

Mid-Year SEC Update

Regulatory Trends and New Disclosures

2024 CFO Conference
Maryland, Virginia and West Virginia

August 22, 2024

Presented by:
Seth Winter & Adrianna ScheerCook

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Agenda

- **Climate Disclosure Rules**
- **Cybersecurity Developments**
- **Spring 2024 Regulatory Agenda**
 - Incentive-Based Compensation Arrangements
 - Financial Data Transparency Act Joint Rulemaking
 - Corporate Board Diversity
 - Human Capital Management Disclosures
- **SEC Comment Letter Trends**
 - Liquidity
 - Interest Rate Risk
 - Commercial Real Estate
 - Non-GAAP
- **Rule 14a-8 Developments and Trends**

Climate Disclosure Rules

SEC Climate Disclosure Rules

On March 6, 2024, the SEC approved final rules for standardized climate disclosure. Adopting release is 885 pages.

- The final rules require disclosure with respect to (among other items):
 - Impacts of climate-related risks on strategy, business model and outlook
 - Board and management oversight of climate-related risks
 - Risk management process
 - Scope 1 and Scope 2 emissions, including expert attestations for larger companies
 - ❖ ***Smaller reporting companies and emerging growth companies are exempt from Scope 1 and Scope 2 emissions disclosures***
 - Certain targets and goals for GHG emissions
- The final rules were largely consistent with the proposed rules, with two primary exceptions:
 - Disclosure of Scope 3 emissions ***is not required***.
 - Substantial reduction of the information required in financial statement footnotes re: the financial impacts of severe weather and other natural conditions, transition activities and mitigation expenditures.
- Complex phase-in timelines vary by disclosure and by issuer size.

Litigation Challenging SEC Climate Disclosure Rules

Immediately after the SEC issued the final climate disclosure rules, multiple parties filed petitions for review in various appellate courts. The Eighth Circuit was chosen on March 21, 2024 to hear all challenges to the final rules.

- All briefs have now been submitted, and oral arguments could occur before the end of 2024.

Before the case was consolidated and moved to the Eighth Circuit, the Fifth Circuit granted an administrative stay, which was lifted.

On April 4, 2024, the SEC “voluntarily” stayed its climate disclosure rules.

- The SEC stated that it “is not departing from its views that the Final Rules are consistent with applicable law” and that it “will continue vigorously defending the Final Rules’ validity in court.”

What does the SEC’s voluntary stay accomplish?

- The SEC maximizes its flexibility to defend the rules in court.
- The SEC indicated in a court filing that a new implementation period will be provided if the rules survive the challenge.

SEC Climate Disclosure Rules – Announced Implementation Timeline

Compliance Dates under the Final Rules ¹						
Registrant Type	Disclosure and Financial Statement Effects Audit		GHG Emissions/Assurance			Electronic Tagging
	<i>All Reg. S-K and S-X disclosures, other than as noted in this table</i>	<i>Item 1502(d)(2), Item 1502(e)(2), and Item 1504(c)(2)</i>	<i>Item 1505 (Scopes 1 and 2 GHG emissions)</i>	<i>Item 1506 - Limited Assurance</i>	<i>Item 1506 - Reasonable Assurance</i>	<i>Item 1508 - Inline XBRL tagging for subpart 1500²</i>
LAFs	FYB 2025	FYB 2026	FYB 2026	FYB 2029	FYB 2033	FYB 2026
AFs (other than SRCs and EGCs)	FYB 2026	FYB 2027	FYB 2028	FYB 2031	N/A	FYB 2026
SRCs, EGCs, and NAFs	FYB 2027	FYB 2028	N/A	N/A	N/A	FYB 2027
¹ As used in this chart, “FYB” refers to any fiscal year beginning in the calendar year listed. ² Financial statement disclosures under Article 14 will be required to be tagged in accordance with existing rules pertaining to the tagging of financial statements. See Rule 405(b)(1)(i) of Regulation S-T.						

SEC Climate Disclosure Rules – What To Do Now?

We recommend that publicly-traded banks continue preparing for climate disclosure rules.

We do not recommend going fully “pencils down” because:

- The outcome of the litigation against the climate disclosure rules is uncertain.
- We expect the SEC to continue to focus on climate disclosures in companies’ filings and may provide feedback in the form of comment letters – starting first with the largest issuers and higher-risk industries.
- We expect investor expectations regarding climate-related disclosures will continue to rise.
- Each company should continuously evaluate the importance of climate disclosures to its shareholders.

Effectively Preparing for Climate Disclosures

- **Governance** – Establish and define Board and management oversight responsibilities. Clearly define roles and responsibilities.
- **Data** – Inventory your company's climate-related information that has already been gathered or is available within the organization. Understand data structures, processes, and controls.
- **Identify and Address Gaps** – We expect each company to have gaps related to data, controls and reporting processes that would be needed for financial statement and other public disclosures. Address gaps with an eye to future disclosure controls testing and attestation requirements.
- **Action Plan** – Climate disclosure projects require a detailed action plan, in order to manage broad scope and cross-organizational requirements.
- **Resources** – Climate disclosures may require new skill and talent sets. Consider what external resources are required.

Cybersecurity Developments

SEC Cybersecurity Rules

On July 26, 2023, the SEC adopted final cybersecurity disclosure rules.

- Form 10-K
 - Processes for assessing, identifying and managing material risks from cybersecurity threats
 - Whether any risks from cybersecurity threats have materially affected or are reasonably likely to affect the company
 - Board's oversight of cybersecurity risks
 - Management's role in assessing and managing material cybersecurity risks
- First required for 10-Ks for fiscal years ending on or after December 15, 2023.

SEC Cybersecurity Rules

On July 26, 2023, the SEC adopted final cybersecurity disclosure rules. *(cont.)*

- Form 8-K – Item 1.05
 - Must disclose any “cybersecurity incident” determined to be material within 4 days of the materiality determination and describe:
 - The material aspects of the cybersecurity incident, including the nature, scope and timing
 - The material impact, or reasonably likely material impact, of the cybersecurity incident on the company, including its impact on financial condition and results of operations
 - Materiality determination must be made without “unreasonable delay after discovery of the incident.”
- First required beginning December 18, 2023.

SEC Comments on Form 8-K, Item 1.05 Disclosures – Focus on Materiality

We note the statement that you expect the cybersecurity incident will have a material impact on the fourth quarter of 2023 results of operations, but that you do not believe the incident will have a material impact on your overall financial condition or on your ongoing results of operations. Please advise us whether you filed this amended Form 8-K pursuant to Instruction 2 to Item 1.05 and confirm, if true, that you determined the incident was material to you under the standard in cases addressing the materiality under the securities laws, including *TSC Industries, Inc. v. Northway, Inc.* Additionally, please clarify in future filings any known material impact(s) that are likely to continue after the fourth quarter. In considering material impacts, please describe all material impacts. For example, consider customer relationships, potential reputational harm, and the impact due to exfiltrated data, whether or not from non-production systems.

We note that at the time of filing, the full scope, nature and impact of the unauthorized occurrences were not yet known. Additionally, while it had and was expected to be reasonably likely to continue to have a material impact on your business operations, you had not yet determined whether the incident is likely to materially impact your financial condition or results of operations. When you file your amended Form 8-K pursuant to Instruction 2 to Item 1.05 of Form 8-K, please also expand your disclosure to address the following items:

- expand your discussion to describe the scope of your business operations impacted; and
- describe the known material impact(s) the incident has had and the material impact(s) that are likely to continue.

In considering material impacts, please describe all material impacts. For example, consider vendor relationships and potential reputational harm related to stolen data and unfulfilled orders, as well as any impact to your financial condition or results of operations.

SEC Commentary on Cybersecurity Disclosures

On May 21, 2024, Erik Gerding (director of Division of Corporation Finance of the SEC) commented on Form 8-K, Item 105 disclosures:

- Item 1.05 disclosures should be limited to material cybersecurity incidents.
- Voluntary disclosure of cyber incidents, either immaterial or the company can't yet conclude materiality, should be made under Item 8.01 or elsewhere on Form 8-K
 - SEC still encourages voluntary disclosure
 - If a company subsequently determines that a voluntarily-disclosed incident is material, the company should file an Item 1.05 Form 8-K within 4 business days of such materiality determination.
- For a material incident, but with unknown actual (or reasonably likely) impacts, the company should disclose the incident under Item 1.05 and:
 - In initial filing, state that the company hasn't yet determined the incident's impact; and then
 - Subsequently amend Form 8-K to disclose the impact of the incident within 4 business days after the company determines such information or after that information becomes available.

SEC Enforcement Actions re: Cybersecurity Events

- SEC enforcement actions give us an opportunity learn from some early mistakes of others.
- The matters relating to these enforcement actions pre-date the SEC's updated cybersecurity disclosure rules.
- **Key Takeaways:**
 - The SEC is focused on disclosure and internal control failures related to cybersecurity incidents, including reviewing internal accounting controls in relation to cybersecurity incidents.
 - The SEC may take disclosures outside of Exchange Act reports into consideration when considering material misrepresentations related to cybersecurity protocols, including disclosures on a company's website.

SEC Cyber Enforcement (con't.)

R.R. Donnelley & Sons Co.

- On June 18, 2024, the SEC announced that it settled claims against R.R. Donnelley relating to disclosure and internal control failure charges relating to cybersecurity incidents and alerts in late 2021-early 2022.
- SEC alleged violations of Section 13a-15(a) of the Exchange Act (disclosure controls) and Section 13(b)(2)(B) of the Exchange Act (internal accounting controls to prevent unauthorized access to company assets).
- Two SEC Commissioners formally dissented:
 - **The Commission's order faulting RRD's internal accounting controls breaks new ground with its expansive interpretation of what constitutes an asset under Section 13(b)(2)(B)(iii). By treating RRD's computer systems as an asset subject to the internal accounting controls provision, the Commission's Order ignores the distinction between internal accounting controls and broader administrative controls. This distinction, however, is essential to understanding that upholding the proper limits of Section 13(b)(2)(B)'s requirements.**

SolarWinds Corporation

- On October 30, 2023, the SEC announced charges against SolarWinds Corporation and its CISO for fraud and internal control failures relating to allegedly known cybersecurity risks and vulnerabilities.
 - First contested SEC proceeding asserting internal accounting control charges related to cybersecurity failures and where SEC asserted fraud-based security disclosure violations related to a cybersecurity breach.
 - First time a CISO was individually charged.
- On July 18, 2024, most of the charges were dismissed, except for material misrepresentation claims related to company's website statements re: cybersecurity protocols.

Spring 2024 Regulatory Agenda

SEC's 2024 Regulatory Agenda

SEC Chair Gensler has said that he will not rush the SEC's agenda to get ahead of possible political changes in Washington.

- Incentive-Based Compensation Arrangements
- Financial Data Transparency Act Joint Rulemaking
- Corporate Board Diversity
- Human Capital Management Disclosure

Incentive-Based Compensation Arrangements

- Section 956 of the Dodd-Frank Act required these regulators to adopt rules that (1) prohibit incentive-based compensation at covered financial institutions that encourages inappropriate risk-taking because it is excessive or could lead to material financial loss, and (2) require the disclosure of information concerning these compensation arrangements to the appropriate federal regulator.
 - These regulators proposed rules in 2011 and updated rules were proposed in 2016, but were never finalized.
- On May 6, 2024, the FDIC, OCC and FHFA issued a notice of proposed rulemaking to implement Section 956 of the Dodd-Frank Act, and the NCUA approve its proposed rule on July 18, 2024.
- There is doubt as to whether the Federal Reserve will join the other regulators at this time.
 - Chairman Powell: “I would like to understand the problem we’re solving and then I would like to see a proposal that addresses that problem.”
- The proposed rules cannot progress through the rulemaking process unless and until it is proposed by all 6 regulators.
- SEC is considering recommending that the SEC, together with the Federal Reserve, FDIC, OCC, FHFA and NCUA, repropose regulations and guidelines with respect to incentive-based compensation practices at certain financial institutions with \$1 billion+ in total assets.

Financial Data Transparency Act Joint Rulemaking

- On August 2, 2024, the SEC proposed joint data standards under the Financial Data Transparency Act of 2022 (“FDTA”) that would establish technical standards for data submitted to certain financial regulatory agencies.
- Each agency must adopt applicable data standards for information regularly filed with or submitted to that agency that incorporate and are compatible with the joint standards.
 - Data standards adopted by each agency must take effect not later than 2 years after final joint rule is promulgated.
- Significant open questions remain with respect to implementation, making the comment period important.
- **Key Takeaways:**
 - Review the proposal and identify potential issues with complying the proposed standards, including the potential need to establish new data systems.
 - May need to obtain a legal entity identifier (or “LEI”) if don’t already have one; many BHCs currently have LEI.
 - May need to implement common identifiers, e.g., for financial instruments, dates, states, countries and currencies.
 - May cause future changes for data transmission and schema and taxonomy formats used by the regulatory agencies.
 - ❖ But, existing data transmission and schema formats for Call Reports, including XML and XBRL, may satisfy these principles.

Corporate Board Diversity

- Considering recommending rule amendments to enhance registrant disclosures about board diversity.
- This proposal has been on the Agenda multiple times, with target dates consistently being moved back – April 2023, October 2023, April 2024, October 2024 and now April 2025.
- Nasdaq's Rule 5606, approved by the SEC in 2021, requires Nasdaq-listed companies to:
 - Publicly disclose board-level diversity statistics on an annual basis using a standardized matrix template; and
 - Have, or disclose why they do not have, a minimum of 2 diverse board members.
- Rule 5606 has been challenged in court, generally based on immateriality of required diversity disclosures. Expect a federal appeals court to issue a ruling later in 2024.
- Large institutional investors continue to push for diversity disclosure and for companies to diversify their boards.
- Both ISS and Glass Lewis have adopted policies in support of gender and racial/ethnic diversity.

Human Capital Management Disclosure

- Considering recommending rule amendments to enhance registrant disclosures regarding human capital management (HCM).
- This proposal has been on the Agenda multiple times, with target dates consistently being moved back – October 2022, October 2023, April 2023, April 2024, and now October 2024.
- In August 2020, SEC adopted principles-based rules requiring registrants to discuss human capital.
 - “Description of the registrant’s human capital resources, including the number of persons employed by the registrant, and any human capital measures or objectives that the registrant focuses on in managing the business (such as, depending on the nature of the registrant’s business and workforce, measures or objectives that address the development, attraction and retention of personnel).”
- The SEC may issue proposed HCM disclosure rules during Fall 2024, but scope of rule and any required disclosures is unknown.

SEC Comment Letter Trends

SEC Staff Comment Letters to Public Bank Holding Companies

During 2023 and 2024, the SEC Staff has been actively issuing comment letters to public BHCs as part of both comprehensive and targeted disclosure reviews.

- Liquidity
- Interest Rate Risk
- CRE and Office concentrations
- Non-GAAP financial measures

Many SEC Staff comments are based on disclosures that public BHCs have included in investor decks, but omitted from 10-K and 10-Q filings.

Liquidity

Please disclose a table summarizing your total available sources of liquidity, by type of borrowing capacity, showing total borrowing capacity less borrowings outstanding to arrive at remaining capacity, then adding in other sources of liquidity such as cash, securities, etc. to arrive at total available liquidity, or tell us where this information is disclosed in the aggregate.

In future filings, please address the items below.

- Expand your discussion of liquidity policy guidelines and provide examples of specific metrics used to manage liquidity, including whether you have been in compliance with internal guidelines and liquidity related limits for periods covered in each filing and, if not, planned actions to remediate non-compliance.
- Consider expanding discussion of your contingency funding plan to describe actions that would be taken to address liquidity risk during a stress event, such as balance sheet repositioning, capital raises, promotional efforts for deposits, increased usage of brokered deposits, etc., as applicable.
- When there have been changes in deposit composition (such as a shift between non-interest-bearing deposit levels) or the level of reliance on different funding sources (such as a heavier reliance on Federal Home Loan Bank borrowings), expand your disclosures to discuss and quantify the impact these changes have had on liquidity and funding costs.

Interest Rate Risks

We note the disclosure on page 67 that the computation of prospective effects of hypothetical interest rate changes are based on numerous assumptions, including relative levels of market interest rates, asset prepayments and deposit decays. Please revise your disclosures in future filings to fully describe and define the various identified assumptions, whether you use proprietary or third-party data, how the data are used in your modeling and any unique facts and circumstances about them, such as how they have or may respond to unknown facts and circumstances, such as exogenous events. Additionally, please disclose changes in any assumptions used for any comparative period, including changes to the data source used or significant changes in the actual assumption itself due to, and for example, internal data market conditions or significant changes in the judgments and determinations made by management as you refine your modeling over time. Please see Item 305(a)(1)(ii)(B) of Regulation S-K.

- Focus on financial institution's disaggregating the composition of CRE loan portfolio to the extent material to an investor's understanding by:
 - Owner and non-owner occupied
 - Borrower type (e.g., office, hotel, multifamily, etc.)
 - Geographic concentrations
 - Other characteristics (e.g., current weighted average and/or range of loan-to-value ratios, occupancy rates, etc.)
- Focus on risk management policies, procedures and other actions taken by management in response to the current environment.

We note that the commercial real estate loans represent 59.2% of your total loans held for investment at December 31, 2023. Given the significance of commercial real estate in your total loan portfolio, please revise your disclosures, in future filings, to further disaggregate the composition of these loans into owner occupied and nonowner occupied, borrower type (e.g., by office, hotel, multifamily, etc.), geographic concentrations and other characteristics (e.g., current weighted average and/or range of loan-to-value ratios, occupancy rates, etc.) material to an investor's understanding of your commercial real estate loan portfolio.

We note your presentation of average total tangible shareholder's equity excluding AOCI and operating return on average tangible equity excluding AOCI as non-GAAP financial measures presented in Exhibit 99.1 to your Form 8-K filed on January 30, 2024. These measures represent individually tailored accounting measures given that the adjustment to exclude AOCI has the effect of changing the recognition and measurement principles required to be applied in accordance with GAAP. Therefore, please remove the presentation of these non-GAAP measures from your future filings. Refer to Question 100.04 of the Division of Corporation Finance's Compliance & Disclosure Interpretations on Non-GAAP Financial Measures and Rule 100(b) of Regulation G.

We note the Company's adjustment for the exclusion of "Day 2 CECL Provision" in your definition of Non-GAAP financial measures. Please address the following:

- Considering the nature of your business and operations, tell us how you evaluated the excluded provision expense to be a normal, recurring operating expense of the Company.
- Tell us how you intend to present this measure on a consistent basis going forward. For example, to the extent that there is a release of the allowance related to the "Day 2 CECL Provision" in a future period, tell us if the Company intends to exclude any potential related gains associated with the release.
- Tell us how you considered and evaluated this adjustment as an individually tailored accounting principle that is prohibited by Rule 100(b) of Regulation G.

SEC Targeted Review of Bank Disclosures

- In 2023 and 2024, increased publicity for SEC Staff reviews of regional and community bank disclosures, following the Spring 2023 bank failures and industry turmoil.
- SEC Staff launched targeted reviews of regional bank disclosures, as well as robust reviews of registration statements – leading to more timely comments than “routine” 10-K and 10-Q reviews.
- Director of SEC’s Division of Corporation Finance Erik Gerding noted his belief that many of the disclosure priorities from 2023 will continue through 2024 and into 2025, including continued focus on:
 - Inflation disclosures (no reversion to boilerplate disclosures).
 - Interest rate risk and liquidity risk disclosures for financial institutions.
 - CRE disclosures (more granular information where possible to improve understanding of material risks and any mitigating steps to address those risks).
 - Monitoring compliance with newer disclosure requirements, including clawbacks and cybersecurity.

Developing Trend – Focus on Period-to-Period ACL Changes

- **Loans held for investment and ACL:**
 - Disclosures re: significant qualitative factors affecting the collectability of the lending portfolio and how qualitative trends influence ACL.
 - Address (in quantitative and qualitative disclosures) the characteristics and risks of particular portfolios, which are assessed to determine the ACL.
 - Disclosures re: significant quantitative changes in ACL or changes that appear inconsistent with changes in key credit metrics or in lending portfolios.

Rule 14a-8 Developments and Trends

Rule 14a-8 Developments

- Rule 14a-8 provides a means for shareholders to submit proposals for inclusion in a public company's proxy statement.
 - In addition to outlining the eligibility and procedural requirements for submitting proposals, Rule 14a-8 provides substantive and procedural bases for excluding shareholder proposals from the proxy statement.
 - Typically, before excluding a proposal, public companies will request that the SEC Staff confirm that it will not recommend enforcement action if it excludes the proposal.

Rule 14a-8 Developments

- In July 2022, the SEC proposed amendments to Rule 14a-8 that would revise 3 of the bases for excluding shareholder proposals from a company's proxy statement:
 - Substantial implementation
 - Duplication
 - Resubmission
- The proposed amendments narrow the exclusions and likely would increase the number of shareholder proposals on company ballots.
- Adoption of a final rule is again on the SEC's Spring 2024 Regulatory Agenda, with the target date pushed back from October 2023 to April 2024 to October 2025.

2024 Proxy Season – Data on Shareholder Proposals

- The number of proposals submitted by shareholders again increased.
 - Governance and social proposals increased, while environmental proposals slightly decreased.
 - Anti-ESG proposals increased.
- Companies submitted more no-action requests than during the 2023 proxy season, and success rates were higher.
- Companies submitted ~50% more no-action requests than during the 2023 proxy season.
 - More than 66% of these requests were granted vs. ~56% during the 2023 proxy season.
- “Ordinary business” basis for exclusion and “micromanagement” arguments were more successful than in 2023.
- Continued uncertainty re: future of Rule 14a-8 and related no-action requests.

Questions?



Speakers

Seth Winter

Troutman Pepper

seth.winter@troutman.com

Adrianna ScheerCook

Troutman Pepper

adrianna.scheercook@troutman.com