securitization

On November 27, 2023, the SEC issued a final rule completing a Dodd-Frank Act mandate to prohibit conflicts of interest in securitizations. The rule covers an asset-backed security (ABS) and hybrid cash and synthetic ABS and applies to any underwriter, placement agent, initial purchaser, or ABS sponsor. The rule prohibits a securitization participant from entering a conflicted transaction for a period ending one year after the date of the first closing of the ABS's sale. Conflicted transactions are defined as follows:

- Transaction is:
  - A short sale of the ABS
  - The purchase of a credit default swap or other credit derivative that entitles the securitization participant to receive payments upon the occurrence of specified credit events with respect to the ABS
  - The purchase or sale of any financial instrument (other than the relevant ABS) or entry into a transaction that is substantially the economic equivalent of a transaction described in the first two bullet points above, other than—for the avoidance of doubt—any transaction that only hedges general interest rate or currency exchange risk
- Materiality – Is there a substantial likelihood a reasonable investor would consider the relevant transaction important to the investor's investment decision, including a decision whether to retain the ABS? There are certain exceptions for hedging and risk management.

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4. Climate Disclosures for Registrants (Stayed)

On March 6, 2024, the SEC approved by a 3-to-2 vote a long-awaited final rule, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*. The final rule requires information about a registrant's climate-related risks that materially impacted or are reasonably likely to have a material impact on its strategy, results of operations, or financial condition. The rule would apply to all SEC reporting companies, even those with no publicly listed securities, and include business development companies, REITs, and issuers of non-variable insurance contracts.

While the SEC scaled back on many of the proposal's mandates, added several materiality thresholds, and lengthened and staggered compliance dates, the final rule may significantly increase reporting costs and complexities. This may include increased data collection and development of significant internal processes and controls. Large Accelerated Filers (LAFs) and Accelerated Filers (AFs) will be required to report Scope 1 and 2 greenhouse gas (GHG) emissions and have those amounts assured.

The final rule adds new sections to both Regulation S-K and Regulation S-X; required disclosures are listed below. Changes from the proposal include an extended phase-in period—highlighted in the table below—as well as new safe harbors and some relief for smaller reporting companies (SRCs) and emerging growth companies (EGCs). The SEC commissioners compromised on the location of the disclosures within annual Form 10-K filings and whether information would be subject to audit or attestation.

Registrant Type	Disclosure & Attestation Compliance Dates (assuming December 31 fiscal year-end)				
	Disclosures			Attestation – Scope 1 & 2	
	Reg. S-K & S-X	Material Expenditures & Impacts (Mitigation, Transition, & Targets)	Scope 1 & 2 Emissions	Limited Assurance	Reasonable Assurance
LAF	Fiscal year 2025	Fiscal year 2026	Fiscal year 2026*	Fiscal year 2029*	Fiscal year 2033*
AF	Fiscal year 2026	Fiscal year 2027	Fiscal year 2028*	Fiscal year 2031*	N/A
Non-Accelerated, SRC & EGC	Fiscal year 2027	Fiscal year 2028	N/A	N/A	N/A
* A domestic registrant can delay filing the GHG emissions disclosures for the most recent fiscal year as part of their 10-Q for the second quarter or as an amendment to their annual report on the 10-K					
In a change from the proposal, and to not discourage business combinations, the final rule will not apply to private companies that are parties to business combination transactions, as defined by Securities Act Rule 165(f), 2481 involving a securities offering registered on Forms S-4 and F-4.					

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Resource: Key Details on SEC's New Climate Disclosure Rule

See the Appendix for previously issued outstanding proposals.

Conclusion

The assurance team at Forvis Mazars delivers extensive experience and skilled professionals to align with your objectives. Our proactive approach includes candid and open communication to help address your financial reporting needs. At the end of the day, we know how important it is for you to be able to trust the numbers; our commitment to independence and objectivity helps provide the security and confidence you desire. Forvis Mazars works with hundreds of publicly traded companies in the delivery of assurance, tax, or advisory services, within the U.S. and globally. For more information, visit forvismazars.us.

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Appendix – Significant Outstanding Proposals

Unless otherwise noted, comment periods are closed.

Shareholder Proposal Exclusion

On July 13, 2022, the SEC voted 3-to-2 to issue a proposal to update three of the substantive bases for excluding a shareholder proposal from a company's proxy statement. The changes would restrict the grounds for excluding shareholder proposals and, if adopted, would most likely increase the number of shareholder proposals that would have otherwise been excluded under prior SEC conclusions.

Resource: Excluding Shareholder Proposals May Get Tougher with SEC Proposal

Sixty-two letters were received. Individual investors and shareholder advocate groups supported the amendments. Trade associations opposed the amendments, citing an increased number of minor or trivial proposals on proxy statements, and arguing not enough time has passed since the 2020 amendments to assess additional changes.

Thirty comment letters were received with universal support from individual investors, exchanges, and funds, including Citadel. ICE believes that any final rule should expressly acknowledge the potential for multiple Treasury clearing agencies and prohibit a clearing agency's rules from restricting or impeding a member's ability to clear a Treasury security or repo/reverse repo agreements at another clearing agency. ICE did not support the requirement to return excess margin within one business day. GTS and ICI requested a staggered implementation, perhaps by security type, or to begin with an expansion of central clearing before any mandates. Exemption was requested for 2a-7 funds and interdealer brokers.

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