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## Public Company Update

# Things to Keep in Mind for the 2024 10-K Season

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As we head into year-end, annual reporting season is just around the corner. Over the past twelve months, the U.S. Securities and Exchange Commission (the “SEC”) has been active on the rulemaking front, resulting in numerous new disclosure obligations for issuers during the 2024 annual reporting season. Public companies should be aware of the new disclosures required and should build time into their reporting calendars to prepare, review and tag the disclosures.

### Applicable Deadlines

The below Form 10-K filing deadlines are applicable for calendar year-end companies:

Filer Status	Due Date
Large Accelerated Filer	Thursday, February 29, 2024
Accelerated Filer	Friday, March 15, 2024
Non-Accelerated Filer	Monday, April 1, 2024

### New Disclosures

The new disclosure obligations implicated in 2024 Form 10-K season are as follows:

Topic	Relevant Rule	Form 10-K Section Impacted
Cybersecurity and Risk Governance	Item 106 of Regulation S-K	Part I, Item 1C
Share Repurchase Modernization <sup>1</sup>	Item 703 of Regulation S-K Item 601(b)(26) of Regulation S-K	Part II, Item 5(c) Part IV, Item 15 – New Exhibit 26

<sup>1</sup> On October 31, 2023, in [Chamber of Commerce v. the SEC](#), the Fifth Circuit Court of Appeals held that the SEC “acted arbitrarily and capriciously” and in violation of the Administrative Procedure Act when it adopted the final share repurchase rules without addressing the contents of the petitioner’s SEC comment letter, which provided guidance on how the SEC could quantify the economic impact of the proposed rule, and subsequently “failed to conduct a proper cost-benefit analysis” regarding the new rules. Pursuant to the order, the final rules have not been invalidated; instead, the SEC was given thirty days to address defects in the rules. The court

Insider Trading	Item 408(a) of Regulation S-K Item 408(d) of Regulation S-K <sup>2</sup>	Part II, Item 9B
Compensation Clawbacks	Item 402(w) of Regulation S-K Item 601(b)(97) of Regulation S-K Nasdaq Rule 5608 NYSE Listed Company Manual Section 303A.14	Cover Page Part IV, Item 15 – New Exhibit 97

## Cybersecurity and Risk Governance

The new rules enhancing and standardizing disclosure regarding cybersecurity risk management, strategy, governance and incident-reporting, include new Item 106 of Regulation S-K. All Form 10-Ks for fiscal years ending on or after December 15, 2023 will be required to provide Item 106 disclosures in response to Part I Item 1C. Cybersecurity.

Pursuant to Item 106, issuers will need to provide disclosure regarding their (1) risk management and strategy related to cybersecurity risk and (2) governance related to cybersecurity risk-oversight.

### *Governance*

Issuers must provide (1) a description of their board of director's role in the oversight of risk stemming from cybersecurity threats, including whether the responsibility has been delegated to a committee or sub-committee, and (2) a description of management's role and expertise in handling material cybersecurity risks. Item 106(c)(2) includes a non-exhaustive list of items issuers should include in their disclosures regarding management's role, namely a description of (1) management's reporting procedures to the board or committee, (2) the overall risk identification, monitoring, mitigation and remediation process and (3) the positions or committees within management responsible for managing cybersecurity threats and the relevant individuals' applicable experience.

### *Risk Management and Strategy*

Issuers must disclose their processes for identifying, assessing and managing material risks from cybersecurity threats, including how their process is integrated into the issuer's overall risk management system, whether any third-parties are utilized and, if so, what processes are in place to oversee cybersecurity risk stemming from the use of a third-party provider.

Furthermore, issuers must describe the material affects or reasonably likely material affects prior cybersecurity incidents have had on the issuer, including its financial condition, business strategy and results of operations.

### *Structured Data Requirement*

Item 106 disclosure must be tagged in Inline XBRL; however, issuers need not comply with this requirement until their Form 10-Ks for fiscal years ending on or after December 15, 2024 (i.e., next year's Form 10-K).

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retains jurisdiction to review the SEC's response and could still invalidate the rules. On November 22, 2024, the SEC stayed the effectiveness of the new share repurchase rules pending further action. In the meantime, the current rules remain in place.

<sup>2</sup> Item 408(d) of Regulation S-K was introduced with the Share Repurchase Amendments, but is covered here under "Insider Trading" for consistency purposes.

## Share Repurchase Modernization

The recent share repurchase amendments were set to go in effect as of an issuer's first filing that covers the first full fiscal quarter beginning on or after October 1, 2023, meaning that calendar year-end issuers were set to include such disclosure in this year's Form 10-K. However, on October 31, 2023, in *Chamber of Commerce v. the SEC*, the Fifth Circuit Court of Appeals held that the SEC "acted arbitrarily and capriciously" and in violation of the Administrative Procedure Act when it adopted the final share repurchase rules without addressing the contents of the petitioner's SEC comment letter, which provided guidance on how the SEC could quantify the economic impact of the proposed rules, and subsequently "failed to conduct a proper cost-benefit analysis" regarding the new rules. Pursuant to the order, the final rules have not been invalidated; instead, the SEC was given thirty days to address defects in the rules. The court retains jurisdiction to review the SEC's response and could still invalidate the rules.

On November 22, 2024, the SEC stayed the effectiveness of the new share repurchase rules pending further action. It is unclear when the SEC will remove the stay on the rules' effectiveness. In the meantime, the current rules remain in place. The below guidance will apply once the SEC removes the stay. We will update the guidance to the extent that the SEC further amends the rules in connection with the order.

### *Fourth Quarter Share Repurchase*

The share repurchase amendments adjust and expand upon issuer's quarterly share repurchase disclosures pursuant to Item 703 of Regulation S-K. The monthly repurchase table that was previously required to be disclosed under Item 703 was eliminated and replaced by a daily repurchase table filed as new Exhibit 26. The information previously required to be provided via footnote to the monthly repurchase table will now be required in the narrative discussion required by Item 703. In addition, issuers will be required to provide new narrative discussion of (i) their objectives or rationales behind each share repurchase plan or program and process and the criteria utilized in order to set the amount of repurchases, and (ii) their policies and procedures related to officers' and directors' transactions in issuer securities concurrent with a repurchase program (including any restrictions thereof). While technically not required, we think it is helpful to include negative disclosure in response to Item 703, even if a company has not made any repurchases during the fourth quarter.

### *Tabular Exhibit*

Pursuant to Item 601(b)(26) of Regulation S-K, issuers must file new Exhibit 26 with their Form 10-K. Our view is that if there were no repurchases made by the company in the fourth quarter, Exhibit 26 can be omitted from the Form 10-K. Exhibit 26 includes quantitative tabular disclosure of all repurchases made by or on behalf of the issuer during the fourth quarter. Specifically, the table requires the following disclosure for each day on which a share repurchase was executed by or on behalf of the issuer or any affiliated purchaser of shares (or other units) of any class of the issuer's registered equity securities:

- the execution date for the share repurchase;
- the class of shares, even if only one class is outstanding;
- the total number of shares purchased, either pursuant to a publicly announced plan or otherwise;
- the average price paid per share, exclusive of commissions or execution costs;
- the total number of shares purchased as part of publicly announced plans;
- the aggregate maximum number of shares, or approximate dollar value, that could in the future be purchased under the publicly announced plans;
- the total number of shares purchased on the open market;
- the total number of shares purchased pursuant to a Rule 10b-18 plan; and

- the total number of shares purchased pursuant to a 10b5-1 plan.

Furthermore, Item 601(b)(26) calls for checkbox disclosure above the repurchase data table indicating whether any Section 16 officer or director purchased or sold shares of the issuer's equity securities that are the subject of a share repurchase plan in the four business days preceding and following the announcement of the share repurchase plan or any expansion thereof. Issuers can rely on a Section 16 reporting person's disclosures on Forms 3, 4 and 5 or on a written representation from the reporting person to determine whether or not to check the box, unless they know or have reason to believe there is a discrepancy with the reports.

#### *Structured Data Requirement*

Item 703 and Item 601(b)(26) disclosure must be tagged in Inline XBRL, with no delayed compliance available.

### **Insider Trading**

#### *Quarterly Director / Officer Disclosure*

By now, most calendar year-end issuers should be accustomed to including new Item 408(a) of Regulation S-K disclosure in their Form 10-Qs, regarding whether any of their officers or directors have adopted, terminated or modified any trading arrangements intending to qualify for the affirmative defense conditions of Rule 10b5-1(c) (i.e., Rule 10b5-1 plans) or "non-Rule 10b5-1 trading arrangements" (as defined by new Item 408(c)) of Regulation S-K during the last quarter. Disclosure pursuant to Item 408(a) is required in an issuer's Form 10-K regarding adoptions, modifications and terminations made during the fourth quarter. This will be the first filing smaller reporting companies are required to include the disclosure because the delayed compliance period has now passed.

As a reminder, modified plans are treated as the termination of the existing plan and adoption of a new plan. If any officers or directors adopted, terminated or modified any such trading arrangements, then the issuer's Form 10-K must include disclosure (other than pricing information) regarding the material terms of the trading arrangement. Even if there were no trading arrangements triggering Form 10-K disclosure obligations during the quarter, we recommend issuers include language indicating as such in their Form 10-K filings as a best practice.

#### *Quarterly Issuer Disclosure (Item 408(d))*

The parallel disclosure for issuers required by Item 408(d) of Regulation S-K regarding issuers' adoption, termination or modification of Rule 10b5-1 trading plans must be included in Form 10-Ks for adoptions, terminations or modifications made during the fourth quarter.

#### *Next Year*

Item 408(b) of Regulation S-K requires issuers to disclose whether they have adopted insider trading policies and procedures and to file their insider trading policy as new Exhibit 19. If the issuer has not adopted insider trading policies and procedures, it must provide disclosure explaining why it has not. This disclosure will not be required until next year's Form 10-K. Since this rule was included within the recent share repurchase amendments, effectiveness is currently stayed.

*Structured Data Requirement*

Item 408(a) and 408(d) disclosures must be tagged in Inline XBRL.

**Compensation Clawbacks***Checkbox Disclosure*

Issuers must include and respond to the two checkbox disclosures added to Form 10-K as part of the clawback rules. The first asks whether the Form 10-K contains financial statements reflecting a correction of an error to previously issued financial statements and the second asks whether any of the corrections are restatements requiring a recovery analysis of incentive-based compensation pursuant to the clawback rules.

*Exhibit*

Issuers must file as new Exhibit 97 their policy relating to recovery of erroneously awarded compensation that is compliant with the relevant NYSE / Nasdaq listing standards, as applicable.

*Narrative*

Item 402(w) of Regulation S-K requires narrative disclosure related to actions taken pursuant to an issuer's clawback policy if a recovery of compensation is triggered as a result of a restatement. This disclosure is required to be included in issuers' Form 10-K or incorporated by reference therein via a timely filed definitive proxy statement.

Generally, issuers will need to describe how they applied their policy, amounts of erroneously awarded compensation, any estimates utilized in the recovery analysis, outstanding amounts to be recovered, and any impracticability determinations. Notably, Item 402(w) disclosures will not be deemed incorporated by reference into Securities Act of 1933 filings unless expressly incorporated at the issuer's discretion. In addition, a new instruction has been added to the Summary Compensation Table regarding disclosure of any amount of erroneously paid compensation recovered.

*Structured Data Requirement*

Item 402(w) disclosure must be tagged in Inline XBRL.

**Trending Disclosure Considerations**

As part of their year-end review, issuers should be considering whether any updates to their risk factor disclosure, forward-looking statement disclaimer or other forward-looking disclosure, MD&A, or business section are needed.

For the fiscal year ending December 31, 2023, issuers should keep in mind the following pertinent matters, and flow any necessary changes in disclosure throughout their Form 10-K:

- Current geopolitical conditions, including the Israel-Hamas War, the ongoing Russia-Ukraine War and conflict between China and Taiwan;
- Effects of sustained high interest rates and inflation on the financial and capital markets and related implications on the issuer's ability to borrow funds or refinance existing indebtedness;

- Choppiness in the capital markets and potential impacts on the issuer's ability to raise funds in the public or private markets;
- Downgrading of the United States' credit rating, and the issuer's preparedness to manage the related political risk;
- Risks related to the upcoming U.S. presidential election;
- Lingering impacts of the turmoil in the banking and financial services sector;
- Continued evolution and use of machine learning and generative AI, including risks arising from insufficient human oversight of AI or a lack of controls and procedures monitoring the use of AI in day-to-day operations as well as from potential future competitive disadvantages related to a lack of investment in AI tools;
- Effects stemming from long-term reliance on hybrid work arrangements, including impacts on productivity and profitability, as well as on operating expenses and overhead costs and / or risks related to return to office programs, including their impact on workforce retention and issues stemming from non-compliance;
- Climate-related or natural disaster-related events like increases in the cost of insurance coverage for entities with operations in high fire, hurricane or flood risk areas;
- ESG-related matters, including the pending SEC rules on climate-related disclosures and the new International Financial Reporting Standards sustainability and climate-related disclosure standards;
- Effects of any potential federal government shutdown (if applicable); and
- Impacts on the issuer's supply or distribution chains related to the above factors or otherwise.

Issuers should also consider industry-specific and geography-specific developments, for example:

- Issuers in the entertainment and media space should consider the impacts related to the recently resolved SAG-AFTRA and WGA strikes;
- Issuers in the transportation industry should consider the financial and other impacts stemming from the United Auto Workers strike and related salary increases;
- Issuers in the residential real estate space should consider the impacts of the challenging housing market;
- Issuers that do business in California should consider the potential effects of recently adopted Senate Bill 253, the Climate Corporate Data Accountability Act and Senate Bill 261, Greenhouse Gases: Climate-Related Financial Risk and the issuer's ability to prepare the required disclosures; and
- Issuers in the banking industry should review their liquidity disclosures in their MD&A and their interest rate risk and sensitivity disclosures in their Quantitative and Qualitative Disclosures About Market Risk in light of the Division of Corporation Finance's focus on these disclosures coming out of the bank failures earlier this year.

## Other Things to Keep in Mind

### *SEC Sample Comment Letter on XBRL Disclosures*

In September 2023, the SEC's Division of Corporation Finance issued a sample comment letter regarding issuers' XBRL disclosures, which includes comments focused on Item 405 of Regulation S-T, the 10-K/10-Q cover page, pay v. performance disclosure and financial statements. The comment letter is not a complete list of the XBRL-related comments an issuer might anticipate, but highlights the importance of compliance with the technical aspects of the SEC rules and the SEC's willingness to issue comment letters if disclosure is not properly tagged.

In their Form 10-Ks, issuers should rethink whether making period over period changes to the XBRL element used to tag a particular item are necessary as that could trigger an SEC comment. Any custom



tags utilized in favor of the XBRL element consistent with US GAAP should be justifiable. Furthermore, issuers should be sure to consistently present the number of shares of common stock outstanding between its cover page and its balance sheet (i.e., presenting a whole amount in one place and the same amount in thousands in the second should be avoided). Since many of the new disclosures include structured data requirements, issuers should build in ample time into their filing calendars to tag their disclosures.

#### *SEC Sample Comment Letter on China-Specific Disclosures*

In July 2023, the SEC's Division of Corporation Finance issued a sample comment letter regarding China-specific disclosures. In particular, to the extent that an issuer has operations, or works with third-parties who have operations, in the Xinjiang Uyghur Autonomous Region, the issuer should consider whether the Uyghur Forced Labor Prevention Act and its restriction on the importation of goods from the Xinjiang Uyghur Autonomous Region, has had a material impact on its operations, business segments, products or lines of services. If so, the material impacts should be described in the issuer's MD&A. Also, companies based in China or that have a majority of their operations in China should consider whether any risk factor disclosure may be appropriate regarding any material impacts that "intervention" or "control by" the People's Republic of China might have on the company or its securities.

#### *SEC C&DIs*

Over the past year, the SEC's Division of Corporation Finance has posted a number of C&DIs related to the newly enacted rules.

Topic	Date	Question	Location
<b>Insider Trading</b>	May 25, 2023	120.26	<a href="#">Exchange Act</a>
		120.27	
		120.28	
	August 25, 2023	120.29 120.30 120.31	<a href="#">Exchange Act</a>
	August 25, 2023	133A.01 133A.02	<a href="#">Regulation S-K</a>
<b>Clawbacks</b>	January 27, 2023	121H.01	<a href="#">Exchange Act</a>
		121H.02	
		121H.03	
		121H.04	

#### *Recent Form Changes Reminders*

Part I, Item 1C. Cybersecurity has been added and requires the disclosure of the matters required by new Item 106 of Regulation S-K.

Part II, Item 6 has been retitled "[Reserved]" (it was formerly Selected Financial Data) and the disclosure under the item should read "Not applicable."

Part II, Item 9C. Disclosure Regarding Foreign Jurisdictions that Prevent Inspections should be included, but given the Public Company Accounting Oversight Board's announcement that it "has secured complete access to inspect and investigate registered public accounting firms headquartered in mainland China and Hong Kong," we anticipate all issuers will provide disclosure indicating "Not applicable."

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*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:*

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