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2022 IN REVIEW

Securities Practice

Paul, Weiss, Rifkind, Wharton & Garrison LLP

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Securities Practice: 2022 in Review

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2022 was a busy year at the SEC. Two new Commissioners joined the SEC – Mark Uyeda (who filled the vacancy left by Elad Roisman) and Jaime Lizárraga (who replaced Alison Herren Lee). This was also Chair Gary Gensler's first full year at the helm of the SEC, and saw the implementation of an ambitious rulemaking agenda. In addition to significant new rule proposals, including on climate and cybersecurity disclosures, the SEC finalized Dodd-Frank legacy rules concerning pay-versus-performance and compensation clawbacks, as well as rules related to Rule 10b5-1, electronic filings and proxy voting advice. This update covers nine pending SEC rule proposals and six final rules, in addition to other SEC disclosure review and accounting initiatives. With the SEC set to address these proposals and consider additional new disclosure rules regarding human capital and board diversity and possible revisions to the Rule 144 holding periods and definition of securities held of record under Section 12(g) of the Exchange Act, 2023 looks to be another busy year.

Securities Trading

The SEC finalized two initiatives that will impact securities trading by corporate insiders in 2023: amendments to Rule 10b5-1 and amendments requiring the electronic filing of Form 144.

Rule 10b5-1 Amendments

In December, the SEC adopted final rules amending Rule 10b5-1 and requiring additional disclosures by companies regarding trading by corporate insiders (see our client memo here). *These amendments will become effective February 27, 2023.* The amendments will not affect the availability of the affirmative defense under an existing 10b5-1 plan entered into prior to the effective date. Compliance with the new Form 4 and Form 5 requirements will be required commencing April 1, 2023.

Under the final rules:

- the conditions of the affirmative defense under Rule 10b5-1 will require not only that the seller (or buyer) entered into the 10b5-1 plan in good faith, but also that such person "has acted in good faith with respect to" the 10b5-1 plan;

- 10b5-1 plans by Section 16 officers and directors will be required to include a cooling-off period between plan adoption and the first trade thereunder of the later of (i) 90 days, and (ii) two business days following the filing of the Form 10-Q or 10-K (or 6-K or 20-F) covering the fiscal quarter in which the plan was adopted, and in any event ending no later than 120 days after plan adoption;

- 10b5-1 plans by persons other than Section 16 officers and directors will be required to include a mandatory 30-day cooling-off period between the adoption of a plan and the first trade thereunder;

- 10b5-1 plans by issuers will not require a cooling-off period;

- early terminations and most modifications of a 10b5-1 plan will trigger a new cooling-off period, but the SEC has clarified that modifications that do not change the sales or purchase prices or price ranges, the amount of securities to be sold or purchased, or the timing of transactions, will not trigger a new cooling-off period;

- other than for issuers, the Rule 10b5-1 affirmative defense will not be available for multiple or overlapping trading plans (which are plans allowing trades in the same period), or more than one single-trade plan in any 12 month period (with exceptions in both cases for sell-to-cover plans solely to satisfy tax withholding obligations on vesting of equity awards);

- when adopting a 10b5-1 plan, Section 16 officers and directors will be required to include representations in the 10b5-1 plan certifying that they are not aware of any material nonpublic information, and they are adopting the 10b5-1 plan in good faith and not as part of a scheme to evade the insider trading laws;

- Form 4 will include a new check box to mark for trades made pursuant to a 10b5-1 plan; and

- gifts by insiders will need to be disclosed within two business days on Form 4 (instead of on a Form 5 due 45 days after the company's year-end).

Electronic Filing of Form 144
As of April 13, 2023, Form 144 will be required to be filed electronically with the SEC via EDGAR (see our client memo here). Form 144 may be filed electronically now, but other forms of submission, including paper submissions mailed to the SEC and email submissions are still permitted and accepted until April 13, 2023. Form 144s filed via EDGAR will be accepted for filing until 5:30 pm on those days that EDGAR is open.

Disclosure Developments

The SEC remains focused on company disclosures – both in its rulemaking and its disclosure review program. 2022 saw the finalization of two key Dodd-Frank initiatives – pay-versus-performance and compensation clawbacks – as well as new disclosure requirements regarding corporate insider trading plans, company trading policies and the issuance of award grants close in time to the disclosure of material nonpublic information (adopted in connection with the Rule 10b5-1 amendments described above). The Division of Corporation Finance also published two new sample comment letters in addition to its other robust ongoing disclosure review initiatives.

Pay-versus-Performance
In August, the SEC adopted final rules implementing the pay-versus-performance provisions of the Dodd-Frank Act (see our client memo here). *The rules are effective, and the new disclosure will be required in proxy and information statements disclosing compensation for fiscal years ending on or after December 16, 2022.*

The new pay-versus-performance rules require reporting companies to disclose in their proxy and information statements:

- a new standardized figure for compensation "actually paid" (that is, total compensation otherwise reported in the proxy with the adjustments to pension and equity award methodologies) to the principal executive officer and to the remaining named executive officers;

- tabular disclosure of certain performance measures, including absolute and relative total shareholder return and net income, and a company-selected performance measure;

- a tabular list of 3-7 of the most important financial performance measures (including the company-selected measure) and other measures that the company uses to link named executive officer compensation to company performance; and

- a description of the relationship between the performance measures and compensation.

Disclosure is initially required for the last three fiscal years; companies will be required to include an additional year in subsequent years until the disclosure covers the last five fiscal years. Smaller reporting companies will initially be required to present disclosure for the last two fiscal years, increasing in the subsequent year to three years of disclosure.

These requirements apply to all reporting companies, except foreign private issuers, registered investment companies and emerging growth companies.

Clawbacks

In October, the SEC adopted final rules to implement the clawback provisions of the Dodd-Frank Act (see our client memo here). *Exchanges have until February 27, 2023 to file proposed listing standards, which must become effective no later than November 28, 2023. Listed companies will be required to adopt clawback policies within 60 days of the date on which the applicable listing standards become effective, and must begin to disclose such policies and how they apply in the proxy/information statements and annual reports filed after they adopt such policy.*

Pursuant to new Rule 10D-1 under the Exchange Act, national securities exchanges must establish listing standards requiring all listed companies to adopt and comply with compensation recovery (or "clawback") policies, and to disclose their clawback policies in accordance with SEC rules.

Under the required terms of these clawback policies, if companies are required to prepare an accounting restatement due to material noncompliance with any financial reporting requirement under the securities laws (which includes both "Big R" and "little r" restatements),[1] they will be required to recover, pursuant to their clawback policy, incentive-based compensation awarded to current and former executive officers during the three fiscal years preceding the date they were required to prepare the accounting restatement, to the degree any such compensation awarded exceeds what such executive officer would have received had the incentive-based compensation been determined based on the restated financial statements. Recovery will be required on a pre-tax and "no fault" basis, without regard to whether any misconduct occurred or to an executive officer's responsibility for the erroneous financial statements.

In addition, companies will be required to:

- file their clawback policy as an exhibit to their applicable Exchange Act annual report on Form 10-K, 20-F or 40-F;

- make certain disclosures regarding any clawbacks, including:

    - details of any required clawback (date triggering the clawback requirement, the aggregate dollar amount to be clawed back, estimates used to calculate it and the methodology used for any estimates);

    - the aggregate clawback amount that remained outstanding and uncollected at the end of their last completed fiscal year, and if any clawback amounts owed by any current or former named executive officer have not been

[1] The SEC's Office of the Chief Accountant is very focused on the assessment of the materiality of financial statement errors. Please see the Acting Chief Accountant's statement, "Assessing Materiality: Focusing on the Reasonable Investor When Evaluating Errors" and our client memo here.

repaid within 180 days or more, the name of and amount due from such person at the end of the last completed fiscal year; and

- if the company has determined that recovery of some or all of the clawback amounts would be impracticable,
  - for *each* current and former named executive officer, the amount of recovery forgone and a brief description of the reason(s) the company has not pursued recovery; and
  - for all other current and former executive officers as a group, the aggregate amount of recovery forgone and a brief description of the reason(s) the company has not pursued recovery.

These new rules apply to all companies listed in the United States (including emerging growth companies, smaller reporting companies, controlled companies and foreign private issuers, including multijurisdictional disclosure system (MJDS) issuers), except for certain registered investment companies. Exchanges will be required to prohibit the initial or continued listing of any security of a company that is not in compliance with the clawback rules.

Trading Plan, Trading Policy and Equity Award Disclosures

In December, as noted above in connection with the Rule 10b5-1 amendments, the SEC adopted enhanced disclosure requirements regarding corporate insider trading plans, company trading policies and the issuance of award grants close in time to the disclosure of material nonpublic information (see our client memo here). *The rules will become effective February 27, 2023. Companies will be required to include these disclosures in their Exchange Act periodic reports on Forms 10-Q, 10-K, 20-F and 6-K and in any proxy or information statements, covering periods commencing on or after April 1, 2023 (smaller reporting companies will have an additional six months to comply with these disclosure requirements).* Under the new disclosure requirements, companies will be required to disclose:

- on a quarterly basis in their Form 10-Q, information regarding the adoption and termination of 10b5-1 trading plans and other trading plans by its officers and directors;
- whether they have adopted an insider trading policy and if not, why not, and to file such policy as an exhibit to their annual report;
- their policies and practices on the timing of certain equity grants (stock options, SARs or similar instruments with option-like features) in relation to the disclosure of material nonpublic information; and
- annually, quantitative information regarding equity award grants made within the period commencing four business days prior to and ending the business day after the company's disclosure of material nonpublic information (including earnings releases, quarterly reports on Form 10-Q, annual reports on Form 10-K and other current reports on Form 8-K).

Sample Comment Letters

As part of its disclosure review program, the SEC's Division of Corporation Finance issued two new sample comment letters in 2022, and continues to review company disclosures and issue comments regarding the impacts of the Russia-Ukraine conflict and related supply chain issues and the impacts of developments in the crypto markets. Additionally, the SEC continues to review and issue comments on climate disclosures in accordance with the sample climate disclosure comments issued September 2021 (see our client memo available here), as well as regarding China-based issuers in accordance with the sample comment letter issued December 2021.

Other SEC Disclosure Review Program Initiatives

The SEC's Division of Corporation Finance has announced that as part of its disclosure review program, it is focusing on corporate governance disclosures made pursuant to Item 407(h) of Regulation S-K set forth in annual meeting proxy statements or annual reports on Form 10-K. The SEC's comments in this area have focused on board leadership structure and its appropriateness for the company (especially where CEO and board chair roles are split), the role of independent directors, the role of the board chair, and risk management.

The SEC also remains focused on non-GAAP measures. The SEC's comments in this area have focused on the use of individually tailored accounting principles, adjustments (especially for taxes, relating to COVID-19, and relating to the Russia/Ukraine conflict); segment profitability disclosure; mixing liquidity and performance measures; non-standard definitions of terms; and failure to give equal or greater prominence to GAAP measures. In December, the SEC updated its compliance and disclosure interpretations regarding the use of non-GAAP financial measures. The updates focus on adjustments to exclude normal, recurring operating expenses (which could cause a non-GAAP measure to be misleading), misleading presentation of non-GAAP measures, examples where non-GAAP measures are presented more prominently than comparable GAAP measures, examples where the reconciliation could cause the non-GAAP measure to be presented more prominently than comparable GAAP measures, and what constitutes a non-GAAP income statement (i.e., non-GAAP income statements give undue prominence to non-GAAP measures in the SEC's view).

The SEC has also been scrutinizing Management's Discussion & Analysis disclosures, particularly in light of the amendments to MD&A disclosures adopted by the SEC in November 2020 (see our client memo here). The SEC's comments have focused on the results of operations discussion (including requiring more detailed descriptions and quantifications of material factors and offsetting factors, unusual events, and economic developments), the presentation and calculation of metrics used by management, disclosure of known trends and uncertainties reasonably likely to impact near and long term results, liquidity and capital resources disclosures, and critical accounting estimates.

Rule 15c2-11

In 2020, the SEC amended Rule 15c2-11 to prohibit broker-dealers from providing price quotations in over-the-counter securities unless certain information about the issuer of the securities is current and publicly available (i.e., not in a password-protected website). In a series of no-action letters issued in 2021, the SEC clarified that Rule 15c2-11 also applies to debt securities (including those issued in private offerings pursuant to Regulation 144A and Regulation S) and extended the compliance deadline for fixed income securities to January 4, 2023. As a result of these interpretations, issuers of Rule 144A debt would be required to publicly report certain financial and business information so that their debt securities could be quoted after the deadline. On November 30, 2022, the SEC issued a no-action letter extending relief from the application of Rule 15c2-11 under the Exchange Act until January 4, 2025 for certain fixed income securities (including debt issued pursuant to Rule 144A).

Annual Meeting Matters

Universal Proxy

On August 31, 2022, the SEC's universal proxy rules came into effect, requiring both companies and dissidents in contested director elections to use universal proxy cards that must include all director nominees (see our client memo here). As a result, this upcoming proxy season, shareholders will be able to choose from all duly nominated candidates, whether nominated by the company or dissidents, even when voting by proxy. In August 2022, the SEC issued compliance and disclosure interpretations regarding dissident shareholder notification requirements under the universal proxy rules, and in December 2022 the SEC issued compliance and disclosure interpretations regarding invalid director nominations and dissident shareholder proxy requirements (all available here). Companies and dissidents are also subject to related new notice and filing procedures and deadlines due to the need to coordinate on the inclusion of each other's nominees in the proxy cards. Further, the new rules impose disclosure requirements applicable to all director elections with respect to the effect of various vote options and standards.

Electronic Filing of Annual Reports
Effective January 11, 2023, companies must file their "glossy" annual reports on EDGAR. The electronic submission must be in PDF format and capture the graphics, styles of presentation, and prominence of disclosures contained in the reports, and should not be re-formatted, re-sized, or otherwise redesigned for purposes of the submission on EDGAR. Please note that this does not change the Rule 14a-3(a) delivery/access requirement that the annual report accompany or precede the proxy. The SEC has not yet clarified whether this filing requirement extends to "wrapped" 10-Ks.

ISS Voting Policies
In December, ISS issued its voting policies for the 2023 proxy season (see our client memo here). Key updates relate to:

- board accountability with respect to: unequal voting rights, problematic governance structures at newly public companies, officer exculpation (ISS is adopting a case-by-case approach to officer exculpation instead of a general "for" policy as had been proposed), poison pills (ISS has explicitly listed, among relevant factors that it will consider in its case-by-case evaluation of short-term pills, the trigger threshold and company market value), unilateral bylaw/charter amendments to fee shifting provisions, board gender diversity, climate accountability and amendments to quorum requirements;

- compensation matters, including problematic pay practices regarding severance payments and ISS's move to using a "value adjusted burn rate" for equity and other incentive plan approvals;

- environmental and social issues, including clarification of ISS's global approach to these issues, racial equity/civil rights audits, ESG compensation-related proposals, and political expenditure and lobbying congruency; and

- share issuance mandates at U.S. domestic issuers incorporated outside the U.S.

Glass Lewis Voting Policies
In November, Glass Lewis issued its voting policies for the 2023 proxy season (see our client memo here). Key updates relate to:

- board diversity, including gender diversity, underrepresented community diversity, state law diversity requirements, and disclosure of director diversity and skills;

- board oversight of environmental and social issues;

- board accountability for climate-related issues;

- executive director overboarding;

- board oversight of cyber risk;

- officer exculpation;

- long-term incentive grants;

- ESG policy initiative changes, including disclosure of shareholder proponents, racial equity audits, and retirement benefits and severance; and

- certain clarifying amendments regarding board responsiveness and mega-grants and other compensation related matters.

Nasdaq Board Diversity Requirements – Updated Deadline
In December, Nasdaq amended the deadlines for its board diversity requirements, effective immediately, changing to a uniform December 31st cut-off in the applicable year of compliance (instead of an August or later proxy filing date deadline) (see our client memo here). Because the rules require these disclosures by the time of a company's annual meeting proxy statement filing (or Form 10-K or 20-F filing, as applicable), even if disclosed via the company's website, these revised dates will not practically affect the compliance schedule for most Nasdaq companies. Litigation challenging Nasdaq's board diversity rules remains ongoing.

Proxy Voting Advice
In July, the SEC adopted amendments to rescind parts of its 2020 rulemaking and guidance on proxy voting advice (see our client memo here), which:

- eliminated the Rule 14a-2(b)(9)(ii) conditions to the exemption from the proxy solicitation information and filing requirements for proxy voting advice that (i) companies that are the subject of proxy voting advice have such advice made available to them at or prior to the time such advice is disseminated to the proxy advisory firm's clients; and (ii) the proxy advisory firm provides its clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding its proxy voting advice by registrants that are the subject of such advice, in a timely manner before the security holder meeting;

- rescinded the SEC's 2020 Supplemental Proxy Voting Guidance, which was issued, in part, to accompany the adoption of Rule 14a-2(b)(9)(ii), to assist investment advisers in assessing how to consider company responses to proxy voting advice; and

- amended Rule 14a-9 to remove Note (e), which identified as examples of material misstatements or omissions "failure to disclose material information regarding proxy voting advice covered by Rule 14a-1(l)(1)(iii)(A), such as the proxy voting advice business's methodology, sources of information, or conflicts of interest."

Even though these amendments sought to address the concerns of proxy advisory firms and investors regarding the adverse cost, independence, timeliness and liability impacts of certain of the 2020 proxy voting advice rules, ISS's litigation related to these rules appears to be proceeding as the proxy advisor's view is that the rules should be rescinded in their entirety.

Pending Proposals

Climate Disclosure
In March, the SEC proposed new climate disclosure rules (see our client memo here). The SEC has indicated it expects to issue final rules in spring 2023, though SEC Chair Gensler has stated that the SEC needs time to consider the voluminous comments the SEC has received (over 15,000 comment letters, including over 1,000 substantive comment letters totaling over 13,000 pages alone).

The disclosure requirements are modeled on the Task Force on Climate Related Financial Disclosure and the Greenhouse Gas Protocol emissions reporting framework, and focus on three main disclosure areas:

- climate-related risks (including risk identification/impact, oversight and governance, risk management and mitigation);

- greenhouse gas emissions (including required Scope 1 and Scope 2 emissions disclosures, Scope 3 disclosures where material or the subject of climate targets set by the company, and, in the case of large accelerated filers and accelerated filers, an attestation report on Scope 1 and Scope 2 emissions); and

- climate-related financial metrics.

Cybersecurity
In March, the SEC also proposed new cybersecurity disclosure rules (see our client memo here). The SEC has indicated that it expects to issue final rules in spring 2023.

The proposed rules focus on two main areas:

- event disclosure: companies would be required to disclose material cybersecurity incidents on Form 8-K within four business days of such materiality determination, and provide any necessary updates in their subsequent periodic reports on Form 10-Q and 10-K; and

- governance: companies would be required to provide annual disclosure regarding their policies and procedures to identify and manage cybersecurity risks, their board oversight of cybersecurity risk (and the cybersecurity expertise of any members of the board) and management's role and expertise in assessing and managing cybersecurity risk and implementing cybersecurity policies and procedures.

Share Repurchases
In December 2021, the SEC proposed amendments to share repurchase disclosures (see our client memo here). Though initially proposed together with the Rule 10b5-1 amendments (which were finalized December 2022), the SEC has indicated it expects to issue final rules in Spring 2023.

The proposed amendments would require additional disclosures by companies when repurchasing their shares, including:

- daily disclosures of share repurchases within one business day of the repurchase, on a new Form SR that would be furnished to the SEC; and

- greater detail about the structure of the repurchase program (including details about trading by officers and directors around the time of repurchases) to be provided quarterly.

Not just the SEC has been focused on share repurchases. As of January 1, 2023, the Inflation Reduction Act of 2022 applies a 1% excise tax on repurchases (including purchases by certain affiliates and other economically similar transactions) of any stock of any publicly traded U.S. corporation (see our client memos here and here).

Beneficial Ownership Reporting
In February, the SEC proposed significant amendments to beneficial ownership reporting under Section 13(d) of the Exchange Act (see our client memo here). The SEC has indicated that it expects to issue final rules in spring 2023.

If implemented, the proposed amendments would, among other things:

- significantly accelerate deadlines for publicly filing Schedules 13D and 13G (including amendments thereto);

- expand beneficial ownership to include certain cash-settled swaps acquired with a control intent; and

- address "wolf-pack" behavior by clearly defining "groups" to include those acting together (even without an agreement to do so) and tippees to a Schedule 13D filing.

Securities-Based Swap Anti-Fraud and Reporting
In December 2021, the SEC proposed rules regarding security-based swap positions. The SEC has indicated that it expects to issue final rules in spring 2023.

The proposed rules address:

- public reporting of large security-based swap positions (persons having acquired a security-based swap position exceeding specified reporting thresholds would be required to file a Schedule 10B with the SEC via EDGAR disclosing certain information related to the position by the end of the following business day, and to promptly file amendments disclosing any material changes to a previously filed Schedule 10B);
    - for credit default swaps, the reporting threshold would be the lower of: a long notional amount of $150 million, a short notional amount of $150 million; or a gross notional amount of $300 million;
    - for security-based swaps based on other debt securities, the reporting threshold would be a gross notional amount of $300 million; and
    - for security-based swaps based on equity securities, the reporting threshold would be the lesser of a gross notional amount of $300 million, or a position representing more than 5% of a class of equity securities (which calculations may include other equity securities of the class if the amounts exceed $150 million or 2.5%);
- liability/anti-fraud provisions relating to security-based swap positions (largely a re-proposal of anti-fraud and anti-manipulation rules previously proposed by the SEC in 2010); and
- influence over swap dealer or swap participant chief compliance officers.

Shareholder Proposals (Rule 14a-8)
In July, the SEC proposed amendments to Rule 14a-8 under the Exchange Act (see our client memo here). The SEC has indicated that it expects to issue final rules in fall 2023.

The proposed amendments would narrow the circumstances under which companies may exclude shareholder proposals on the grounds that they are "substantially implemented," "substantially duplicate" another proposal or constitute a resubmission that did not meet specified approval rates in prior years. This proposal is the most recent move by the SEC to limit exclusion of shareholder proposals, following Staff Legal Bulletin 14L (see our client memo here) and other policy changes.

Securities Settlement Cycle
In February, the SEC proposed rules to shorten the securities settlement cycle to T+1 (see our client memo here). The SEC has indicated it expects to issue final rules in spring 2023.

If adopted as proposed, the rules would require T+1 settlement by March 31, 2024. In addition, the SEC noted its goal to reach T+0 settlement and has invited comment on how to eventually achieve that goal.

SPACs
In March, the SEC proposed significant new SPAC rules (see our client memo here). The SEC has indicated it expects to issue final rules in spring 2023.

The proposed new rules would:

- impose new liabilities in connection with de-SPAC transactions (including on SPAC underwriters and de-SPAC targets and their management);

- modify the scope of the safe harbor of the Private Securities Litigation Reform Act of 1995 for forward-looking statements so that projections and other forward-looking information used in de-SPAC registration statements would not be eligible for safe harbor protections conventionally given to such disclosure outside of the traditional IPO context;

- require enhanced disclosures at the SPAC IPO and de-SPAC stages (including requiring a fairness determination by the SPAC regarding the de-SPAC transaction); and

- create a new, non-exclusive safe harbor from registration under the Investment Company Act of 1940 for SPACs that would accelerate most SPAC timelines.

Share Lending Reporting

In November 2021, the SEC proposed rules to increase the transparency and efficiency of the securities lending market. The SEC has indicated that it expects to issue final rules in fall 2023.

Under the proposed rules, all lenders of securities (without regard to the value of the transaction) would be required to provide certain terms of their securities lending transactions to a registered national securities association (i.e., FINRA) within 15 minutes of the transaction. Certain information, including the names of the parties and their roles (as borrower, lender or an intermediary), would remain confidential, while other details (including identification of the security, the amount loaned, the time and date of the loan and its term, the fees and charges associated with the loan, and the type of collateral and the percentage of collateral to the value of the loaned securities) would be made public by the registered national securities association.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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