Governance & Securities Alert

Weil

From the Public Company Advisory Group of Weil, Gotshal & Manges LLP

January 2023

Disclosure Developments and 2022 Form 10-K Disclosure Locator

By Howard Dicker, Catherine Dixon, P.J. Himelfarb, Shira Barron and Julie Rong

This Alert is in the form of a Disclosure Locator for the 2022 calendar year fiscal year-end Form 10-K to be filed by U.S. companies in 2023. Additionally, many of these disclosure developments will be useful in considering material change disclosure in upcoming Form 10-Qs. The Locator highlights disclosure considerations drawn from:

- Developments companies are facing stemming from the political, regulatory and investor response to the geopolitical events and financial upheavals of 2022;
- SEC staff comments, both actual and as set forth in sample comment letters published in 2022 by the SEC staff;
- Recent CDIs published by SEC staff;
- Lessons learned from recent enforcement proceedings;
- Recently adopted SEC rules and NYSE/Nasdaq corporate governance listing standards that are in effect or that are on the horizon; and
- Disclosure enhancements to consider that are gleaned from recent or upcoming SEC rule proposals.

Highlights from the Disclosure Locator

1. Increased and evolving human capital management disclosure
2. Business impacts of global events such as the Russia/Ukraine conflict, supply chain disruptions, inflation and climate change
3. Risk factors relating to these events that are specific to your company
4. ESG disclosures and related controls and procedures
5. Old and new CDIs clarifying non-GAAP reporting in MD&A
6. MD&A developments and focus on known trends and uncertainties
7. FASB's proposed changes to segment reporting
8. SEC enforcement focus on loss contingency disclosure
9. Considerations for the recently adopted SEC clawback rule
10. Required EDGAR submission of "Glossy" Annual Reports to Shareholders and 10-K "Wraps"

Weil

Annual Report on Form 10-K

Cover Page

- Emerging Growth Company Check Box
  - While the check box is not new, we note that in September 2022, the SEC adopted amendments to its rules to implement inflation adjustments mandated by the Jumpstart Our Business Startups (JOBS) Act. The SEC's amendments increase the inflation-adjusted annual gross revenue threshold of an EGC from $1.07 billion to $1.235 billion.
- On the Horizon: Clawbacks
  - The SEC has adopted a "clawback" rule for erroneously awarded incentive compensation, which will not have practical effect until implemented later in 2023 by stock exchange listing standards. The new rule is complemented by the addition of check boxes on the cover of Form 10-K to indicate whether (i) there are previously issued financial statements included in the filing that include an error correction and (ii) any such corrections are restatements that triggered a clawback analysis during the fiscal year. This means that both "Big R" and "little r" restatements will be easy to identify (see more below in our discussion of financial statements). The deadline for exchanges to propose clawback listing standards is February 27, 2023, and the deadline for clawback listing standards to become effective is November 28, 2023. The actual date for the check boxes to be added to the cover of Form 10-Ks and when they need to be checked is not yet clear.

Part I, Item 1 – Business

- Human Capital Management
  - The SEC is expected to propose a rule on human capital management ("HCM") in 2023, based on its Rulemaking Agenda (here), to expand upon the disclosures already required in the business section of Form 10-K, which include the number of employees and any human capital measures or objectives that the company focuses on in managing the business to the extent material to an understanding of the particular business. While it is not possible to know exactly what the SEC plans to propose, the following gives us some insight into the possible breadth of the upcoming proposal:
    - The Working Group on Human Capital Accounting Disclosure submitted a petition (here) to the SEC in June 2022 requesting the development of additional rules on HCM "to allow investors to assess the extent to which firms invest in their workforce." The letter requests disclosure of workforce costs in the MD&A, accounting for workforce costs in the same manner as R&D, and disaggregation within the income statement to give better insight into workforce costs, including in a uniform chart on workforce disclosure.
    - In 2021, SEC Chair Gensler had suggested that the proposed rules might require disclosure of metrics on workforce turnover, skills and development training, compensation, benefits, workforce demographics and health and safety.
    - We expect that companies also may be required to disclose any large-scale layoffs. In addition, some companies are starting to address employee well-being, talent engagement and retention programs, as well as their efforts to recruit military veterans.
- Impact of Russia/ Ukraine Conflict
  - In a sample comment letter posted on May 10, 2022 (here), the SEC staff urges companies to disclose the following in the business discussion:
    - Direct or indirect exposure to Russia, Belarus, or Ukraine through their operations, employee base, investments in Russia, Belarus, or Ukraine, securities traded in Russia, sanctions against Russian or

    - Belarusian individuals or entities, or legal or regulatory uncertainty associated with operating in or exiting Russia or Belarus;
    - Direct or indirect reliance on goods or services sourced in Russia or Ukraine or, in some cases, in countries supportive of Russia;
    - Actual or potential disruptions in the company's supply chain; and
    - Business relationships, connections to, or assets in, Russia, Belarus, or Ukraine.
  - There are additional comments in the sample letter if a company has referred to business in Russia, Belarus, or Ukraine, or when a material portion of the company's operations or those of companies with which the company does business is conducted through facilities in Russia, Belarus, or Ukraine.
- Supply Chain and Inflation
  - The SEC staff has sent a range of comment letters on these topics focusing on the need for companies to explain how inflation or disruptions in the supply chain have materially affected the company's business goals.
- Climate Change
  - In March 2022, the SEC issued proposed rules on climate change disclosure requirements. In the proposing release (here), the SEC expresses its view – consistent with the SEC's Climate Change Interpretive Release (here) issued in 2010 – that climate change disclosure should be required, if material. For example, under the "Business" section, the SEC stated that companies are required to include climate change disclosure of the material effects of compliance with federal, state and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, and that disclosure is required of any material estimated capital expenditures for environmental control facilities for the remainder of the current fiscal year, succeeding fiscal year and for such further periods as a company may deem material.
- Privacy
  - Companies that collect, maintain, and/or access personal information should update disclosure regarding new state data protection laws and compliance programs in relation to such new laws, including the California Privacy Rights Act, effective on January 1, 2023; Colorado Privacy Act, effective on July 1, 2023; Connecticut Data Privacy Act, effective on July 1, 2023; Utah Consumer Privacy Act, effective December 31, 2023; and Virginia Consumer Data Protection Act, effective on January 1, 2023.

Part I, Item 1A – Risk Factors

- Market Conditions, Inflation and Rising Interest Rates
  - Companies should review their market-related risk factors to ensure that all risks are covered given the volatility of the global economy. Additionally, companies should review such risk factors to ensure that they include specific, as opposed to generic, risks to their business, results of operations, and liquidity. Underscoring this point, the SEC staff recently has been issuing comments on inflation-related risk factors, asking companies to revise them to be more specific to the company. In considering specific impacts that could be addressed, companies should consider enhanced risk of material impairments, inability to refinance debt, credit default triggers, loss of customers, etc.
- War in Ukraine
  - In a sample letter (here), the SEC requests companies to add a risk factor on cybersecurity to the extent material and disclose any new or heightened risk of potential cyberattacks by state actors or others since Russia's invasion of Ukraine and whether the company has taken actions to mitigate such risks.

- Regardless of whether companies have operations in Russia, Belarus, or Ukraine that warrant disclosure, companies may wish to disclose risks related to the increased risk of cyberattacks, increased or ongoing supply chain challenges, trade disruptions, energy shortages or rationing, volatility related to the trading prices of commodities, Russian sanctions, reputational impacts, and the ongoing impacts of the conflict on the global economic condition.

- Cybersecurity
  - As public companies contend with increasingly sophisticated and frequent cybersecurity incidents, disclosure of actual or potential cybersecurity risks has become increasingly important to both regulators and investors. In March 2022, the SEC released proposed amendments (here) to its rules to enhance and standardize public company disclosures related to cybersecurity risk management, strategy, governance, and reporting. The proposal would require, among other things, periodic reporting about: a registrant's policies and procedures to identify and manage cybersecurity risks; the registrant's board of directors' oversight of cybersecurity risk; and management's role and expertise in assessing and managing cybersecurity risk and implementing cybersecurity policies and procedures. The proposal would further require annual reporting or certain proxy disclosure about the board of directors' cybersecurity expertise, if any.
  - These proposed mandatory disclosures heighten the focus on companies' cybersecurity practices. Companies should consider updating their existing cybersecurity disclosures, particularly, as discussed above, as they relate to the ongoing war in Ukraine.

- COVID-19
  - With the COVID-19 pandemic entering its third year, companies may wish to update their existing COVID-19 risk factor disclosures. Although the COVID-19 pandemic has had an extensive impact on virtually all aspects of business and society, companies may wish to re-focus their risk factor disclosures on relevant COVID-related risks going forward. Such risks include, but are not limited to, supply chain disruptions, inflation in the supply chain, partial business lockdowns in suppliers' markets, cybersecurity risks stemming from the increase in remote work arrangements, and the hybrid schedule approach to the reopening of offices.

- Regulatory
  - Changes in law, regulation, and/or policy may necessitate updates to existing regulatory risk factors. Among other regulations, companies should assess and consider disclosing the impact of the 2022 Inflation Reduction Act and other new or updated regulations on the company's business, finances, and results of operations. The corporate tax provisions of the Inflation Reduction Act include, but are not limited to, the creation of a 15% corporate alternative minimum tax (applicable to companies with an average adjusted financial statement income over $1 billion for the past three years) equal to the excess of 15% of a corporation's adjusted financial statement income, and a 1% excise tax on certain stock repurchases. Consider how new tax laws may impact your company and the potential impact it may have on the company's workforce, cash management, supply chain, and deal activity.

- ESG
  - In recent years, the SEC, investors, customers, lenders, and other stakeholders have placed increasing emphasis on corporate ESG practices, particularly companies' responses to climate change. In recent months, the SEC has focused the vast majority of its risk factor comments on climate change. Many companies have already began to disclose risks related to the effects of climate change, including from policy and regulatory changes that could impose additional compliance burdens, and litigation risks related to climate change. Companies should ensure that such disclosures are sufficiently tailored to the company's business and financial conditions and identify the risks with specificity.

- In recent comment letters, the SEC staff has continued to issue comments gleaned from the sample comment letter to companies released by the SEC staff in September 2021 (here). For example, the SEC staff has called upon companies to address the following climate change-related risks:
  - If material: (i) the physical impact of climate change on the company's operations and results (with examples such as severity of weather; quantification of property damage; customer impact; and availability of insurance); (ii) the indirect consequences of climate-related regulation or business trends, such as decreased demand for goods or services that produce significant GHG, increased demand for goods that result in lower emissions, increased competition to develop innovative new products, increased demand for alternative energy sources, and anticipated reputational risks; and (iii) specific effects of evolving investor sentiment related to the use of fossil fuels.
- In addition, companies may want to include additional disclosures related to the increased cost of compliance with current and new legal and regulatory requirements, the cost of voluntary disclosures, the interpretation or application of disclosure frameworks, and the ability of companies to meet the expectations of investors, regulators, and other stakeholders.
- Many companies have publicly established and announced climate-related goals, commitments, and targets. If companies are unable to meet these targets, they may face operational, regulatory, reputational, financial, legal, and other risks, which may have a material adverse impact on the company's reputation and stock price. Such risks include reputational harm, inability to retain customers or employees, inability to access certain types of capital, and unfavorable investor sentiment. Companies should also ensure that they have adequate internal controls for the monitoring and reporting of ESG data, and should properly disclose risks related to the data collection process itself.
- In its Spotlight on Enforcement Task Force Focused on Climate and ESG Issues (here), the SEC identifies enforcement cases including alleged material gaps or misstatements in companies' disclosure of climate risks under existing rules. For example, in September 2022, the SEC settled charges against Compass Minerals International for misleading investors about, among other things, failing to analyze the potential financial consequences of its environmental contamination.

- Trade Sanctions
  - Companies should disclose material risks related to business dealings with suppliers located in regions subject to financial and/or trade sanctions, or tightened controls relating to exports. Given recent SEC attention on the impact of trade sanctions, companies with suppliers located outside of the U.S. should disclose whether they directly or indirectly import any supplies from the Xinjiang region of China, and if so, discuss the material impact of the recently enacted Uyghur Forced Labor Prevention Act (UFLPA) on the company's ability to obtain supplies and customer orders. Companies should discuss any efforts taken to mitigate such impacts and, where possible, quantify the impact to the business.
  - Industry-wide, and even global, risks are disclosable to the extent that they may, if realized, have a material adverse impact on your company. Explain these risks with specificity and describe the material effect of the risk on the company's business; do not use boilerplate or include mitigating language in the risk-factor section. If you want to explain how your company manages and mitigates a particular risk, use the MD&A. As discussed in Item 8 below, material risks tied to incentive compensation – for both executive and non-executive employees – will have to be addressed in the 2023 proxy statement.
- China
  - In response to increased geopolitical tensions between the U.S. and China, companies should consider addressing any related risk. This is especially important for U.S. issuers doing business in China, however, the implications of the relationship between the two countries should be addressed if applicable to other companies too. Some risks include the imposition of additional taxes or tariffs, trade embargos, sanctions,

export or other restrictions on foreign trade, the impacts of the Personal Information Protection Law (PIPL), and currency controls in China.

- Consider whether the political and economic instability including the disputes between China and Taiwan need to be addressed as well. For technology companies, Taiwan may be a central hub and instability may slow the supply chain.

Part II, Item 7 – Management's Discussion and Analysis ("MD&A")

Non-GAAP Financial Measures

- The SEC staff continues to issue a significant number of comments on MD&A, especially use of non-GAAP financial measures. In particular, the SEC staff continues to ask about the appropriateness of adjusting out recurring items from GAAP measures. See the Compliance & Disclosure Interpretations ("CDI") on non-GAAP financial measures (here). On December 13, 2022, the SEC released seven additional CDIs on Non-GAAP adjustments. Here is our full alert explaining the implications of the new CDIs. A discussion of the significant changes is provided below.
  - Question 100.01 notes that certain adjustments, although not expressly prohibited, may violate Rule 100(b) of Regulation G because they cause the presentation of the non-GAAP measure to be misleading. For example, presenting a non-GAAP performance measure that excludes normal, recurring, cash operating expenses necessary to operate a registrant's business could be misleading. The SEC staff embellished that when evaluating what is a normal, operating expense, the staff considers the nature and effect of the non-GAAP adjustment and how it relates to the company's operations, revenue generating activities, business strategy, industry and regulatory environment. Furthermore, the staff would view an operating expense that occurs repeatedly or occasionally, including at irregular intervals, as recurring.
  - Question 100.04 has been reframed to more broadly address the concept of "individually tailored" measures. A non-GAAP measure can violate Rule 100(b) of Regulation G if the recognition and measurement principles used to calculate the measurement are inconsistent with GAAP. By definition, a non-GAAP measure excludes or includes amounts from the most directly comparable GAAP measure. However, if a non-GAAP adjustment has the effect of changing the recognition and measurement principles required to be applied in accordance with GAAP, it would be considered individually tailored and may cause the presentation of a non-GAAP measure to be misleading. This updated CDI provides the following examples of adjustments that the staff may consider to be misleading:
    - changing the pattern of recognition, such as including an adjustment in a non-GAAP performance measure to accelerate revenue recognized ratably over time in accordance with GAAP as though revenue was earned when customers were billed;
    - presenting a non-GAAP measure of revenue that deducts transaction costs as if the company acted as an agent in the transaction, when gross presentation as a principal is required by GAAP, or the inverse, presenting a measure of revenue on a gross basis when net presentation is required by GAAP; and
    - changing the basis of accounting for revenue or expenses in a non-GAAP performance measure from an accrual basis in accordance with GAAP to a cash basis.
  - Question 100.05 is a new CDI, which notes that non-GAAP measures are not always consistent across, or comparable with, non-GAAP measures disclosed by other companies and therefore, without an appropriate label and clear description, may be considered misleading to investors. The following examples are provided of non-GAAP measures that would violate Rule 100(b) of Regulation G:
    - Failure to identify and describe a measure as non-GAAP.
    - Presenting a non-GAAP measure with a label that does not reflect the nature of the non-GAAP measure, such as:

Weil

- a contribution margin that is calculated as GAAP revenue less certain expenses, labeled "net revenue";
- a non-GAAP measure labeled the same as a GAAP line item or subtotal even though it is calculated differently than the similarly labeled GAAP measure, such as "Gross Profit" or "Sales"; and
- a non-GAAP measure labeled "pro forma" that is not calculated in a manner consistent with the pro forma requirements in Article 11 of Regulation S-X.

- Question 100.06 is a new CDI and confirms that a non-GAAP financial measure could be misleading to such a degree that even extensive, detailed disclosure about the nature and effect of each adjustment would not prevent the non-GAAP measure from being materially misleading. This CDI does not provide any examples from which to draw from in terms of what the SEC staff would find to be so misleading.
- Question 102.10 has always addressed the need for GAAP measures to be equally or more prominent than non-GAAP financial measures, but the CDI question is now divided into parts (a) through (c), with additions and revisions as follows:
  - Question 102.10(a) clarifies that the prominence requirement applies not only to the presentation of a non-GAAP measure but also to any related discussion and analysis. The staff made clear that a non-GAAP income statement would be too prominent anywhere it appears. While not new requirements, the staff also added two new or expanded examples of non-GAAP measures that are more prominent than the comparable GAAP measure:
    - Presenting a ratio where a non-GAAP financial measure is the numerator and/or denominator without also presenting the ratio calculated using the most directly comparable GAAP measure(s) with equal or greater prominence.
    - Presenting charts, tables or graphs of a non-GAAP financial measures without presenting charts, tables or graphs of the comparable GAAP measures with equal or greater prominence, or omitting the comparable GAAP measures altogether.
  - Question 102.10(b) addresses undue prominence in the non-GAAP reconciliation, including a non-GAAP income statement and a new reference to starting the reconciliation with a non-GAAP measure. With respect to exclusion of a quantitative reconciliation for a forward-looking non-GAAP measure in reliance on the exception provided in the rule, the non-GAAP measure would be considered unduly prominent if it is presented without disclosing reliance upon the exception, identifying the information that is unavailable, and its probable significance in a location of equal or greater prominence.
  - Question 102.10(c) notes that the SEC staff considers a non-GAAP income statement to be one that is comprised of non-GAAP measures and includes all or most of the line items and subtotals found in a GAAP income statement.

Continued Focus on the "A" in MD&A

- MD&A continues to be one of the top areas of focus of SEC comment letters, including, according to PWC (here), (1) noting a trend or significant increase or decrease year-over-year in amounts without an explanation in MD&A; (2) quantifying offsetting factors that are mentioned with respect to a particular line item; (3) quantifying the most significant factor contributing to a particular financial statement line item; (4) addressing trends or uncertainties discussed during the company's earnings calls; and (5) providing information necessary to assess the probability of future impairments.
  - Recent SEC comment letters remind companies, in preparing the Form 10-K, if there's a vast difference in metrics year-over-year, consider whether this is the result of a trend or uncertainty. Also, they also ask companies to disclose the quantification of key drivers impacting results of operations.

- Following the settlement of the SEC's enforcement action against NVIDIA Corporation (here) this past spring, companies should be reminded of the importance of each element of Item 303 of Regulation S-K. NVIDIA reported material growth in revenue of its gaming business but did not disclose that a significant portion of such growth was due to a volatile business, cryptocurrency mining. As a result, the SEC concluded that NVIDIA failed to thoroughly disclose "material changes in the registrant's results of operations" and "identify any significant elements of the registrant's income or loss from continuing operations which do not arise from or are not necessarily representative of the registrant's ongoing business." The 2003 MD&A interpretive release (here) notes that "if events and transactions reported in the financial statements reflect material unusual or non-recurring items, aberrations, or other significant fluctuations, companies should consider the extent of variability in earnings and cash flow, and provide disclosure where necessary for investors to ascertain the likelihood that past performance is indicative of future performance."
- The SEC staff sample comment letter (here) to companies regarding disclosures pertaining to Russia's invasion of Ukraine and related supply chain issues included the following with respect to MD&A:
  - Please disclose any known trends or uncertainties that have had or are reasonably likely to have a material impact on your cash flows, liquidity, capital resources, cash requirements, financial position, or results of operations arising from, related to, or caused by the global disruption from, Russia's invasion of Ukraine. Trends or uncertainties may include impairments of financial assets or long-lived assets; declines in the value of inventory, investments, or recoverability of deferred tax assets; the collectability of consideration related to contracts with customers; and modification of contracts with customers.
  - Please enhance your critical accounting estimate disclosures related to impairment of assets, valuation of inventory, allowance for bad debt, deferred tax asset valuation allowance, or revenue recognition, as applicable, with both qualitative and quantitative information, to the extent the information is material and reasonably available, that addresses the following:
    - Why the critical accounting estimate is subject to uncertainty, including any new uncertainties related to the estimate, such as the asset, customer, or supplier is located in or reliant upon business(es) or operations in Russia/Belarus/Ukraine;
    - The method used to develop the estimate and the significant assumptions underlying its calculation, such as discounted cash flow and the discount rate assumption;
    - The degree to which the estimate and the underlying significant assumptions have changed over the current period or since the last assessment, including due to effects of changing prices, changes in exchange rates, changes in estimated cash flows due to loss of operations, etc.; and
    - The sensitivity of the reported amount to the method and assumptions underlying its calculation. For example, if the cash flow estimates used were based on assumptions about the invasion or sanctions and those assumptions could significantly impact the estimate, then that should be disclosed along with how sensitive the estimate is to changes in those assumptions.
  - Disclose any material impact of import or export bans resulting from Russia's invasion of Ukraine on any products or commodities, including energy from Russia, used in your business, or sold by you. Disclose the current and anticipated impact on your business, taking into account the availability of materials, cost of needed materials, costs and risks associated with transportation in your business, and the impact on margins and on your customers.
  - Please disclose whether and how your business segments, products, lines of service, projects, or operations are materially impacted by supply chain disruptions, especially in light of Russia's invasion of Ukraine. For example, discuss whether you have or expect to:
    - suspend the production, purchase, sale, or maintenance of certain items;

    - experience higher costs due to constrained capacity or increased commodity prices or challenges sourcing materials (e.g., nickel, palladium, neon, cobalt, iron, platinum or other raw material sourced from Russia, Belarus, or Ukraine);
    - experience surges or declines in consumer demand for which you are unable to adequately adjust your supply;
    - be unable to supply products at competitive prices or at all due to export restrictions, sanctions, or the ongoing invasion; or
    - be exposed to supply chain risk in light of Russia's invasion of Ukraine and/or related geopolitical tension or have sought to "de-globalize" your supply chain.
  - Explain whether and how you have undertaken efforts to mitigate the impact and where possible quantify the impact to your business.

Part II, Item 8 – Financial Statements and Supplementary Data

- The SEC has shown renewed focus on disclosure of loss contingencies. In September 2022, the SEC charged Spyr (here) for failing to disclose to its auditors a loss contingency relating to an ongoing SEC investigation into the company's investment in a biotechnology company, and the CEO and CFO for signing a Form 10-K and Form 10-Q without disclosure of the loss contingency.
- In preparing your Form 10-K, it is important that investors are provided with high quality, well-reasoned, holistic, and objective financial information. In his statement on *Assessing Materiality* (here), SEC Chief Accountant Paul Munter reminds companies to assess materiality "through the lens of the reasonable investors." While the focus of his speech was evaluating errors, he provided helpful guidance to prevent errors in financial statements and the need for restatements: when determining what is material, companies should "evaluate the total mix of information," including both quantitative and qualitative factors, with an emphasis on qualitative factors that often go unrecognized. He also notes that the staff is often involved in discussions where a company argues that a quantitatively significant error is nevertheless immaterial because of qualitative considerations. He states that the SEC staff "believes, however, that as the quantitative magnitude of the error increases, it becomes increasingly difficult for qualitative factors to overcome the quantitative significance of the error."
  - On the Horizon: Restatements Covered by Clawbacks
    - As discussed above, the final incentive compensation clawback rule covers both "Big R" restatements, which stems from an error was material to previously issued financial statements (requiring a company to file an Item 4.02 Form 8-K); and "little r" restatements, which corrects errors that were not material to previously issued financial statements but that would result in a material misstatement in the current period if (i) the error was left uncorrected in the current period, or (ii) the correction of the error was recognized only in the current period.
    - Certain retrospective accounting changes to an issuer's financial statements do not trigger compensation recovery under the rules, including: (i) application of a change in accounting principle; (ii) revisions to reportable segment information due to a change in the structure of an issuer's internal organization; (iii) reclassification due to a discontinued operation; (iv) application of a change in reporting entity, such as from a reorganization of entities under common control; and (v) revisions for stock splits, reverse stock splits, stock dividends or other changes in capital structure, etc. Furthermore, an "out-of-period adjustment" (i.e., when the error is immaterial to the previously issued financial statements and the correction of the error is immaterial to the current period) should not trigger a clawback analysis under the rules because it is not an "accounting restatement."

- On the Horizon: FASB Considering Changes to Segment Reporting
  - On October 6, 2022, the Financial Accounting Standards Board (FASB) issued proposed Accounting Standards Update (ASU), Segment Reporting (Topic 280): Improvements to Reportable Segment Disclosures. Stakeholders are asked to review and provide comment on the proposed ASU by December 20, 2022. The proposed ASU includes enhanced segment disclosures, such as significant segment expenses, an amount for other segment expenses, interim segment disclosure similar to 10-K disclosure required by Topic 280, codification of positions regarding additional measures of segment profit or loss, and a requirement for certain disclosures when there is only a single reportable segment.

Part II, Item 9A – Controls and Procedures

- ESG
  - As companies increase their ESG disclosure, it is important to make sure that there are disclosure controls and procedures and internal controls in place to ensure the transparency and accuracy of the data. While difficult to ensure third-party supplier data, companies are requesting assurances and turning to their audit and finance teams to assist in ESG disclosure. Some companies are applying similar controls that they use for Sarbanes-Oxley Section 404 assessment of internal control over financial reporting for oversight of ESG data.
- War in Ukraine
  - In the sample letter discussed above on the war in Ukraine (here), the SEC included the following regarding disclosure controls and procedures and internal control over financial reporting, respectively:
    - Based on your disclosures, it appears that you may have had changes in or issues that arose impacting the effectiveness of your disclosure controls and procedures due to Russia's invasion of Ukraine and/or supply chain disruptions. Please tell us the impact of Russia's invasion of Ukraine on your design of disclosure controls and procedures and its impact on your conclusion of their effectiveness as of the end of the reporting period.
    - Based on your disclosures, it appears that you may have had changes to your internal controls as a result of Russia's invasion of Ukraine and/or supply chain disruptions. Please disclose any changes in your internal control over financial reporting identified in connection with your evaluation that occurred during the last fiscal quarter (or your fourth fiscal quarter in the case of an annual report) that has materially affected or is reasonably likely to materially affect your internal controls over financial reporting. See Item 308(c) of Regulation S-K.

Required EDGAR Submission of "Glossy" Annual Reports to Shareholders and 10-K "Wraps"

Beginning January 11, 2023, companies are required to submit electronically through EDGAR their annual report to shareholders used to satisfy the requirements of Rule 14a-3(c), which are required to accompany or precede their proxy statements (colloquially referred to by the SEC as "glossy" annual reports). According to the SEC, glossy annual reports should not be re-formatted, re-sized, or otherwise redesigned for purposes of the submission on EDGAR. Currently, the only format that EDGAR supports is PDF. The formal EDGAR submission uses the Form Type "ARS." The ARS will be considered "furnished" and not "filed," meaning that the report will not automatically be incorporated by reference into other SEC filings and does not also carry Section 18 liability that attaches to SEC filings. Notwithstanding the requirement to submit through EDGAR, companies will continue to be obligated, pursuant to proxy rule 14a-16(b) (Internet Availability of Proxy Materials/Notice and Access), to post their glossy annual report on a website other than the SEC's website. Additionally, electronically submitted annual reports also may be required for companies filing information statements or for companies filing Form 10-K pursuant to Section 15(d) that do not have securities registered under Section 12 of the Exchange Act.

* * *

Weil

If you have questions concerning the contents of this alert, or would like more information about Weil's Public Company Advisory Group, please speak to your regular contact at Weil.

Howard Dicker	View Bio	howard.dicker@weil.com	+1 212 310 8858
Lyuba Goltser	View Bio	lyuba.goltser@weil.com	+1 212 310 8048
Kaitlin Descovich	View Bio	kaitlin.descovich@weil.com	+1 202 682 7154
Catherine Dixon	View Bio	catherine.dixon@weil.com	+1 202 682 7147
Adé Heyliger	View Bio	ade.heyliger@weil.com	+1 202 682 7095
P.J. Himelfarb	View Bio	pj.himelfarb@weil.com	+1 202 682 7208
Alicia Alterbaum	View Bio	alicia.alterbaum@weil.com	+1 212 310 8207
Steven Bentsianov	View Bio	steven.bentsianov@weil.com	+1 212 310 8928
Rachel Alpert	View Bio	rachel.alpert@weil.com	+1 212 310 8061
Shira Barron	View Bio	shira.barron@weil.com	+1 212 310 8336
Bianca Lazar	View Bio	bianca.lazar@weil.com	+1 212 310 8748
Julie Rong	View Bio	julie.rong@weil.com	+1 212 310 8201
Eleni Samara	View Bio	eleni.samara@weil.com	+1 212 310 8617

© 2023 Weil, Gotshal & Manges LLP. All rights reserved. Quotation with attribution is permitted. This publication provides general information and should not be used or taken as legal advice for specific situations that depend on the evaluation of precise factual circumstances. The views expressed in these articles reflect those of the authors and not necessarily the views of Weil, Gotshal & Manges LLP. If you would like to add a colleague to our mailing list, please click here. If you need to change or remove your name from our mailing list, send an email to weil.alerts@weil.com.