Quarterly Perspectives

SEC 3Q 2024 – Registrants

forvis mazars

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Introduction

This paper provides an overview of recent standard-setting activity by the SEC's Division of Corporation Finance, reminders on newly effective rules, updates on the SEC's regulatory agenda, and 2024 disclosure focus areas.

I. On the Radar

A. SEC Disclosure Review Program

In a recent speech, Erik Gelding, director of the Division of Corporation Finance, highlighted two new additions to the focus areas for the agency's 2024 Disclosure Review Program. Those included:

Artificial Intelligence (AI). Several existing regulations may require disclosure about how a company uses AI and the risks related to its use, including disclosure in the description of the business section, risk factors, management's discussion and analysis, the financial statements, and the board's role in risk oversight. This year, the Division staff will consider how companies are describing these opportunities and risks, including—to the extent material—whether the company:

- Clearly defines what it means by AI and how the technology could improve the company's results of operations, financial condition, and future prospects.
- Provides tailored—rather than boilerplate—disclosures, commensurate with its materiality to the company, about material risks and the impact the technology is reasonably likely to have on its business and financial results.
- Focuses on the company's current or proposed use of AI technology rather than generic buzz not relating to its business.
- Has a reasonable basis for its claims when discussing AI prospects.

Commercial Real Estate (CRE). SEC staff will review how:

- Banks are disclosing disaggregation of loan portfolio characteristics, geographic and other concentrations, loan-to-value ratios, loan modifications, nonaccrual loan policies, policies around timing, frequency and sources of appraisals, and risk management.
- Office and retail real estate investment trusts (REITs) describe default risks or liquidity issues and any mitigating efforts, debt maturity and lease term schedules, trends in lease renewals, major tenant rollovers, financial viability of tenants, property dispositions, asset impairments, and tenant receivables.

The SEC encourages companies to consider other areas of their disclosures where more granular information could be provided to improve investors' understanding of the material risks inherent in the company's CRE or other loan portfolios and any mitigating steps they are taking to address those risks. Companies also should keep in mind that other types of industries outside of banks and REITs could be impacted by the current CRE environment, and they should continue to re-evaluate these disclosures as the interest rate environment changes.

Resource: Auditing Spotlight on Commercial Real Estate Holdings

Recently Adopted Rules. These include:

- **Clawbacks.** The SEC will review disclosures to confirm the filing of the Clawback Policy and assess disclosures when a recovery analysis is triggered.
- **Pay Versus Performance.** As it did in 2023, the SEC will continue to leverage machine-readable data to make preliminary assessments of compliance with the rules.
- **Universal Proxy.** In 2024, the SEC will continue to review proxy contest filings to assess compliance with the universal proxy rules and improve disclosures regarding shareholders' voting options.
- **Beneficial Ownership Reporting.** The SEC will review selected beneficial ownership reports to assess compliance with the new, shortened filing deadlines and issue comments as necessary to improve required disclosures.

- **Cybersecurity.** The SEC will review both current reports about material cybersecurity incidents and selected annual disclosures to assess compliance with the rules, provide guidance, and improve disclosures.

On May 21, 2024, the Division of Corporation 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 a 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 the 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.

"I would encourage public companies to work with the FBI, CISA, and other law enforcement and national security agencies at the earliest possible moment after cybersecurity incidents occur" – Erik Gelding

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Resources:

Details on SEC's New Cybersecurity Disclosures

SEC's New Cyber Disclosure Rule: Answering Your Top Questions (Webinar)

B. Segment Disclosures – Single Segments & Non-GAAP Measures

Public companies will need to reflect FASB Accounting Standards Update (ASU) 2023-07, *Segment Reporting*, in 2024 calendar year-end annual financial statements. SEC staff addressed several questions raised by other accounting firms.

1. **Would entities managed on a consolidated basis be permitted to disclose a segment's measure of profit or loss other than consolidated net income?**

Yes. The SEC staff would continue to expect that the required measure for these entities would be a consolidated GAAP measure, such as consolidated net income, since Accounting Standards Codification (ASC) 280 requires disclosure of the measure closest to GAAP, *i.e.*, the measure most consistent with how amounts are measured in the financial statements. A public entity may voluntarily disclose additional measures of segment profit or loss. However, such additional measures, if not computed in accordance with GAAP, would be considered non-GAAP measures subject to existing requirements for non-GAAP measures.

2. **Would the SEC staff's views on whether a consolidated GAAP measure is the required measure to be disclosed under ASC 280 be different if the chief operating decision maker (CODM) were not the CEO or CFO who certifies the Form 10-Q or Form 10-K for an entity that is managed on a consolidated basis?**

While certification of the Form 10-Q or Form 10-K is one of several data points indicating that the certifying officer receives and reviews information about consolidated net income, it is not determinative in identifying the measure used to manage an entity with a single reportable segment on a consolidated basis. The staff is unaware of instances in which a CODM has managed an entity with a single reportable segment on a consolidated basis but has not regularly reviewed a consolidated GAAP measure of profit and loss, such as consolidated net income.

3. **Could there be circumstances in which an entity is organized as a single operating segment but is not managed on a consolidated basis?**

It depends. ASC 280-10-55-15D (added by ASU 2023-07) explicitly addresses this question. An entity should determine if an entity is managed on a consolidated basis under ASC 280-10-50-4, which considers how an entity distinguishes the business activities of the single operating segment from other activities of the entity and whether there is evidence—beyond just the existence and use of a certain measure of profit or loss—that the entity is managed on a consolidated basis. An entity might consider how budgets are prepared, resources are allocated, and performance is assessed.

SEC staff noted the mere exclusion of corporate headquarters or a functional department from a measure of profit or loss reviewed by the CODM is not determinative of whether an entity is managed on a consolidated basis. Entities should carefully consider all relevant facts and circumstances when reaching their conclusions and may consider discussing their specific facts and circumstances with the staff.

4. **Is it acceptable for an entity to disclose a segment expense that is not calculated in accordance with GAAP as a significant segment expense category?**

Yes. ASC 280 does not require a significant segment expense to be calculated in accordance with GAAP. However, other requirements may be applicable, *e.g.*, Regulation S-X, Rule 4-01(a), which prohibits misleading information. If the significant segment expense is not GAAP compliant, additional narrative disclosure should detail why it is not misleading, *e.g.*, how the significant segment expense is computed, the purpose of applicable adjustments, and how the significant segment expense is used.

5. **Would the SEC staff object to the use of a different measure of segment profit or loss for different reportable segments?**

No. If an entity can provide evidence that the CODM uses different measures for different reporting segments to allocate resources and assess performance, disclosure of different measures of segment profit or loss for different reportable segments would be acceptable.

Resource: **FASB Mandates New Segment Details for Public Companies in 2024**

C. Regulatory Agenda

On July 5, 2024, the SEC's Spring Regulatory Agenda was released. The planned proposal on financial data transparency was issued on August 2, 2024. 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.

Spring Reg Flex Agenda – Division of Corporation Finance	
Planned Proposals (Remaining)	**Planned Final Rules (Remaining)**
Corporate board diversity	Shareholder proposals (Rule 14a-8)
Human capital management disclosure	
Resource extraction issuers' payment disclosure	
Incentive-based compensation arrangements (for certain financial institutions with $1 billion or more in assets)	
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.	

D. Climate Rule & ESG

Disclosure Expectations. On April 4, 2024, the SEC stayed the final rule issued in March 2024 to avoid regulatory uncertainty for companies that might have been subject to the rule as litigation proceeds. The SEC has stayed the climate rules, not climate disclosures currently required by the SEC's 2010 interpretive statement .

Resource: Updated SEC Expectations on Climate Disclosures

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

SEC ESG Task Force Disbanded. Bloomberg reported that the SEC disbanded its Enforcement Division's Climate and ESG Task Force within the last few months. The group was established in April 2021. An SEC spokesperson noted, "The strategy has been effective, and the expertise developed by the task force now resides across the Division."

II. Rule Setting 3Q 2024

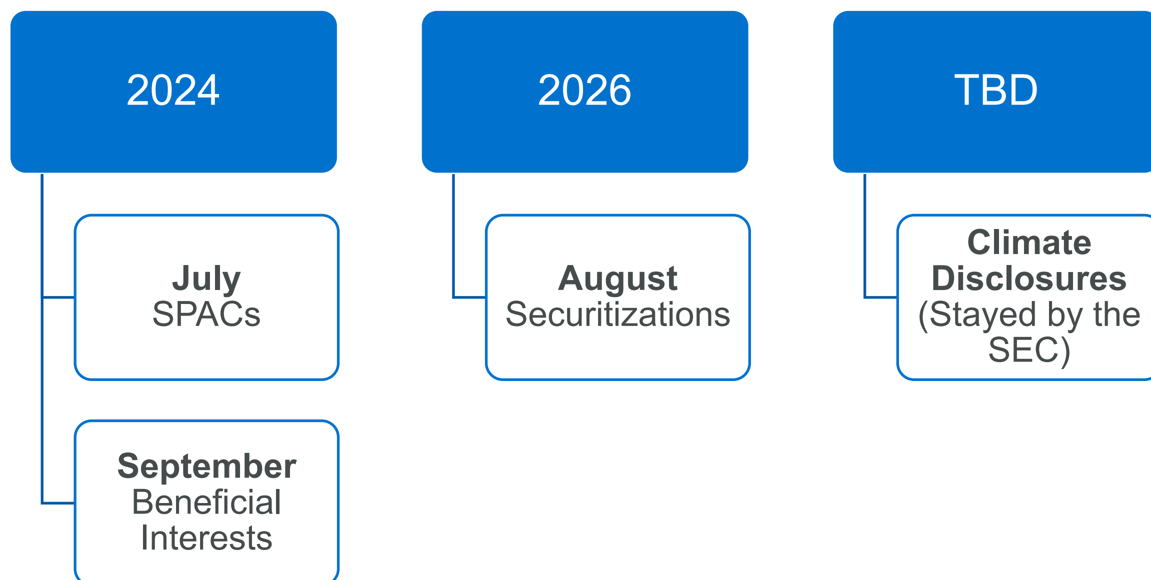
1. Proposal – Financial Data Transparency

On August 2, 2024, the SEC and eight federal agencies jointly issued a proposal establishing technical standards for future data submissions fulfilling requirements of the *Financial Data Transparency Act of 2022* (FDTA). The proposal addresses only how data is to be submitted using common identifiers and open-source data standards; no new disclosures are required. Comments are 60 days from Federal Register publication.

Resource: SEC's Joint Proposal Sets FDTA Data Standards

Initial Timeline

III. 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 enhance 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:
  - Schedule 13D – Cut the initial filing deadline once a 5% interest is acquired to five business days (from 10 days) and the 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.

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 impact or are reasonably likely to have a material impact on their 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 the 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					

IV. Outstanding Proposals

1. Shareholder Proposal Exclusion (Rule 14a-8)

On July 13, 2022, the SEC voted 3-to-2 to issue a proposal to update three 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 that 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. Intercontinental Exchange (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. An exemption was requested for 2a-7 funds and interdealer brokers.

Conclusion

The assurance team at Forvis Mazars delivers extensive experience and skilled professionals to help 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 to deliver assurance, tax, or consulting services within the U.S. and globally. For more information, visit forvismazars.us.

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