2024 SEC Reporting Insights

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INTRODUCTION

In 2024, the Securities and Exchange Commission (SEC) issued its highly anticipated climate change disclosure rules. While the final rules were scaled back from the proposed rules with the addition of materiality qualifiers and other revisions to make certain rules less prescriptive, several petitions for review were filed in the U.S. Court of Appeals challenging their validity. In response to these legal challenges, the SEC placed an administrative stay on the rules' implementation. Due to the stay and pending litigation, the compliance dates and phase-in periods, along with other aspects of the rules, remain uncertain. The SEC also issued final rules on Special Purpose Acquisition Companies (SPACs) that aim to align the investor protection and disclosure requirements associated with a SPAC or "de-SPAC transaction" with those applicable to a traditional initial public offering. Although SEC Chair Gary Gensler oversaw a robust rulemaking agenda in 2024, no other proposed or final rules in 2024 will have or have had a significant impact on SEC registrants' financial reporting.

The SEC staff remained focused on post-implementation matters related to the SEC's cybersecurity disclosure rules that were adopted in 2023 and issued several compliance and disclosure interpretations (C&DIs) and statements to assist registrants with their interpretation of the rules. The SEC staff also disseminated guidance about the interaction of its non-GAAP rules and regulations with the new segment reporting standard that will be effective for calendar year end registrants this year.

This publication summarizes these final rules and the SEC staff's guidance from 2024. We have also provided other disclosure and reporting reminders for upcoming filings as we head into the 2024 10-K reporting season. We encourage registrants to carefully consider the impact of emerging and evolving risks or other macroeconomic and geopolitical conditions on their disclosures. We also recommend reviewing other frequent areas of SEC staff comment when preparing the annual report.

SEC REPORTING REMINDERS

Cybersecurity Incident Disclosures

SEC REFERENCES

Regulation S-K, Item 106, Cybersecurity

Form 8-K, Item 1.05, Cybersecurity Incidents

Form 20-F, Item 16K, Cybersecurity

The SEC's cybersecurity rules, which are currently effective for all registrants,[1] require disclosure of material cybersecurity incidents in Item 1.05 of Form 8-K[2] ("Item 1.05") and a registrant's policies and procedures for identifying and managing cybersecurity risk in its annual report. When disclosure is triggered under Item 1.05, the registrant must disclose the material:

- Aspects of the scope, nature, and timing of the cybersecurity incident
- Impact or reasonably likely material impact on the registrant's financial condition and results of operations

The annual disclosures must address the board's oversight of risks from cybersecurity threats and management's role in assessing and managing material risks from cybersecurity threats. Registrants must describe:

- Their processes, if any, for assessing, identifying, and managing material risks from cybersecurity threats
- Whether any risks from cybersecurity threats have materially affected (or are reasonably likely to materially affect) their business strategy, results of operations, or financial conditions
- The board's oversight of risks from cybersecurity threats and, if applicable, any board committee or subcommittee responsible for the oversight of these risks and the related processes by which such committee is informed about the risks

[1] Asset-backed issuers are exempt from the disclosure requirements.
[2] Foreign private issuers (FPIs) must make similar disclosures on Form 6-K.

- Management's role in assessing and managing material risks from cybersecurity threats

Refer to our Bulletin, **The SEC's New Cybersecurity Disclosure Rules are Here** for more information.

Since the adoption of the rules in 2023, the SEC staff has released guidance on incident disclosures to assist registrants with their implementation and interpretation of the disclosure requirements.

Voluntary Disclosure of Cybersecurity Incidents

In May 2024, the SEC staff issued a **statement** clarifying that registrants who voluntarily disclose cybersecurity incidents in Form 8-K should not do so under Item 1.05, as it may confuse investors. Registrants that voluntarily disclose cybersecurity incidents may do so under a different item in Form 8-K, such as Item 8.01 ("Item 8.01"). The SEC staff believes the distinction between disclosing a material cybersecurity incident under Item 1.05 and voluntarily disclosing under another item, such as Item 8.01, allows investors to make better investing and voting decisions related to material cybersecurity incidents.

The following details the SEC staff's statement on disclosing material and other cybersecurity incidents:

CYBERSECURITY INCIDENT DETERMINATION	IS DISCLOSURE REQUIRED IN FORM 8-K?
MATERIAL	Yes. Registrants must disclose material cybersecurity incidents under Item 1.05 within four business days from the date they determine the incident(s) to be material.
MATERIALITY ASSESSMENT INCOMPLETE	No. Registrants that voluntarily disclose cybersecurity incidents in Form 8-K should do so under another item, such as Item 8.01, and not Item 1.05. Registrants that later determine an incident is material must disclose the incident under Item 1.05 within four business days of the date they determine the incident is material. Registrants may refer to their previous disclosures about the incident, but additional disclosure may be necessary to comply with the requirements under Item 1.05.
IMMATERIAL	No. Registrants that voluntarily disclose cybersecurity incidents in Form 8-K should do so under another item, such as Item 8.01, not Item 1.05.

The SEC staff stated that the intent of this clarification is not to deter registrants from voluntarily reporting cybersecurity incidents, but rather to help investors more readily distinguish between material and other cybersecurity incidents. The SEC staff also reminded registrants that determining the materiality of a cybersecurity incident involves an assessment of both quantitative and qualitative factors and must be made without unreasonable delay.

Cybersecurity Incidents Involving Ransomware

SEC STAFF GUIDANCE

C&DIs 104B.05 through 104B.09

In June 2024, the SEC staff released more C&DIs that focus on the materiality assessment and disclosure requirements under various scenarios involving ransomware attacks:

C&DI	GUIDANCE
If the ransomware payment occurs before the registrant makes a materiality determination, does the registrant need to assess whether the incident is material?	Yes. The registrant must assess the materiality of the incident, even though the incident is resolved (that is, the resolution of the incident does not alleviate the registrant's obligation to determine the materiality of the incident). If material, the registrant must report the incident under Item 1.05 within four business days from the date it determined the incident is material.
If the registrant determines the incident is material, but the ransomware payment is made before filing Item 1.05, does the registrant need to disclose the incident?	Yes. The registrant must report the incident under Item 1.05 within four business days from the date it determined the incident is material. The resolution of the incident does not exempt the registrant from disclosure under Item 1.05.
If under its insurance policy, the registrant is reimbursed for all (or most) of the ransomware payment made, is the incident immaterial?	Not necessarily. The registrant may not conclude the incident is immaterial based solely on the fact that all or a substantial portion of the ransomware payment was reimbursed under its insurance policy. When determining whether the incident is material, the registrant must consider all relevant facts and circumstances, including both quantitative and qualitative factors. For example, the registrant may consider an increase in the cost and availability of future insurance policies that cover cybersecurity incidents.
If the ransomware payment is a small dollar amount, is the incident immaterial?	Not necessarily. The registrant may not conclude the incident is immaterial based solely on the quantitative harm to the registrant (for example, the small amount paid). Qualitative factors, such as reputational harm, must also be considered.

The definition of a cybersecurity incident includes "a series of related unauthorized occurrences" as cyberattacks sometimes compound over time, rather than at a point in time. The C&DIs also remind registrants who have experienced multiple individually immaterial cybersecurity incidents that disclosure under Item 1.05 is required if the incidents are related and collectively material. In the adopting release for the final rules, the SEC gave the following examples:

- The same malicious actor engages in small but continuous cyberattacks against the registrant and collectively, they are material.
- A series of related attacks from multiple actors attack the same vulnerability and collectively, impede the registrant's business in a material way.

Evaluating whether a series of related unauthorized occurrences are collectively material to the registrant may require the application of professional judgment, based on the facts and circumstances.

Requests to Delay Disclosure of Material Cybersecurity Incidents

SEC STAFF GUIDANCE

C&DIs 104B.01 through 104B.04

Registrants may delay disclosing a material cybersecurity incident when the U.S. Attorney General ("Attorney General") notifies the SEC in writing that such disclosure poses a substantial risk to national security or public safety.[3] Late in 2023, the SEC staff released C&DIs addressing the timeline to disclose material cybersecurity incidents when registrants request to delay disclosure in the interest of national security or public safety.[4] The guidance is as follows:

SCENARIO	FORM 8-K FILING DUE DATE
The Attorney General does not respond to the registrant's request or declines to make a determination.	Within four business days from the date the registrant determined the cybersecurity incident is material
The Attorney General notifies the SEC in writing that such disclosure poses a substantial risk to national security or public safety, and: ▶ The registrant requests an additional delay, but the Attorney General does not respond to the request or declines to make a determination. ▶ During the delay period, the Attorney General notifies the registrant and SEC that disclosure no longer poses a substantial risk to national security or public safety.	Within four business days from the date: ▶ The delay period ends ▶ The Attorney General notifies the registrant and SEC

The SEC staff also indicated that consulting with the DOJ regarding the availability of a delay in reporting does not indicate that the registrant has concluded the incident is material. Accordingly, a registrant may consult with the DOJ or other national securities agencies before its materiality assessment is complete.

BDO INSIGHTS — CYBERSECURITY COMMENT LETTERS

As part of the SEC's Division of Corporation Finance disclosure review program, the SEC staff is using a group of cybersecurity subject matter experts to help evaluate compliance with and reporting issues related to the cybersecurity rules.[5] Some of the initial comment letters have focused primarily on the omission of required disclosures. While the SEC staff may be considering the most effective way to disseminate its overall observations from the disclosure review program (whether through a sample comment letter or other guidance), we expect comment letters on the annual cybersecurity disclosures and incident disclosures to increase in the coming year.

Segment Disclosures

Accounting Standards Update (ASU) 2023-07, *Segment Reporting (Topic 280): Improvements to Reportable Segment Disclosures* ("ASU 2023-07") requires new segment disclosures and must be adopted by calendar year-end registrants in their 2024 Annual Reports on Form 10-K. This new segment reporting standard requires registrants, including those with single reportable segments, to disclose the following:

- Significant segment expenses for each reportable segment
- Other segment items for each reportable segment
- Title and position of the individual or the name of the group or committee identified as the chief operating decision maker (the "CODM")
- Explanation of how the CODM uses the disclosed measure(s) of segment performance

For more guidance on the new segment reporting disclosure requirements, see our publication, **New Segment Reporting Disclosures**.

At the 2023 AICPA and CIMA Conference on SEC and PCAOB Developments and in separate interactions in 2024, the SEC staff shared its views on certain aspects of ASU 2023-07 and segment reporting, including the disclosure of multiple

[3] Item 1.05(c) of Form 8-K.

[4] The DOJ released **guidance** that registrants should follow to obtain a delay, which includes information about the Attorney General's process to determine whether a delay is appropriate.

[5] **June 2024 CAQ SEC Regulations Committee Highlights**, Topic III.A

measures of segment performance and the measure of segment performance when a registrant has a single reportable segment that is managed on a consolidated basis.

Disclosing Multiple Measures of Segment Performance

Upon adopting ASU 2023-07, registrants may (but are not required to) disclose multiple measures segment performance if the CODM uses these measures to allocate resources and assess segment performance. Because segment reporting uses a management approach, these additional measures are not required to be consistent with the recognition and measurement principles of U.S. GAAP. However, at least one of the disclosed measures (or the single measure if only one is disclosed) must be the measure most consistent with U.S. GAAP measurement principles. ASC 280 previously limited an entity to presenting one measure of segment performance — the measure most consistent with U.S. GAAP measurement principles.

The SEC staff expressed its view that additional measures of segment performance that are not calculated in accordance with U.S. GAAP are not considered “expressly permitted” by U.S. GAAP (that is, the ASU does not specify what measures to present). As a result, such measures are subject to the SEC’s rules on non-GAAP financial measures, which prohibit the inclusion of additional non-GAAP measures of segment performance in the financial statements. Notwithstanding this prohibition, the SEC staff offered the following guidance for an entity that elects to disclose additional measures of segment performance that do not comply with U.S. GAAP:

- At a minimum, the entity must continue to disclose the measure of segment performance that is most consistent with U.S. GAAP.
- Any measure of segment performance disclosed should be regularly reviewed by the CODM and used by the CODM to allocate resources and assess performance.
- Any additional measure of segment performance that is a non-GAAP financial measure must not be misleading and must comply with Regulation G, Item 10(e) of Regulation S-K, and non-GAAP C&DIs which require:
  - A statement disclosing why the non-GAAP measure is useful to investors
  - A reconciliation to the nearest U.S. GAAP measure

The incremental disclosures about the usefulness of an additional non-GAAP measure of segment performance and the reconciliation to the nearest U.S. GAAP measure are not required in the financial statements but must be included in the filing (for example, within management’s discussion and analysis (“MD&A”)). SEC rules generally prohibit entities from including cross-references within their financial statements to information or disclosures outside of their financial statements unless specifically permitted or required. Accordingly, entities that make the incremental disclosures in MD&A to comply with the non-GAAP rules for additional measures of segment performance should not include cross-references to MD&A in their financial statements.

BDO INSIGHTS — APPLICATION OF THE NON-GAAP RULES TO FINANCIAL STATEMENT DISCLOSURE

The SEC staff’s guidance outlined above only applies to the **optional** non-GAAP measures of segment performance, not the required measure of segment performance. Accordingly, even if the segment performance measure that is most consistent with U.S. GAAP is considered “non-GAAP,” the SEC staff’s guidance about the application of the non-GAAP rules does not apply.

The application of the SEC’s non-GAAP rules to financial statement disclosure is a new concept. What is considered “misleading” in terms of disclosure is often in the eye of the beholder. Accordingly, different stakeholders, including the SEC staff, may have different views about whether certain measures are misleading. We encourage registrants with plans to disclose optional non-GAAP measures of segment performance to carefully consider the non-GAAP rules and regulations and discuss with their outside securities counsel, auditor, and audit committee well in advance of year-end.

Single Reportable Segment Measure of Performance

ASU 2023-07 requires registrants with a single reportable segment to disclose the measure of segment performance used by the CODM that is most consistent with U.S. GAAP. Accordingly, the SEC staff expects the measure of segment performance for a registrant with a single reportable segment that is managed on a consolidated basis to be consolidated net income. Registrants that choose to disclose additional measures of segment performance that are not calculated in accordance with U.S. GAAP must follow the SEC staff guidance discussed in Disclosing Multiple Measures of Segment Performance.

The SEC staff also shared its views on other questions about single segment registrants, as follows:

- **Question**: Would the SEC staff's views about the measure of segment performance for an entity managed on a consolidated basis differ if the CODM was not the Chief Executive Offer (CEO) or Chief Financial Officer (CFO) that certify the Form 10-K and Form 10-Q filings?

  Answer: The CEO and CFO certifications represent only one data point that indicates the certifying officers receive and review consolidated results. The SEC staff is unaware of circumstances in which a single segment registrant is managed on a consolidated basis and the CODM is not regularly reviewing a consolidated U.S. GAAP performance measure such as consolidated net income.
- **Question**: Could there be circumstances in which the CODM manages a single operating segment entity on something other than a consolidated basis?

  Answer: It depends. The SEC staff encourages entities to consider the guidance in ASC 280-10-55-15D that explicitly addresses this question. Careful consideration of the facts and circumstances (including how budgets are prepared and resources are allocated) is required to determine what business activities constitute part of an operating segment and whether the entity is managed on a consolidated basis. For example, corporate headquarters or certain functional departments may not be part of the operating segment in certain cases. However, the SEC staff believes that the mere exclusion of a corporate headquarters or certain functional department from the measure of segment performance would not be determinative as to whether the entity is managed on a consolidated basis.

Macroeconomic Conditions and Other Evolving Risks

The macroeconomic environment in the U.S. remains volatile with continued uncertainty about inflation, the direction of interest rates (despite a recent rate decrease), supply chain challenges and labor shortages. Geopolitical conflicts around the globe like the ongoing wars in the Middle East and between Russia and Ukraine as well as the impending presidential election only add to the uncertainties a registrant may face. Depending on the impact (or potential impact) on a registrant's operations and financial condition, additional disclosures in risk factors, MD&A, or even the financial statements may be required.

The SEC staff has often emphasized that registrants should avoid "boilerplate language" to address these risks, trends, and uncertainties in filings. Registrants should also avoid describing the impact of such conditions and events as hypothetical risks when they have had an impact on the business. Disclosures should address the direct and indirect impacts when they are material to understanding a registrant's results of operations and liquidity. The SEC staff has asked registrants to not only expand their discussion of these risks, but also to address the quantitative impact(s) and any mitigation efforts (for example, if the registrant has increased prices in response to inflationary pressures, modified contracts, or changed suppliers in response to inflationary pressures or higher labor costs). While the SEC staff has not issued specific guidance about the war in the Middle East, registrants should consider the SEC staff's Sample Letter to Companies Regarding Disclosures Pertaining to Russia's Invasion of Ukraine and Related Supply Chain Issues for the types of detailed disclosures that may be warranted.

Certain other emerging and evolving risks may also warrant attention in upcoming filings, including:

- Artificial Intelligence (AI)
  - The SEC has observed a significant increase in the number of registrants that mention AI in their annual reports. The rise in the use of AI, including generative AI, may expose registrants to enhanced operational, technological, and other regulatory risks. A registrant's use of AI may enhance concerns about data privacy, the protection of intellectual property, or biases in reported results. AI may also impact a registrant's strategy, reputation, demand for its products and services, and other aspects of its business. The SEC staff is focused on the need for clear and transparent disclosure about how the registrant defines AI, how it is or will be used in the business, the material risks that may exist, and how such plans may affect the registrant's results of operations, financial condition, and future prospects.
- Commercial Real Estate (CRE) Exposure
  - Registrants should consider whether they have material exposure to losses on CRE loans and assets that may indicate or create a higher risk for impairment. Higher vacancies, lower property valuations, elevated interest rates, and higher loan delinquencies have increased the risk associated with CRE portfolios, particularly for real estate investment trusts (REITs) and banks with significant CRE exposure (though other industries may be impacted by the CRE environment). The SEC staff is closely examining how banks disclose loan portfolio characteristics, geographic concentrations, loan-to-value ratios, and risk management practices. Similarly, entities with CRE exposure may need to address default risks, liquidity issues, debt maturity schedules, tenant viability and asset impairments. The SEC staff encourages companies to consider providing more granular

disclosure to help investors understand the risks and any mitigating steps to address those risks (such disclosures may appear in the business section, risk factors, MD&A, and the financial statements, as appropriate).

Clawback Checkboxes

In connection with the SEC's rules requiring the recovery of erroneously awarded compensation (the "clawback rules"), NYSE and Nasdaq listed registrants ("issuers") are required to evaluate two checkboxes that appear on the cover pages of annual reports on Forms 10-K, 20-F, and 40-F. The checkboxes require issuers to indicate whether:

1) The financial statements included in the filing reflect the correction of an error to previously issued financial statements.
2) Any of the error corrections identified in 1) required an analysis for the recovery of incentive-based compensation from its executive officers.

As a reminder for upcoming Form 10-K filings, the final rule explicitly states that both "Big R" and "little r" restatements may trigger a clawback analysis. However, questions have arisen regarding the application of the first checkbox. At the 2023 AICPA & CIMA Conference on Current SEC and PCAOB Developments, the SEC staff clarified that issuers should check the first checkbox when the financial statements reflect the correction of an accounting error, as defined in U.S. GAAP (or IFRS), in the previously issued financial statements. Corrections of accounting errors include "Big R," "little r," and voluntary restatements. The first checkbox does not apply to out-of-period adjustments because the previously issued financial statements are not corrected.

The following table summarizes the types of error corrections and the applicability of the first clawback checkbox based on the remarks of the SEC staff:

TYPE OF ERROR CORRECTION	SUMMARY	DOES CHECKBOX 1) APPLY?
Big R	An error is corrected through a Big R restatement when the error is material to the previously issued financial statements. A Big R restatement requires the entity to restate and reissue its previously issued financial statements.	Yes
little r	An error is corrected through a little r restatement when the error is immaterial to the previously issued financial statements, but correcting the error in the current period would materially misstate the current period financial statements. For example, an immaterial error that has been uncorrected for multiple periods and has aggregated to a material number in the current period may be corrected through a little r restatement.	Yes
Voluntary restatement	An error is corrected through a voluntary restatement if previously issued financial statements are corrected for errors that are not considered Big R or little r restatements. Examples of voluntary restatements include immaterial classification errors in the balance sheet and statement of cash flows, and corrections of immaterial errors in the financial statement footnotes.	Yes
Out-of-period adjustment	An error is corrected within the current period as an out-of-period adjustment when it is considered immaterial to both the current and prior period(s). The error correction is reflected in the current period, not the previously issued financial statements.	No

The SEC staff also addressed the application of the first checkbox in the annual report when previously filed interim financial statements are presented in an unaudited footnote of the annual financial statements and reflect the correction of an error.[6] This presentation may be required under Item 302 of Regulation S-K ("S-K Item 302"). When

[6] June 2023 CAQ SEC Regulations Committee Highlights, Topic III.D

the correction of the error does not impact the previously issued **annual** periods, the SEC staff indicated it would not object if an issuer does not check the first checkbox. For example, to comply with S-K Item 302 due to errors in the previously issued 20X4 interim financial statements, a registrant presents restated 20X4 interim financial information in an unaudited footnote in its 20X4 Form 10-K. The previously issued annual financial statements for 20X3 and 20X2 presented in the 20X4 Form 10-K do not reflect the correction of an error. In this scenario, a registrant is not required to check the first checkbox.

We encourage issuers to work closely with legal counsel regarding the applicability of the checkboxes to their particular facts and circumstances.

Select SEC Staff Comment Letter Topics

The SEC staff reviews registrant filings at least once every three years but may choose to review a registrant more frequently. When selecting disclosures for review, the SEC staff considers events such as significant volatility in the stock price of the registrant as compared to its peers, restatements, and other factors.[7] The extent of the review varies and may cover the entire document, the financial statements and related disclosures in MD&A, or target specific disclosures.

During 2024, the SEC staff's comment letters have remained focused on non-GAAP financial measures, MD&A, segment reporting, business combinations and revenue recognition. These disclosures typically involve areas of judgment, whether in the application of U.S. GAAP or in complying with SEC rules and regulations.

Non-GAAP Financial Measures

SEC staff comments often seek to understand the nature of non-GAAP measures, and the information the registrant is trying to convey to its investors. While registrants should clearly describe the non-GAAP measure and its related adjustments, the SEC staff has emphasized that no amount of disclosure can cure a misleading non-GAAP measure. If, through the comment letter process, the SEC staff determines that a non-GAAP measure is misleading, the registrant must remove or update the presentation of the measure in the next filing (if comparable periods are presented, the misleading non-GAAP measure should also be removed or updated for the comparable period). In December 2022, the SEC staff updated its non-GAAP C&DIs[8] and often refers to this guidance, as well as Regulation G and Item 10(e) of Regulation S-K when commenting on non-GAAP measures. Key themes in comment letters related to non-GAAP financial measures include:

TOPIC	COMMENT LETTER OBSERVATIONS
Normal, recurring, cash operating expenses	▶ It is unclear why certain cash expenses are excluded from the non-GAAP measure. The SEC staff comments ask why the registrant does not consider the expense to be a normal, recurring cash expense in the context of its operations, strategy, industry, and regulatory environment. Adjustments to exclude legal fees, litigation or restructuring expenses, and reserves or write-downs related to inventory or receivables from non-GAAP measures are often questioned. Comment letters may result in the registrant expanding its disclosures to include more information about the nature of the non-recurring cash expense, or the staff may request the registrant remove the adjustment from its non-GAAP measure.
Individually tailored accounting principles	▶ The non-GAAP measure adjusts the measurement and recognition principles required by U.S. GAAP or IFRS ("individually tailored accounting principles"). Examples include: • Adjusting revenue to recognize it at a point in time when GAAP requires the registrant to recognize revenue over time, and vice versa. • Presenting revenue on a gross basis when net presentation is required by GAAP, and vice versa.

[7] Section 408 of the Sarbanes-Oxley Act requires the review of disclosures made by registrants that report under the Securities Exchange Act of 1934. Section 408 also details criteria the SEC staff considers when selecting reviews.
[8] See our Bulletin, SEC Updates Compliance and Disclosure Interpretations on Non-GAAP Financial Measures.

TOPIC	COMMENT LETTER OBSERVATIONS
	• Changing the basis of accounting for revenue or expenses from accrual basis to cash basis • Adjusting inventory to an internal basis of accounting inconsistent with U.S. GAAP • Consolidating the results of an entity that does not qualify for consolidation, or excluding an entity that does qualify for consolidation • Adjusting for parts, but not all, of an accounting concept, such as excluding amortization of certain, but not all, intangibles SEC staff comments request the registrant remove adjustments that include an individually tailored accounting principle from the non-GAAP measure.
Prominence	▶ The non-GAAP measure is presented or discussed with more prominence than the most directly comparable GAAP measure. Examples include: • Reconciling the non-GAAP measure to a measure that is not the most directly comparable GAAP measure (e.g., reconciling an adjusted gross profit measure to net income rather than a fully loaded GAAP gross profit) • Discussing the non-GAAP measure before the GAAP measure • Presenting the non-GAAP measure in bold, underlined, in a larger font, or other formatting that gives the non-GAAP measure undue prominence SEC staff comments request the registrant to update its disclosure so as not to give the non-GAAP measure undue prominence.
Why the non-GAAP measure is useful to investors	▶ The registrant stated the non-GAAP disclosure is useful to investors but did not explain why. SEC staff comments request the registrant update its disclosure to more clearly explain why the non-GAAP measure is useful to investors in understanding the registrant's financial condition and results of operations.

BDO INSIGHTS — PRESENTING A DEBT COVENANT MEASURE IN AN EARNINGS RELEASE

A registrant may present a non-GAAP measure calculated in accordance with a debt covenant when the measure is useful for investors to understand the registrant's financial condition and results of operations. If disclosed, the non-GAAP covenant measure and related discussion should generally be limited to the liquidity section in MD&A in the registrant's Form 10-K or Form 10-Q.[9] Recently, the SEC staff clarified that disclosure of a non-GAAP covenant measure in an earnings release is not objectionable when the measure is material to understanding the registrant's financial condition and liquidity and it is presented in a manner similar to the registrant's liquidity disclosures in MD&A. The SEC staff will likely object to the presentation of a non-GAAP covenant measure in an earnings release if the measure appears to be disclosed as an indicator of performance rather than liquidity.[10]

[9] Non-GAAP Financial Measures C&DI 102.09
[10] June 2024 CAQ SEC Regulations Committee Highlights, Topic III.G

Management Discussion and Analysis

The objective of MD&A is to provide investors with material information relevant to assessing the registrant's financial condition and results of operations. SEC staff comments focus on whether disclosures about known trends and uncertainties, material changes in operations, liquidity, and critical accounting estimates meet the underlying requirements and objective of MD&A. Key themes in comment letters related to MD&A include:

TOPIC	COMMENT LETTER OBSERVATIONS
Results of operations	▶ Material changes to operations are not quantified or the underlying reason for the change is not discussed. For example, when multiple events or transactions contribute to a material change in operations, SEC staff comments request that the registrant: • Quantify each event or transaction • Explain why that event or transaction caused the change ▶ Disclosure of known trends or uncertainties is vague or missing. When material changes to operations occur, or when other factors that could affect operations are discussed elsewhere in the filing or in other information made available to the public, SEC staff comments ask the registrant to expand its disclosures. The expanded disclosures should address whether there are known trends or uncertainties that have affected or are reasonably likely to affect operations. Examples include supply chain disruptions, interest rate fluctuations, inflation, geopolitical instability, or other macroeconomic factors.
Liquidity and capital resources	▶ The analysis of changes in operating cash flows does not describe the underlying reason for material changes. When the discussion narratively recites what is readily apparent from the statement of cash flows, SEC staff comments request the registrant to describe the underlying reasons for material changes and often focus on material changes in working capital items. ▶ Material increases or decreases in liquidity resulting from known trends or any known demands, commitments, events, or uncertainties are not discussed. SEC staff comments may request the registrant to expand its discussion to address its short and long-term liquidity needs. Examples include macroeconomic factors, such as interest rate fluctuations and inflation.
Critical accounting estimates	▶ The disclosures reiterate or reference the accounting policies in the financial statements. SEC staff comments request the registrant to provide more quantitative and qualitative information on aspects of the estimate that involve significant judgment, as well as the sensitivity of reported figures to changes in the assumptions underlying the estimate.

Segment Reporting

Segment disclosures provide valuable insights into the company from management's perspective and frequently influence the discussion in MD&A. SEC staff comments often emphasize the alignment of segment disclosures with information shared outside the financial statements, such as during earnings calls and in investor presentations. Key themes in comment letters related to segment reporting include:

TOPIC	COMMENT LETTER OBSERVATIONS
Identification of operating segments	▶ Discrete financial information shared during earnings calls, in investor presentations, or on the registrant's website do not align with the segment disclosures in the financial statements. SEC staff comments seek to understand the registrant's identification of operating segments by asking the registrant to:

TOPIC	COMMENT LETTER OBSERVATIONS
	• Describe the role of the CODM, and identify the individuals that report to the CODM (“direct reports”) • Describe the basis for determining the compensation for the CODM’s direct reports • Provide details about meetings between the CODM and his/her direct reports, including the frequency of the meetings, the financial information reviewed by the CODM in preparation for the meetings, the financial information discussed during the meetings, and who attends the meetings • Describe the information regularly provided to the CODM and Board of Directors, and how often it is prepared • Explain the budgeting process, including how budgets are prepared, reviewed, and approved, as well information about communication and meetings to discuss budget-to-actual variances • Provide the financial information the CODM uses to assess performance and allocate resources ▶ A change in key management, a significant acquisition or disposition, restructuring or another significant event has occurred with no corresponding change in reportable segments. SEC staff comments ask the registrant for its analysis of how it determined its reportable segments after such an event.
Aggregation of operating segments	▶ Two or more operating segments are aggregated into a single reportable segment, but it is unclear why aggregating the operating segments is consistent with the objective and basic principles of ASC 280. SEC staff comments ask the registrant to provide its analysis supporting the aggregation, including how the operating segments have similar economic characteristics.
Performance measure used by the CODM	▶ A combined total of each segment’s measure of performance is presented in a manner other than as required by ASC 280. SEC staff comments remind registrants that such presentation is a non-GAAP measure. As such, the measure may only be presented outside of the financial statements and must comply with the SEC’s non-GAAP rules and regulations.[11] As highlighted in the **Segment Disclosures** section, ASU 2023-07 will permit additional measures of segment performance in the financial statement footnotes, but additional disclosure requirements will apply if they are not calculated in accordance with U.S. GAAP.
Entity-wide disclosures	▶ Entity-wide information is not disclosed. SEC staff comments focus on the following required disclosures: • Revenues from external customers for each group of products and services, or for each group of similar products or services • Information about geographic areas, including revenues from external customers and long-lived assets attributable to the registrant’s country of domicile and each individual foreign country (if material)

[11] Non-GAAP Financial Measures **C&DI** 104.04

BDO INSIGHTS — NEW SEGMENT DISCLOSURES

SEC staff filing reviews often target areas that involve judgement or the application of new accounting standards. The new segment reporting disclosures required by ASU 2023-07 (see Segment Disclosures for more guidance) require management to make judgments not previously required by ASC 280, particularly in determining which expenses are significant and therefore must be disclosed. As such, we expect SEC staff comment letters on segments will continue to be a focus area and comment letter topics will expand to include the new segment reporting disclosures required by ASU 2023-07.

Business Combinations

Business combination disclosures required by U.S. GAAP and the financial information required by Rule 3-05 and Article 11 of Regulation S-X provide information to investors so they may assess the nature and effect of the acquired business on the registrant's operations. SEC Staff comments often focus on compliance with FASB's Accounting Standards Codification (ASC) Topic 805, *Business Combinations* (ASC 805) or Regulation S-X as follows:

TOPIC	COMMENT LETTER OBSERVATIONS
ASC 805	▶ Revenue and earnings of the acquiree from the acquisition date to the end of the reporting period or supplemental pro forma financial information are not disclosed in the financial statements. SEC staff comments may challenge management's assertion that disclosure of such information is immaterial if the acquisition appears to be material to the registrant's balance sheet.
Regulation S-X	▶ Form 8-K discloses a significant acquisition but financial statements of the acquiree and related pro forma financial information are not filed. SEC staff comments may ask for the significance test performed by the registrant to assess compliance with Rule 3-05 and Article 11 of Regulation S-X.

Revenue Recognition

Revenue recognition disclosures required by ASC Topic 606, *Revenue from Contracts with Customers* (ASC 606) are intended to provide users of the financial statements with sufficient information to understand the nature, timing, and uncertainty of revenue and cash flows arising from contracts with customers. SEC staff comments often request more information, or clarification regarding the registrant's revenue recognition. Key themes in comment letters related to revenue recognition include:

TOPIC	COMMENT LETTER OBSERVATIONS
Presentation and Disclosure	▶ Revenue is presented on a gross or net basis, but it is unclear whether the registrant is the principal or agent. SEC staff comments may request the registrant's analysis to support its presentation. ▶ Revenue data in MD&A, earnings calls, investor presentations, or other public information is disaggregated differently from the financial statements. SEC staff comments ask the registrant why the disaggregation presented in the financial statements best reflects how economic factors affect the nature, amount, timing, and uncertainty of revenue and cash flows.
Nature, timing, and amount	▶ The nature, timing, and amount of revenue recognition is unclear. SEC staff comments ask the registrant to clarify:

TOPIC	COMMENT LETTER OBSERVATIONS
	• The performance obligations, including how the registrant determined whether certain promised goods or services are distinct • The type and nature of variable consideration, including whether any variable consideration is constrained • The timing of revenue recognition (over-time or at a point-in-time), and for revenue recognized over-time, the method used and why the method is appropriate

COMMISSION AND SEC STAFF ACTIVITIES

Final Rules

Climate Disclosures

SEC REFERENCE

Final Rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors

In March 2024, the SEC adopted its highly anticipated rules to enhance and standardize climate-related disclosures and require registrants to report information on greenhouse gas (GHG) emissions, climate-related risks, and financial metrics in registration statements and annual reports. The rules apply to all registrants[12] and offer phased-in compliance dates dependent on a registrant's filer status.

The final rules require:

- Disclosures in the audited financial statements about the impact of severe weather events and other natural conditions to a registrant's financial statements, including quantitative disclosures of expenses, losses, capitalized costs and charges related to such events, aggregate amounts of carbon offsets, and renewable energy credits (RECs), as well as qualitative disclosures about the estimates and assumptions materially impacted by such events.
- Disclosures of material GHG emissions from direct (Scope 1) and indirect (Scope 2) activities of large accelerated filers (LAFs) and accelerated filers that are not smaller reporting companies (SRCs) or emerging growth companies (EGCs) (AFs). Scope 1 and Scope 2 GHG emissions disclosures are subject to attestation requirements.
- Qualitative disclosures about the registrant's climate-related risks, including board oversight and governance, and management's process to identify, assess, and manage such risks.

CURRENT STATUS

In April 2024, the SEC stayed the final rules due to several petitions for review filed in the U.S. Court of Appeals that challenge the validity of the rules. Due to the stay and pending litigation, the compliance dates and phase-in periods (which initially began in 2025), along with other aspects of the rules, remain uncertain.

[12] However, Canadian registrants that use the Multi-Jurisdictional Disclosure System and file on Form 40-F are exempt.

Disclosure Requirements

Audited Financial Statements

The amendments introduce new Article 14 of Regulation S-X, *Disclosure of Severe Weather Events and Other Information* (S-X Article 14). The final rules require quantitative and qualitative information related to “severe weather events and other natural conditions” (hereinafter referred to as “severe weather and conditions”) in a footnote to the registrant’s annual audited financial statements. Accordingly, such disclosures are subject to a registrant’s internal control over financial reporting. While registrants must apply the same accounting principles used in the preparation of their consolidated financial statements, processes, procedures, and controls must be designed and implemented to ensure information related to these events is captured and considered for disclosure.

WHAT SEVERE WEATHER AND OTHER CONDITIONS TRIGGER DISCLOSURE?	WHAT INFORMATION MUST BE DISCLOSED?	FOR WHAT PERIODS IS DISCLOSURE REQUIRED?
While not all-inclusive, severe weather and conditions include hurricanes, tornadoes, flooding, drought, wildfires, extreme temperatures, rising sea levels, and earthquakes.[13] Registrants are not required to determine whether any of the severe weather or conditions were caused by climate change for the purpose of making the required disclosures and may need to apply judgment in their consideration of what constitutes severe weather or conditions based on the specific risks they face, including their geographic location and historical experience, among other factors.	The financial statement categories of disclosure include: ▶ Aggregate amounts of expenses, losses, capitalized costs, and charges related to severe weather and conditions ▶ Accounting policies for and aggregate amounts of carbon offsets and RECs ▶ Financial estimates and assumptions materially impacted by severe weather and conditions ▶ Contextual information about financial statement effects, estimates and assumptions, and accounting policies, including the aggregate amounts of insurance recoveries related to any disclosed expenses, losses, capitalized costs, and charges	Disclosure must be provided for the most recently completed fiscal year in the first year disclosure is required. For subsequent filings, registrants must present their prior S-X Article 14 disclosures that relate to historical annual periods presented in the financial statements and included in the filing.

Expenses, Losses, Capitalized Costs, and Charges

Registrants must disclose the following amounts related to severe weather and conditions:

- Aggregate expenses and losses (excluding recoveries) that exceed 1% of the absolute value of income or loss before income taxes for the fiscal year, subject to a de minimis threshold of $100,000.
- The absolute value of aggregated capitalized costs and charges that exceed 1% of the absolute value of stockholders’ equity or deficit at the end of the fiscal year, subject to a de minimis threshold of $500,000.

Examples of expenses and costs related to severe weather include those related to impairment, restoration, relocation, and repairs.

Registrants must disclose where such expenses or losses and capitalized costs or charges are presented in the income statement or balance sheet.

S-X Article 14 includes an attribution principle to assist registrants with their determination of whether expenses, losses, capitalized costs, and charges relate to severe weather or conditions. Registrants must attribute such expenses, costs, and charges to severe weather event or condition when such event or condition is a “significant contributing factor” in incurring the cost, expense, or charge.

[13] Footnote 2091 of the adopting release cites earthquakes as an example of “natural conditions” that may require disclosure when they are severe, depending on the registrant’s particular facts and circumstances.

Carbon Offsets and Renewable Energy Credits

When carbon offsets or RECs are a material component of a registrant's plan to achieve its disclosed climate-related targets or goals, the aggregate amount of (1) capitalized costs (2) expenses and (3) losses related to the purchase and sale of carbon offsets and RECs must also be disclosed. Such disclosures are not subject to a 1% or de minimis threshold and must be accompanied by disclosure of:

- The registrant's accounting policy(policies) for carbon offsets and RECs
- The beginning and ending balances of capitalized amounts for carbon offsets and RECs on the balance sheet

Like disclosures for weather-related expenses and losses, registrants must disclose where the carbon offsets and RECs are reported in the income statement and balance sheet, as applicable.

Financial Estimates and Assumptions

Registrants must qualitatively describe how their financial estimates and assumptions were affected by known impacts or risks and uncertainties related to severe weather and conditions, or any disclosed climate-related targets or transition plans, when such impact is material.

Contextual Information

Contextual information that must accompany the financial disclosures required by Article 14 includes:

- How the financial statement effect was derived and other information that is important to understand such effect
- A description of the significant inputs, assumptions, and judgments made to determine the amounts disclosed
- Accounting policy decisions, if applicable
- Aggregate insurance recoveries recognized during the period and where they are presented in the income statement and balance sheet, when the registrant discloses information about expenses, losses, capitalized costs, and charges

Contextual information may also include disclosure of the specific severe weather events, natural conditions, and transactions for which financial disclosures were required.

Climate-Related Disclosure

New Subpart 1500 of Regulation S-K, *Climate-Related Disclosure,* requires registrants to disclose material climate-related expenditures, climate-related risks and impacts on its strategy, business, and outlook, climate-related targets, and goals (if any), as well as its governance and management of climate-related risks. AFs and LAFs must disclose material GHG emissions metrics. Registrants may include the climate-related disclosures in existing sections of the filing, or in a separately captioned "Climate-Related Disclosure" section.[14] Such disclosures are subject to the registrant's disclosure controls and procedures.

Materiality

The materiality evaluation for climate-related disclosures (including GHG emissions) is consistent with the evaluation of any other event or risk that a registrant may face. Accordingly, a disclosure is material if "there is substantial likelihood that a reasonable shareholder would consider it important" or if it would have "substantially altered the 'total mix' of information made available from the perspective of a reasonable investor." Considerable judgment may be required in the materiality determination; registrants must consider all relevant facts and circumstances, including both quantitative and qualitative factors.

GHG Emissions

AFs and LAFs must separately disclose material Scope 1 (direct) and Scope 2 (indirect) GHG emissions (expressed in terms of carbon dioxide equivalent, or "CO_2e"), and each material GHG type. GHG emissions must be presented gross and exclude any offsets purchased or generated by the registrant. Scope 1, Scope 2, and GHGs are defined as:

- Scope 1: direct GHG emissions from sources owned or controlled by the registrant
- Scope 2: indirect GHG emissions from the activities of the registrant, such as the generation of purchased or acquired electricity, steam, heat, or cooling
- GHGs: carbon dioxide, methane, nitrous oxide, nitrogen trifluoride, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride

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[14] Registrants may incorporate by reference disclosures from other parts of the filing, or, if eligible, other filed or submitted reports.

Registrants must describe their methodology, significant inputs and assumptions, and protocol or standard used to compute the GHG emissions disclosures. Additionally, registrants must disclose the organizational boundaries used to calculate Scope 1 and Scope 2 GHG emissions, including the method for determining these boundaries. Registrants must also explain any material differences between the boundaries and scope of entities and operations included in the consolidated financial statements.

GHG emissions disclosures are presented for the most recently completed fiscal year, and, if previously required to be disclosed, for the historical years presented in the financial statements. For example, in the first year disclosure is required, only the most recent fiscal year must be disclosed; in the second year, the most recent fiscal year and the prior fiscal year must be disclosed; in the third year, all historical years presented in the financial statements must be disclosed.

GHG Emissions Due Date

The GHG emissions disclosures are due no later than the due date of the registrant's second quarter Form 10-Q, or for foreign private issuers (FPIs) that do not use domestic forms, no later than 225 days after their fiscal year end. A registrant that does not include GHG emissions disclosures in its Form 10-K may comply with the due date by filing an amendment to Form 10-K or incorporating the information by reference from its second quarter Form 10-Q (an FPI that does not use domestic forms may file an amendment to its Form 20-F).

In registration statements, GHG emissions disclosures must be included (or incorporated by reference) for the most recently completed fiscal year that is within 225 days of the date the registration statement is effective. For example, if a calendar year-end LAF's registration statement is effective on September 5, 2028, it must include GHG emissions disclosures for fiscal year 2027; if the registration is effective on August 3, 2028, it must include GHG emissions disclosures for either fiscal year 2026 or fiscal year 2027.[15]

GHG Emissions Attestation Requirements

AFs and LAFs must obtain (and include in the filing) an attestation report over their Scope 1 and Scope 2 GHG emissions disclosures. As adopted, LAFs would need limited assurance for fiscal years beginning in 2029, and reasonable assurance for fiscal years beginning in 2033 and AFs would need limited assurance for fiscal years beginning in 2031. However, due to the SEC's stay, these dates remain uncertain.

The attestation provider must be an expert in GHG emissions and independent with respect to the registrant (but is not required to be a registered public accounting firm).[16]

Incremental disclosures about the provider are required, including whether the engagement and provider is subject to any oversight inspection program, and any changes in or disagreements with the attestation provider (similar to the disclosure requirements in Item 4.01 of Form 8-K and Item 304 of Regulation S-K), amongst others.

Risks and Impacts

Material Impacts

Registrants must disclose climate-related risks that have had or are reasonably likely to have a material impact on their business strategy, results of operations, or financial condition, along with their plan to address the risks. Risks expected to impact the registrant in the short-term must be described separately from those expected to impact the registrant in the long-term. Climate-related risks must be identified as either physical or transition risks.

- Physical risk disclosures must include:
  - Whether the risk is chronic or acute
  - The geographic location of properties, processes, and operations subject to the risk
- Transition risk disclosures must include:
  - The nature of each risk (for example, regulatory, technological, market-related, or other)
  - How each risk impacts the registrant

[15] If the registration statement's effective date is less than 225 days after its most recently completed fiscal year-end, the registrant is not required to disclose the GHG emissions for the prior fiscal year unless it was required to do so under S-K Item 1505 for that year (see footnote 1074 of the final rule).
[16] GHG emissions attestation providers must comply with the independence requirements in S-K Item 1506 but are not required to separately comply with S-X Rule 2-01.

Climate-related risks, physical risks, and transitions risks are defined as:

RISK	DEFINITION
Climate-related	▶ Climate-related conditions or events that have had or could have a negative impact on a registrant's business, results of operations, or financial condition.
Physical	▶ Chronic and acute risks to a registrant's operations • Chronic – longer-term effects of weather patterns. Examples include temperature increases, drought, and a rise in sea levels. • Acute – shorter-term event driven risks. Examples include wildfires, hurricanes, tornadoes, floods, and heatwaves.
Transition	▶ The actual or potential negative impact to a registrant's business, results of operations, or financial condition due to climate-related regulatory policies or litigation, technology, and market conditions (such as changes in behavior and choices of consumers, investors, and employees). Examples include costs to comply with regulations and litigation, demand for carbon-intensive products or services, new technology, and reputational harm.

For each material climate-related risk identified, registrants must disclose information, if applicable, about transition plans, scenario analyses, and internal carbon price as follows:

- Transition plan - registrants that adopt a transition plan to manage a material transition risk must describe the plan. Examples of transition plans include planned reductions in GHG emissions to meet an internal, legal, or regulatory commitment. When describing the plan, registrants must disclose quantitative and qualitative information related to material expenditures incurred and material impacts to financial estimates and assumptions resulting from the plan.
- Scenario analysis - registrants that determine a climate-related risk is material using a scenario analysis must disclose the scenarios, along with the parameters, assumptions, analytic choices, and expected material impacts of each scenario.
- Internal carbon price - registrants that use internal carbon pricing to manage and evaluate material climate-related risks must disclose the CO_2e price per metric ton and total price, as well as how the expected change in total price over the period the registrant expects the risk to materially impact them.

Targets and Goals

Registrants must disclose any climate-related targets or goals that have had or are reasonably likely to have a material impact on their business strategy, results of operations, or financial condition. Such disclosures include:

- The scope of activities related to the target
- The unit of measurement
- The timeframe to meet the target along with any progress made and how such progress was achieved
- The baseline used to track progress (if applicable)
- A description of the registrant's plan to meet the target and any actions taken to do so. Quantitative and qualitative information of any material expenditures and material impacts to financial estimates and assumptions must be disclosed for any actions taken that have or are reasonable likely to materially impact the registrant
    - Information about the use of carbon offsets or RECs (including their nature and source, costs, amounts of carbon reduction, avoidance or removal, and renewable energy generated, and any registries or other authentication, as well as the location and a description of the underlying projects) must be disclosed if such use is material to the plan

Registrants may rely on the safe harbor for forward-looking statements for disclosures based on estimates or assumptions of future events, rather than historical fact (such as transition plans, scenario analyses, and internal carbon pricing, as well as certain information about targets and goals).

Governance and Risk Management

Registrants must disclose their process to identify, assess, and manage material climate-related risks, including:

- How they identify physical or transition risks that are material or reasonably likely to be material to their business, results of operations, or financial condition
- How they prioritize whether to address the risk and decide whether to mitigate, accept, or adapt to the risk
- Management's role in the process, including the positions or committees responsible for assessing and managing risk and the nature of their expertise, and whether they report information to the board

Registrants must also describe the board's oversight of climate-related risks. If a board committee oversees such risk, registrants must identify the committee, the process to inform the board of the risks, and how the board oversees transition plans or progress toward a target or goal (when applicable).

Compliance Dates and Phase-In Periods

The rules apply to all registrants, including FPIs,[17] SRCs, and EGCs. However, certain filers are exempt from the disclosure and assurance requirements related to GHG emissions:

- SRCs, EGCs, and non-accelerated filers (NAFs) are exempt from all GHG emission disclosure and assurance requirements under S-K Items 1505 and 1506
- AFs are exempt from the reasonable assurance requirement of Item 1506

The disclosure requirements apply to registration statements on Forms S-1, F-1, S-3, F-3, S-4, F-4, S-11 and Forms 10 and 20-F and Annual Reports on Forms 10-K and 20-F. In a change from the proposal, the disclosure requirements will not apply to certain private companies that are part of a business combination transaction involving a securities offering on Forms S-4 and F-4.

As adopted, the rules were slated to take effect over a phased-in timeline determined by filer status and disclosure requirement beginning in 2025. However, because the rules have been stayed by the SEC, effective dates for the rules remain uncertain.

Registrants must electronically tag both the qualitative and quantitative disclosures in Inline XBRL.

BDO INSIGHTS — CONSIDER CURRENT CLIMATE-RELATED DISCLOSURE GUIDANCE

Although the climate rules are stayed, registrants should continue to follow existing rules, regulations, and guidance, which may require disclosure of climate-related matters in SEC filings:

- Commission Guidance Regarding Disclosure Related to Climate Change
- SEC Staff Sample Comment Letter to Companies Regarding Climate Change Disclosures

The SEC staff has historically issued comments on climate-related matters in filings under the existing rules and regulations. The staff's sample letter to companies on climate change disclosure is an excellent resource for understanding the nature of these comments.

Special Purpose Acquisition Companies, Shell Companies, and Projections

SEC REFERENCE

Final Rule: Special Purpose Acquisition Companies, Shell Companies, and Projections

In January 2024, the SEC adopted final rules on special purpose acquisition companies (SPACs), shell companies, and projections that significantly enhance and expand disclosure requirements related to SPAC initial public offerings (IPOs) and de-SPAC transactions.

[17] However, Canadian registrants that use the Multi-Jurisdictional Disclosure System and file on Form 40-F are exempt.

These final rules:

- Expand the liability for parties involved in a SPAC transaction by requiring private operating company targets (“targets”) to be co-registrants and remove the safe harbor for forward-looking statements in SPAC filings
- Require incremental SPAC disclosures and align the financial statement requirements in a de-SPAC transaction with those applicable to traditional IPOs
- Require the combined company to redetermine its smaller reporting company (SRC) status and reflect a change in status in filings made 45 days following the de-SPAC transaction

New Disclosure Requirements

The disclosure requirements applicable to SPACs in new Subpart 1600 of Regulation S-K largely codify existing practice. These disclosures, required in connection with SPAC IPOs and de-SPAC transactions, include information about:

- SPAC sponsors, affiliates, and promoters
  - Background on the experience, roles, and responsibilities, including the nature and amounts of compensation earned, awarded, or paid
- Conflicts of interest
  - Actual and potential material conflicts of interest between the SPAC sponsor or its affiliates, the SPAC’s officers, directors, or promoters, or the target’s officers and directors and the SPAC’s unaffiliated security holders
- Dilution
  - Presented in tabular format showing the nature and amount of each source of dilution
  - A description of potential sources of future dilution
- The board’s consideration of the de-SPAC transaction
  - Whether the de-SPAC is advisable and in the best interest of the shareholders if such determination is otherwise required by law
  - A summary of any reports, opinions, or appraisals received that materially relate to the fairness of the de-SPAC
  - The name of any SPAC director that voted against or abstained from voting on the de-SPAC, and the reason for doing so (if known)

Additionally, the final rules align other non-financial statement disclosure requirements (such as the description of the business and property, legal proceedings, and changes in and disagreements with accountants) for the target with those required in an IPO registration statement. Such disclosures were not previously required until the combined company filed the Form 8-K due within four business days of the completion of the de-SPAC transaction (the “Super 8-K”).

Financial Statement Requirements

The final rules add Article 15 of Regulation S-X to align certain financial statement disclosure requirements for de-SPAC transactions with traditional IPOs (most of which are largely consistent with existing SEC staff views and guidance), including:

- Audit standards
  - The financial statements of the target must be audited in accordance with PCAOB standards. If there are multiple targets, only those deemed to be the predecessor must be audited in accordance with PCAOB standards; others may be audited in accordance with U.S. GAAS
- Target financial statement requirements
  - Only two years of the target’s audited annual financial statements are required if the target would qualify as an SRC **or** emerging growth company (EGC)
  - The age of the target’s financial statements must comply with the requirements in Rule 3-12 of Regulation S-X (S-X) (or S-X Rule 8-08X if the target would qualify as an SRC)
- The target’s acquisition of a business or real estate operation
  - The target must apply S-X Rule 3-05 (or S-X Rule 8-04 if the target would qualify as an SRC) to businesses or real estate operations acquired or to be acquired
- SPAC financial statement requirements following the de-SPAC transaction
  - The combined company may exclude the SPAC’s financial statements from its filings if:

  - The predecessor's financial statements prior to the de-SPAC transaction have been filed for all required periods
  - The combined company has filed financial statements that include the period in which the de-SPAC transaction was completed

Projections

In de-SPAC-related registration statements and proxies, the target's projections of future financial performance are often disclosed. The amendments to Regulation S-K require incremental disclosures related to such projections by:

- Adding new Item 1609 of Regulation S-K that requires disclosure of:
  - Why the projections were prepared and who prepared them
  - All material bases for the projections, including their assumptions (for example, the growth and discount rates and why such rates were used)
  - Whether the projections still reflect the views of the target's board or management as of the filing date, and if not, the purpose of disclosing projections and the reasons for any continued reliance on them by management or the board (the same disclosures are required by a SPAC that discloses its financial projections)
- Amending the guidelines in Item 10(b) of Regulation S-K to explicitly address the basis and format of the target's projections in de-SPAC transactions and require disclosure:
  - To distinguish projections that are not based on historical financial results from those that are (in general, if projections that are based on historical financial results or operational history are presented, the underlying historical measure or operational history should be presented with equal or greater prominence)
  - To address why projections with a non-GAAP financial measure are presented (if applicable), including a definition or explanation of the non-GAAP measure and the comparable GAAP financial measure

Smaller Reporting Company Status

The amendments require the combined company to redetermine its SRC status following a de-SPAC transaction based on its public float and annual revenues as follows:

- Public float – measure within four business days following consummation of the de-SPAC
- Annual revenues – determine as of the most recently completed fiscal year reported in the Super 8-K

The change in SRC status, if any, must be reflected in all filings beginning 45 days after consummation of the de-SPAC (the "minimum transition period"). Accordingly, the combined company is not required to apply a change in status in the Super 8-K that is due within four business days of the de-SPAC. However, any change in status must be reflected in filings made after the minimum transition period, including any amendments to the Super 8-K (that is, historical financial statement periods of the target that predate those presented in the registration statement or proxy may not be omitted if they are otherwise required following the loss of SRC status). If the combined company retains EGC status following the de-SPAC, it is not required to present financial statements for a period prior to those included in the registration statement.

Enhanced Liability Provisions and Other Requirements

The final rules expand the liability of certain parties associated with SPAC and de-SPAC transactions by:

- Treating the target as a co-registrant in a registered de-SPAC transaction and adding new Rule 145a, which considers the de-SPAC transaction to be a sale of securities from the combined company to the SPAC's existing shareholders. As such, the Securities Act of 1933 liability provisions for untrue material statements or material omissions apply to the target and its signing persons (for example, principal executive and financial officers).
- Amending the definition of a "blank check company" to encompass SPACs, meaning that SPACs cannot rely on the safe harbor for forward-looking statements under the Private Securities Litigation Reform Act of 1995 (PSLRA).

The final rule also requires a minimum dissemination period, generally requiring the distribution of the proxy statement, information statement, or prospectus filed in connection with the de-SPAC to investors at least 20 days in advance of a shareholder meeting.

SPAC Status: The Investment Company Act of 1940

In lieu of amending its rules, the SEC shared its views on facts and circumstances to consider when a SPAC determines its status as an investment company under the Investment Company Act of 1940. The views, provided in the context of the five-factor test typically applied in making such determination, relate to:

- The nature of the SPAC's assets and income, and whether the SPAC's primary business is to earn returns on investments held
- Whether the activities of the SPAC's officers, directors, and employees are spent seeking a target (and ultimately the de-SPAC), or managing the investments to achieve returns
- Whether the SPAC's timeline to de-SPAC exceeds the one-year safe harbor under the Investment Company Act of 1940, or the 18-month limitation applicable to certain blank check companies
- Whether the SPAC's marketing suggests it primarily engages in investing, reinvesting, or trading in securities
- Whether the SPAC's target is an investment company

Effective Date

The final rules were effective July 1, 2024. No transition period was provided for in-process SPAC IPOs or de-SPAC transactions. All SPAC and de-SPAC-related filings after July 1, 2024, must comply with the new rules.

BDO INSIGHTS — RECENT MARKET ACTIVITY FOR SPACS

SPACs first emerged in the 1990s, and their popularity increased substantially in 2020, particularly as a mechanism for private companies to go public. The surge led to increased regulatory scrutiny and concerns about various aspects of the SPAC structure and investor protection matters. Following the SEC's proposed rules in March 2022, SPAC IPOs and de-SPAC transactions drastically declined. SPAC market activity (both IPOs and de-SPAC transactions) remains depressed following the SEC's adoption of the final rules and some believe it is unlikely that de-SPAC transactions will be viewed as an attractive alternative to traditional IPOs.

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