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Preparing for the 2024 Reporting Season

September 21, 2023

(updated December 21, 2023)[1]

Securities and Capital Markets

Following an active period of rulemaking by the Securities and Exchange Commission (the "SEC"), public companies have numerous new requirements to consider in preparing annual and quarterly reports and proxy statements in 2024 and 2025. In this alert, we summarize these new requirements, as well as other recent developments for companies to consider in updating their periodic disclosures.

I. Summary of Key Changes for 2024

The table below summarizes key new requirements for Forms 10-K and 10-Q and proxy statements filed in 2024. The second column of this table describes disclosure requirements applicable to an issuer that has a calendar end fiscal year, is not a smaller reporting company (an "SRC") and is not a foreign private issuer (an "FPI"). The third column of the table summarizes the applicable requirements for SRCs and FPIs, as well as whether the applicable disclosure requirement must be tagged in Inline XBRL.

Topic and Source	Disclosure Required	SRCs, FPIs and XBRL
Form 10-Ks and 10-Qs Filed in 2024		
Director and officer Rule 10b5-1 trading plans[2] Item 408(a) of Regulation S-K Item 9B of Form 10-K Item 5(c) of Part II of Form 10-Q	Companies must disclose, on a quarterly basis on Forms 10-Q and 10-K (for the fourth quarter), whether, during the most recent quarter, any director or officer adopted or terminated a Rule 10b5-1 trading plan or non-Rule 10b5-1 trading arrangement, as well as the material terms of the trading plan, such as (i) the names and titles of the directors and officers adopting or terminating a plan, (ii) the date of adoption or termination, (iii) the stated duration of the plan, (iv) the aggregate amount of securities to be sold or purchased under the plan and (v) whether the plan is a Rule 10b5-1 trading plan or a non-Rule 10b5-1 trading arrangement. Price terms do not have to be disclosed. Importantly, any modification or change to the amount, price, or timing of the purchase or sale of the securities underlying a Rule 10b5-1 trading plan constitutes the termination of the plan and the adoption of a new trading plan,	**SRCs**: Same rule **FPIs**: Not applicable **XBRL**: Required

[1] Updated to reflect that the share repurchase disclosure modernization rule (Rel. No. 34-97424) was vacated on December 19, 2023. See full article here.

[2] This disclosure requirement is already in effect for non-SRCs and will come into effect for SRCs beginning with the Form 10-K filed in 2024 (covering the fourth quarter of 2023), for calendar year end filers.

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	triggering the disclosure described above. Finally, on August 25, 2023 the SEC staff issued guidance that disclosure is not required for plans that end due to their expiration or completion. *Covington's client alert addressing this topic can be accessed here.*	
Form 10-Ks Filed in 2024		
Checkbox to denote correction of errors in prior period financials Cover page of Form 10-K	New checkbox on the cover page of Form 10-K requires companies to indicate (i) whether the financial statements of the company included in the filing reflect correction of an error to previously issued financial statements and (ii) whether any of those error corrections are restatements that required a recovery analysis of incentive-based compensation received by any of the company's executive officers during the relevant recovery period. *Covington's client alert addressing this topic can be accessed here.*	**SRCs**: Same rule **FPIs**: Same rule (on the cover pages of Forms 20-F and 40-F) **XBRL**: Required
Cybersecurity risk management policies and procedures[3] Items 106(b) and (c) of Regulation S-K Item 1C of Form 10-K	Companies will need to make several new disclosures regarding their cybersecurity practices and controls, including: 1. the processes the company has, if any, for assessing, identifying and managing material risks from cybersecurity threats, including addressing the following non-exclusive list of items in their disclosure: a. whether and how the company's cybersecurity processes have been integrated into the company's overall risk management system or processes, b. whether the company engages assessors, consultants, auditors, or other third parties in connection with any such processes, and c. whether the company has processes to oversee and identify material risks from cybersecurity threats associated with its use of any third-party service provider; 2. whether any risks from cybersecurity threats, including as a result of any previous cybersecurity incidents, have materially affected or are reasonably likely to materially affect the company and, if so, how; 3. the board's oversight of risks from cybersecurity threats, and, if applicable, any board committee or subcommittee responsible for such oversight and the processes by which	**SRCs**: Same rule **FPIs**: Same rule (Item 16K of Form 20-F) **XBRL**: Required

[3] In addition to the new cybersecurity-related periodic report disclosures, beginning on December 18, 2023 for non-SRCs and June 15, 2024 for SRCs, U.S. public companies and, in certain instances, FPIs must report their material cybersecurity incidents on Form 8-K and Form 6-K, as applicable. For a description of these new real-time reporting requirements, Covington's client alert can be accessed here.

Topic and Source	Disclosure Required	SRCs, FPIs and XBRL
	the board or such committee is informed about these risks; and 4. management's role in assessing and managing material risks from cybersecurity threats, including: a. who in management is responsible for assessing and managing such risks, and the relevant expertise of such persons, b. the processes by which management is informed about and monitors the prevention, detection, mitigation, and remediation of cybersecurity incidents, and c. whether management reports information about these risks to the board or a committee or subcommittee of the board. *Covington's client alert addressing this topic can be accessed here.*	
File clawback policy Item 601(b)(97) of Regulation S-K Exhibit to Form 10-K	Companies with equity securities listed on a national securities exchange must adopt a compensation clawback policy by December 1, 2023, and this policy will need to be filed as an exhibit to the Form 10-K, beginning with the Form 10-K filed in 2024. We understand the NYSE has communicated with listed companies that they will be required to confirm to the exchange, by December 31, 2023, their adoption of a compliant clawback policy or their decision to rely on an exemption from the requirement. *For a description of the substantive requirements for clawback policies, Covington's client alert can be accessed here.*	**SRCs**: Same rule **FPIs**: Same rule for FPIs filing annual reports on Form 20-F **XBRL**: Not required
2024 Proxy Statements		
Clawback recoveries and outstanding balances Item 402(w) of Regulation S-K Item 8 of Schedule 14A	If, during or after the last completed fiscal year, a company was required to prepare an accounting restatement that required a clawback or there was an outstanding balance of erroneously awarded compensation relating to a prior restatement, the company will be required to disclose the following: 1. the date on which it was required to prepare the restatement, the dollar amount of erroneously awarded compensation attributable to the restatement or, if such amount has not yet been determined, an explanation of the reasons; 2. the dollar amount of erroneously awarded compensation that remained outstanding at the end of its last completed fiscal year; 3. if the erroneously awarded compensation related to stock price or total shareholder return, the estimates used to determine the amount and an explanation of the methodology used for such estimates; 4. if recovery would be impracticable, the amount of recovery forgone for each named executive officer ("NEO"),	**SRCs**: Same rule **FPIs**: Same rule (Item 6.F of Form 20-F and paragraph (18) of General Instruction B to Form 40-F) **XBRL**: Required

Topic and Source	Disclosure Required	SRCs, FPIs and XBRL
	individually and as a group, as well as a brief description of the reason recovery was foregone; and 5. for each current and former NEO, the amount of erroneously awarded compensation still owed that had been outstanding for 180 days or longer since the date the company determined the amount owed. Companies that prepared an accounting restatement during the prior fiscal year but concluded that recovery of erroneously awarded compensation was not required will also be required to disclose under Item 402(w) why application of the company's clawback policy resulted in this conclusion. *Covington's client alert on this topic can be accessed here.*	

II. Requirements for 2025 Filings

In addition to the foregoing new reporting obligations, public companies will need to address the following disclosure requirements beginning with their Form 10-Ks and proxy statements filed in 2025. As above, the second column of this table describes disclosure requirements applicable to an issuer that has a December 31 fiscal year, is not an SRC and is not an FPI, and the third column of the table summarizes the applicable requirements for SRCs and FPIs, as well as whether the applicable disclosure requirement must be tagged in Inline XBRL.

Topic and Source	New Disclosure Required	SRCs, FPIs and XBRL
Form 10-Ks Filed in 2025		
File insider trading policy Item 601(b)(19) of Regulation S-K Exhibit to Form 10-K	Companies will need to file their insider trading policies and procedures with their Form 10-Ks, beginning with the Form 10-K filed in 2025. *Covington's client alert addressing this topic can be accessed here.*	**SRCs**: Same rule **FPIs**: Same rule for FPIs filing annual reports on Form 20-F **XBRL**: Not required
Insider trading policy discussion Item 408(b) of Regulation S-K Item 7(b) of Form 10-K	Companies will need to disclose annually whether they have adopted insider trading policies and procedures relating to the purchase, sale or other disposition of the company's securities by directors, officers or employees, or by the company and, if so, a description of these policies and procedures. A company that has not adopted insider trading policies or procedures will be required to provide an explanation of why it has not done so. While this disclosure is required by Form 10-K, it may be incorporated by reference from a proxy or information statement	**SRCs**: Same rule **FPIs**: Same rule (Item 16J of Form 20-F) **XBRL**: Required

Topic and Source	New Disclosure Required	SRCs, FPIs and XBRL
	involving the election of directors, if filed within 120 days of the end of the fiscal year covered by the Form 10-K. *Covington's client alert addressing this topic can be accessed here.*	
2025 Proxy Statements		
Timing of equity awards table and discussion Item 402(x) of Regulation S-K Item 8 of Schedule 14A	Companies will need to provide both narrative and tabular disclosures regarding the timing of awards of stock options, stock appreciation rights ("SARs") and similar option-like instruments in proximity to disclosures of material non-public information ("MNPI"). The narrative disclosure must discuss the company's policies and practices regarding the timing of awards of stock options, SARs and similar option-like instruments in relation to the disclosure of MNPI, including how the board determines when to grant these awards. In addition, a company must disclose whether the board or compensation committee takes MNPI into account when determining the timing and terms of awards, and, if so, how, and whether the company has timed the disclosure of MNPI to affect the value of executive compensation. Additionally, if during the last completed fiscal year any such instruments were awarded to an NEO within a period starting four business days before and ending one business day after the filing of a 10-K or 10-Q, or an 8-K that discloses MNPI, the company must provide the following information for each award in a table: 1. the name of the NEO; 2. the grant date of the award; 3. the number of securities underlying the award; 4. the per-share exercise price; 5. the grant date fair value of the award computed using the same methodology as used for the company's financial statements; and 6. the percentage change in the price of the underlying securities between the closing price of the security one trading day prior to and the trading day beginning immediately following the disclosure of MNPI. In anticipation of this requirement applying in 2025 with respect to compensation decisions made in 2024, companies may wish to consider adjusting the timing of their grant practices for options and option-like instruments in order to avoid the need for this disclosure in their 2025 proxy statements. *Covington's client alert addressing this topic can be accessed here.*	**SRCs**: Same rule **FPIs**: Not applicable **XBRL**: Required

III. Other Recent Developments

A. New Compliance & Disclosure Interpretations

The SEC Staff has published several new compliance and disclosure interpretations ("C&DIs") providing helpful gloss on the amendments to Rule 10b5-1 and the related disclosure requirements, which are summarized below:

- C&DI 120.28 discusses the situation in which an individual has two effective Rule 10b5-1 plans in place, but with one of the plans not authorized to begin until all trades under the other plan have completed or expired without execution. According to the C&DI, if the earlier plan is terminated other than by its terms, the second plan would be subject to a 90-day cooling off period. However, if the first plan were to end by its terms without action by the individual, then the cooling-off period for the second plan would not be reset.
- C&DI 120.29 clarifies that under Rule 10b5-1(c)(1)(ii)(B)(1), which imposes a cooling-off period of the later of (i) 90 days after the adoption of the plan or (ii) two business days following the disclosure of the issuer's financial results in a Form 10-Q or Form 10-K for the completed fiscal quarter in which the plan was adopted, the first of the two business days would be the first business day following such filing, as opposed to the date of the filing counting as the first business day.
- C&DI 120.30 discusses the situation in which an individual relies on Rule 10b5-1 to participate in a 401(k) plan, and the plan administrator purchases stock on the open market to make matching grants of the issuer's common stock to plan participants. Per the C&DI, even though the individual elects how much to contribute to their 401(k) account, the open-market transaction conducted at the discretion of the plan administrator would not be an overlapping plan for purposes of Rule 10b5-1.
- C&DI 120.31 confirms that, with respect to the new checkbox on Form 4 to indicate whether the transactions were made pursuant to a Rule 10b5-1 trading plan, such checkbox need not be checked if the trading plan was adopted prior to the effective date of the amendments to Rule 10b5-1. Nevertheless, the footnotes to such Form 4s may indicate that trades were conducted pursuant to Rule 10b5-1 trading plans.

B. SEC Sample Comment Letter on XBRL Tagging

On September 7, 2023, the SEC Staff published a sample comment letter to companies regarding their use of XBRL tagging, indicating that the Staff may place increased emphasis on XBRL compliance in their review of periodic filings. The sample letter, which may be accessed here, focused generally on companies' compliance with the SEC's rules that require XBRL tagging, highlighting requirements with respect to periodic report cover pages, pay versus performance disclosure and financial statements.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Securities and Capital Markets practice:

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