2025 SEC Annual Reporting Workshop

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Tackling the Hot Spots in Periodic Reports and Earnings Releases

Top 10 Tips for Drafting Periodic Reports and Earnings Releases

1. Don’t miss the technical stuff
2. Get up to speed on recent rule changes
3. Keep your risk factors current
4. Watch your use of Non-GAAP Financial Measures
5. Draft effective forward-looking statement disclaimers

Top 10 Tips for Drafting Periodic Reports and Earnings Releases (cont.)

6. Stay coordinated so you don't miss material disclosures and updates
7. Update your macroeconomic conditions and geopolitical disclosures
8. Ensure your earnings script and earnings release material disclosures are consistent with your 10-K and 10-Q disclosures
9. Keep an eye on the exhibit index
10. Get up to speed on recent trends in SEC comment letters

Don’t Miss The Technical Stuff

Don’t Miss the Technical Stuff

- Take steps to ensure that each filing complies with the latest form, rules and regulations, including:
  - Conduct a compliance check from both a legal and accounting perspective.
  - Confirm filer status type and “emerging growth company” / “smaller reporting company” status.
  - Review any prior SEC comment letters and company responses.
  - Review language relating to disclosure controls and internal control over financial reporting.

Compliance Check

- Review the Form 10-K/Form 10-Q and its instructions; ensure you have the current version (available on the SEC website).
- Review the draft Form 10-K/Form 10-Q against the form and relevant legal and accounting rules referenced, including those in Regulation S-K and Regulation S-X.
- Financial team and auditors should review the financial disclosures in the financial statements and MD&A to ensure compliance with the relevant rules, regulations and accounting guidance.
- Cooley often assists clients with a form check of the legal requirements.

Filer Status Type

- **Large accelerated filer (LAF)**:
  - Public float of $700 million or more as of the end of the last fiscal second quarter
  - SEC filer for past 12 months
  - Filed at least one annual report with the SEC
- **Non accelerated filer (NAF)**:
  - Any filer not a LAF or AF
- **Transitioning out of LAF or AF**

- **Accelerated filer (AF)**:
  - Public float of $75 - $700 million as of the end of the last fiscal second quarter
  - SEC filer for past 12 months
  - Filed at least one annual report with the SEC
  - Not an SRC reporting less than $100 million of annual revenues in most recent fiscal year
- **Resource:**
  - Cooley Filer Status Determination Flowchart

Filer Status Type (cont.)

- Dictates filing dates for Form 10-K and Form 10-Q and need for auditor's attestation report on internal control over financial reporting.
- Filing dates by type of filer:
  - Large accelerated filer (LAF) – file 10-K 60 days after FYE; file 10-Qs 40 days after QE.
  - Accelerated filer (AF) – file 10-K 75 days after FYE; file 10-Qs 40 days after QE.
  - Non-accelerated filer (NAF) – file 10-K 90 days after FYE; file 10-Qs 45 days after QE.

Filer Status Type (cont.)

- The timely filing of Forms 10-K and 10-Q impacts S-3 eligibility.
  - Form 12b-25 (Form NT) provides a grace period (5 days for Form 10-Q; 15 days for Form 10-K) that extends eligibility.
  - Must disclose reason the report cannot be filed timely; if related to an anticipated restatement or correction of prior financial reporting, be sure to say so in Form 12b-25.
- Failure to timely file will cause an otherwise eligible issuer to lose Form S-3 eligibility for at least 12 months.
  - There are nuances in the rules as to how late 8-K and 10-Q filings impact use of existing shelf registration statements vs. eligibility to file a new shelf registration statement.

Filer Status Type (cont.)

- Smaller reporting company (SRC):
  - Not an investment company, an issuer of asset-backed securities, or a majority-owned subsidiary of a parent that is not an SRC.
  - Annual revenues of less than $100 million during the most recently completed fiscal year and either no public float or public float of less than $700 million.*
  - Public float of less than $250 million (regardless of annual revenues).*
  - Eligible to take advantage of scaled-down disclosure requirements.

Many AFs and NAFs also meet the SRC criteria

*If previously didn't qualify as an SRC, qualifying in a subsequent year requires falling below lower thresholds for revenue/public float. Refer to the Cooley Filer Status Determination Flowchart or contact your Cooley team to assist with this analysis.

Filer Status Type (cont.)

- Emerging growth company (EGC):
  - Many companies meet the definition of an EGC upon going public and can take advantage of SRC or EGC scaled-down disclosure requirements.
  - Status terminates:
    - last day of the fiscal year in which annual gross revenues of exceed $1.235 billion;
    - date on which has issued more than $1.0 billion in non-convertible debt during past three years;
    - last day of year in which fifth anniversary of IPO occurs; or
    - when issuer becomes an LAF.

EGC/SRC status <u>does not</u> affect time period to file reports but does reduce disclosure requirements. Eligible to take advantage of scaled-down disclosure requirements.

Prior SEC Comment Letters

- Review prior SEC comment letters and company responses to make sure all “future filing” commitments are fulfilled in the Form 10-K/Form 10-Q.
  - Comment letters can be found by searching for “UPLOAD” on EDGAR.
  - Company responses can be found by searching for “CORRESP” on EDGAR.

Controls & Procedures

- Disclosure controls and procedures
  - Processes designed to ensure that information required in periodic reports is recorded, processed, summarized and reported within specified time periods.
  - Includes procedures for accumulating information and communicating it to the CEO and CFO, as appropriate, to allow timely decisions regarding required disclosure.
    - Disclosure Committee.
    - Sub-Certifications.
- Internal control over financial reporting (ICFR)
  - Pertains to the reliability of financial reporting and the preparation of financial statements.
  - Management's responsibility for establishing and maintaining adequate internal control over financial reporting.
  - Maintenance of accurate records; assurance regarding prevention or timely detection of unauthorized use of company assets that could materially affect the financial information, etc.

Internal Controls over Financial Reporting

- All filers, except newly-public companies (first filed Form 10-K), must include the management's report on ICFR.
  - If a newly public company is taking advantage of the accommodation to exclude management's report (as nearly every company does), it must include the following statement in its first 10-K filing:

    "This annual report does not include a report of management's assessment regarding internal control over financial reporting or an attestation report of the company's registered public accounting firm due to a transition period established by rules of the Securities and Exchange Commission for newly public companies."
  - **Reminder: after the company's first Form 10-K filing, it must include management's report.**
  - Note that a company is permitted to omit the portion of the introductory language in paragraph 4 as well as language in paragraph 4(b) of the SOX 302 certification that refers to the certifying officers' responsibility for designing, establishing and maintaining internal control over financial reporting for the company, until it its first annual report required to include a report by management on the effectiveness of the company's internal control. **Remember to add it back when the company is no longer eligible to omit it!**

Internal Controls over Financial Reporting (cont.)

- All filers, except non-accelerated filers, EGCs and newly-public companies (first filed Form 10-K), are also required to include the auditor’s attestation report on the company’s ICFR.
- Some companies include a statement indicating why the auditor’s report has not been included, e.g., sample language for an EGC might be:

  “This annual report does not include an attestation report of our independent registered public accounting firm. Our independent registered public accounting firm will not be required to formally attest to the effectiveness of our internal control over financial reporting as long as we are an “emerging growth company” pursuant to the provisions of the JOBS Act.”

Internal Controls over Financial Reporting (cont.)

- SEC is picky about ICFR disclosure
  - Either (1) reference “disclosure controls and procedures (as defined in Exchange Act Rule 13a-15(e) and 15d-15(e))”, OR (2) give the full two-sentence definition.
  - Limitation language – “reasonable, not absolute, assurance” – fine but also must include statement that “disclosure controls and procedures are effective at the reasonable assurance level.”
- Example of disclosure statement:
  - *“Our management evaluated, with the participation of our [CEO and CFO], the effectiveness of our disclosure controls and procedures as of the end of the period covered by this Quarterly Report on Form 10-Q. Based on this evaluation, our [CEO and CFO] concluded that as of [date], our disclosure controls and procedures were effective to ensure that information we are required to disclose in reports that we file or submit under the Securities Exchange Act of 1934 were (i) recorded, processed, summarized and reported within the time periods specified in SEC rules and forms; and (ii) accumulated and reported to our management, including our [CEO and CFO], to allow timely discussions regarding required disclosures.”*

Get Up To Speed On Recent Rule Changes

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Rule Change Reminders

- EDGAR furnishing of Annual Reports
  - Even if the 10-K is used as the Annual Report, it should be filed in PDF form as EDGAR Form type ARS
- Clawback checkboxes on 10-K cover page
  - Whether the financial statements include the correction of any error
  - Whether any of those error corrections are restatements that required a recovery analysis of incentive-based compensation
- File clawback policy as Exhibit 97 to Form 10-K
- Additional clawback-related disclosure required if during or after its last completed fiscal year a company either (1) was required to prepare an accounting restatement that required a clawback under the company’s clawback policy or (2) had an outstanding balance of unrecovered excess incentive-based compensation under such policy relating to a prior restatement
- File insider trading policy as Exhibit 19 to Form 10-K

Reminder: Quarterly Insider Trading Disclosures

- Item 408(a) of Regulation S-K regarding quarterly D&O 10b5-1 plan disclosures re adoption, material modification and termination of plans, including:
  - name and title of the director or officer;
  - date of adoption, material modification or termination of the trading plan or arrangement;
  - duration of the trading plan or arrangement;
  - aggregate number of securities to be sold or purchased under the trading plan or arrangement; and
  - whether the trading plan or arrangement is a Rule 10b5-1 trading plan or a non-Rule 10b5-1 trading arrangement.
- No prescribed form, but most companies are using a tabular format.
- Reminder: disclosures must be XBRL tagged.

Reminder: Annual Insider Trading Disclosures

- Item 402(x) requires tabular disclosure if any stock options, stock appreciation rights or instruments with option-like features were granted to any named executive officer (NEO) within four business days before or one business day after the filing of a periodic report or Form 8-K disclosing material news, including:
  - the name of the NEO, the grant date, the number of securities underlying the award, the per-share exercise price, the grant date fair value of the award; and the percentage change in the market value of the securities underlying the award between one trading day before and one trading day after disclosure of the MNPI.
- Item 402(x) also requires narrative describing the issuer's policies and practices in connection with the timing of stock options, stock appreciation rights or instruments with option-like features in relation to the disclosure of material non-public information and must explain:
  - how the issuer's board determines when to grant such equity awards, whether and how the issuer's board or compensation committee considers material nonpublic information (MNPI) when determining the timing and terms of an award, and whether the issuer has timed the disclosure of MNPI for the purpose of affecting the value of executive compensation.
- Item 408(b) requires disclosure of whether a company has adopted insider trading policies and procedures … that are reasonably designed to promote compliance with insider trading laws, rules and regulations, and any listing standards applicable to the company. If not, explain why not.
- Item 601 has also been amended to require issuers to file their insider trading policies as an exhibit to Form 10-K with the first annual report that requires disclosure under new Item 408(b).
- For calendar year filers, these requirements are effective for the 2024 annual report (to be filed in 2025) and the proxy statement for the 2025 annual meeting.
- Issuer Share Repurchase Modernization Rule, including narrative disclosures and tabular exhibit filing requirement, was vacated in December 2023.

Reminder: Cybersecurity Disclosures

- Form 8-K Item 1.05 effective for all filers
  - Disclose material cybersecurity incident within four business days of determining materiality (subject to narrow national security and public safety delay exception)
  - Describe the *material* aspects of the incident’s (i) nature, scope and timing; and (ii) impact, or reasonably likely impact, on the company, including its financial condition and results of operations
- Item 1C.10-K disclosures effective for all filers
  - Risk Management and Strategy
    - Describe processes for the assessment, identification and management of material risks from cybersecurity threats
    - Describe 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’s business strategy, results of operations or financial condition
  - Governance
    - Describe management’s role in assessing and managing material risks from cybersecurity threats
    - Board’s oversight of risks from cybersecurity threats including, if applicable, identifying the board committee or subcommittee responsible for this oversight of risks from cybersecurity threats
- 8-K and 10-K disclosures must be iXBRL tagged, effective one year after initial compliance with the related disclosure requirement

Comment Samples: Cybersecurity Disclosures

- The SEC has begun issuing comments on Item 106 disclosure. A few examples[1]:
  - We note that leaders from your information security, compliance and legal team oversee cybersecurity risk management. Please revise future filings to provide the relevant expertise of such persons or members in such detail as is necessary to fully describe the nature of the expertise as required by Item 106(c)(2)(i) of Regulation S-K.
  - We note statements that you have not currently engaged any third-party service providers to support, manage, or supplement your cybersecurity processes, and that your Audit Committee receives updates from and discusses matters with your third-party IT support specialists. These statements appear inconsistent. Please revise future filings to clarify whether you engage assessors, consultants, auditors or other third parties in connection with your processes for assessing, identifying and managing material risks from cybersecurity threats as required by Item 106(b)(1)(ii) of Regulation S-K.
  - We note you do not include Item 1C. Cybersecurity. Please revise or advise us why you do not provide disclosures as applicable under Item 106 of Regulation S-K.

1. TheCorporateCounsel.net

Keep Your Risk Factors Current

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Risk Factors

- Consider whether new risk factors have emerged and whether previously disclosed risk factors have evolved.
- Risk factors should generally be listed in order of importance, but similar risk factors should be grouped together (subheading requirement).
  - Information about the most significant risks that apply to the company or to its securities.
  - Focus on the risks, not how the company addresses them. Avoid "mitigating" language in the risk factors.
- Form 10-Q risk factors should include material changes from risk factors in Form 10-K.

Risk Factors (cont.)

- Check the following for possible risk factor updates:
  - Press releases and 8-Ks for potential disclosures;
  - Disclosures regarding contracts or agreements;
  - General economic trends disclosure;
  - Change in cash position; and
  - Any new SEC disclosures leading to new risk factors.

Risk Factors (cont.)

- Drafting risk factors
  - Plain English—short sentences, active voice, no legalese, everyday language.
  - Concise and organized logically—business, industry, or company.
  - Specific to the company or securities—not generic or broad.
  - State the risk in the first three sentences; don’t wait until the end of the risk factor.
  - Heading that clearly describes the risk, followed by an explanation.
  - Fight the urge to add positive statements to mitigate the risk statement—SEC will likely comment and defensive benefit in the event of litigation may be lost.

Risk Factors: Hot Topics

- Avoid the use of hypothetical risk factors when a risk has already materialized.
  - Risk factor disclosure that an event “could” occur when it has actually occurred will receive SEC scrutiny for being materially misleading and may subject a company to private litigation risk.
  - This scrutiny of hypothetical risk factors is especially germane in the case of cybersecurity intrusions or vulnerabilities, particularly in light of new cybersecurity rules.
  - The requirement to timely update hypothetical risk factors applies even if a company does not typically include risk factors in its Form 10-Qs.
  - See, e.g., *In re Alphabet Securities Litigation*

Risk Factors: Hot Topics (cont.)

- Items for consideration in reviewing / updating risk factors for 2024 annual reports:
  - Potential tariffs, supply chain, inflation, interest rates, supply chain, and general economic conditions
  - Artificial intelligence
    - If a company provides AI-related disclosure in an SEC filing, the company should ensure the disclosure is not boiler plate and provides specific business and risk-related disclosure related to what AI means for the company and how it specifically impacts the business.
    - Potential risks posed to companies by AI include risks relating to confidentiality and privacy, violation of laws regulating development and use of AI, lack of data science skills, misinformation or biased results, price pressure from competitors using lower-cost AI systems, or failure to secure IP rights, among other risks.
  - Foreign exchange rates
  - Middle East conflicts and Russia / Ukraine war and related sanctions
  - Cybersecurity and data privacy
  - Net neutrality, if applicable
  - Climate change

Watch Your Use Of Non-GAAP Financial Measures

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What is a Non-GAAP Financial Measure?

- **Definition:** A numerical measure of historic of future financial performance, financial position or cash flows that:
  - *Excludes* amounts that are *included* in the most directly comparable GAAP measure; or
  - *Includes* amounts that are *excluded* from the most directly comparable GAAP measure.

What is a Non-GAAP Financial Measure? (cont.)

- Examples of Non-GAAP Financial Measures:
  - Analytical measures such as EBIT and EBITDA.
  - *Ad hoc* adjustments to GAAP measures to derive “normalized” or “recurring” results of operations.
  - Free cash flow.

Rules Regarding Non-GAAP Financial Measures

- Initially Effective March 2003.
- ***Regulation G***:
  - Applies to all public disclosures of material information containing non-GAAP financial measures.
- ***Item 10(e) of Regulation S-K***:
  - Applies to the use of non-GAAP financial measures in SEC filings.

- Corp Fin has also issued numerous C&DIs comprising its interpretations of the rules and regulations on the use of non-GAAP financial measures.

Guidance Regarding Non-GAAP Financial Measures

- On December 13, 2022, the SEC updated its guidance on issuers' disclosure of non-GAAP financial measures.
- The updated guidance:
  - Clarifies the meaning of "normal, recurring operating expenses" and "non-GAAP income statement" (updating Questions 100.01 and 102.10 of the C&DI)
  - Provides additional examples of misleading non-GAAP measures in the context of prior guidance (updating Question 100.04)
  - Provides additional examples of non-GAAP measures presented with greater prominence than their comparable GAAP measure (updating Question 102.10)
  - Includes guidance on whether a non-GAAP measure can be misleading if it is not appropriately labeled and clearly described (Question 100.05)
  - Includes guidance on whether a non-GAAP measure that is accompanied by extensive disclosure about the nature and effect of each adjustment could still be misleading (Question 100.06)

Requirements For All Public Disclosures

- **Reconciliation Requirement**: A non-GAAP financial measure must be accompanied by:
  - Presentation of the most comparable GAAP financial measure; and
  - Quantitative reconciliation of the differences between the non-GAAP financial measure and the most comparable GAAP financial measure.
- **Non-Misleading**: A non-GAAP financial measure must not misstate a material fact or omit to state a material fact necessary to make the presentation of the non-GAAP financial measure not misleading.

Requirements For All Public Disclosures (cont.)

- **Oral Disclosures**: If a non-GAAP financial measure is disclosed orally (including via webcast, broadcast, telephone and similar means), the company must:
  - Post the comparable GAAP measure and reconciliation on its web site; and
  - Disclose the location and availability of that information during the oral presentation.

Additional Requirements for SEC Filings

- **Additional Requirements for SEC Filings:**
  - Reasons why management believes the non-GAAP financial measure is useful to investors;
  - If material, any additional purposes for which management uses the non-GAAP financial measure; and
  - Presentation of the non-GAAP financial measure may not be more prominent than the presentation of comparable GAAP financial measure.

Additional Requirements for SEC Filings (cont.)

- Prohibited presentations of Non-GAAP financial measures in SEC Filings include:
  - Excluding <u>cash</u> charges or liabilities from non-GAAP liquidity measures (other than EBIT and EBITDA).
  - Adjusting a non-GAAP performance measure to eliminate a "non-recurring, infrequent or unusual" item when (1) the item is reasonably likely to recur within the next two years or (2) a similar item occurred within the prior two years.
  - Presenting non-GAAP measures on the face of GAAP financial statements or in the accompanying notes.
  - Presenting non-GAAP measures on the face of pro forma financial statements required to be disclosed by Article 11 of Regulation S-X.
  - Using titles or descriptions of non-GAAP financial measures that are confusingly similar to those used for GAAP financial measures.

SEC Focus on Non-GAAP Financial Measures

- Non-GAAP measures have been one of the most frequently commented on topic by the SEC in recent years.[1]
- Common focus areas of the comments include:
  - The presentation with equal or greater prominence of the most directly comparable GAAP financial measure;
  - The reconciliation to the most comparable GAAP financial measure;
  - The appropriateness of adjustments to eliminate or smooth items identified as non-recurring, infrequent, or unusual;
  - The use of individually tailored accounting principles; and
  - The disclosure of why management believes the non-GAAP presentation provides useful information to investors regarding the financial condition or results of operations of the company.
- Companies considering presenting financial results that are adjusted for an armed conflict should review the SEC's sample comment letter related to the Russia/Ukraine conflict before doing so, as it includes illustrative comments on such adjustments.

1. PwC Viewpoint, *SEC Comment Letter Trends* (2024)

Note on Key Performance Indicators (KPIs)

- The SEC issued an interpretive release in 2020 relating to the use of KPIs and metrics.
- KPIs that are operational metrics (and therefore not considered non-GAAP financial measures) must be accompanied by disclosure containing a clear definition of each metric and how it is calculated, a statement indicating the reasons why the metric provides useful information to investors and a statement indicating how management uses the metric in managing or monitoring the performance of the business.
- "Need[s] to include such further material information, if any, as may be necessary in order to make the presentation of the metric, in light of the circumstances under which it is presented, not misleading." – SEC 2020 Interpretive Release

Draft Effective Forward-looking Statement Disclaimers

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Overview of Forward-Looking Statements

- Private Securities Litigation Reform Act (PSLRA) of 1995 created a safe harbor from liability under the federal securities laws for companies that comply with specified requirements when making forward-looking statements.
- Form 10-K, Form 10-Q and earnings releases typically contain many forward-looking statements, including:
  - **Qualitative statements** – statements about the company's future strategies or initiatives, business prospects, future financial condition or macroeconomic or industry trends; and
  - **Quantitative statements** – guidance / financial outlook for projected earnings or other operating results.

Forward-Looking Statements Disclaimers

- Forward-looking statements disclaimers are almost always included in Form 10-K, Form 10-Q and earnings releases.
- Forward-looking statements disclaimers should comply with two primary requirements:
  - the forward-looking statements must be identified as such, including by using expressions of expectation or belief; and
  - such statements must be accompanied by meaningful cautionary statements identifying the key material risk(s) and uncertainties that could cause actual results to differ materially from those in the forward-looking statements – must be company-specific and tailored to the specific forward-looking statements included in the applicable document.
- Forward-looking statements disclaimers should also:
  - direct investors to where in SEC filings the more detailed discussion of risks can be found;
  - state that the forward-looking statements are made as of the date of the applicable document; and
  - explicitly disclaim any duty to update the forward-looking statements (except as required by law).

Forward-Looking Statements Disclaimers (cont.)

- The key in drafting forward-looking disclaimers is to be **specific** and **tailored** to the included forward-looking statements in the applicable document.
- The cautionary language in the disclaimers should warn of specific risks and include a discussion of actual developments that are relevant to the risks; avoid general risks that are true for any company.
- A disclaimer can be deemed misleading if it does not include historical facts that might impact the forward-looking statements.
- Disclaimers should explicitly note that the accuracy of the forward-looking statements depends on future events.

Stay Coordinated So You Don’t Miss Material Disclosures And Updates

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Disclosure Procedures

- The contents of periodic reports will be the responsibility of numerous departments within a company, including business, finance/accounting, legal, human resources and others; companies should ensure there is regular communication and coordination among the various contributing departments.
- Companies should have an active disclosure committee, whose duties include, among other things:
  - Overseeing production of information required to be disclosed to SEC.
  - Assisting in the design of disclosure controls and procedures to ensure that corporate information is recorded, processed, summarized and reported accurately.
  - Helping to monitor the integrity of internal control processes.
  - Monitoring publicity regarding company, as well as peer company filings for best practices.
  - Meeting at least quarterly and being responsive to disclosure matters as they may arise.

General Disclosure Principles

- Consistency
  - Within periodic reports – descriptions in Notes to Financial Statements; Business section; Risk Factors; MD&A.
  - Outside of periodic reports – transactions and events reported in 8-K, press releases, social media, corporate sustainability reports, and other news stories.
- Factual backup
  - Adequate third-party back-up (not the company's website) substantiating industry, market and similar data included in the Form 10-K
  - Company documents support statements re: the company's business (e.g., clinical trial results, user metrics, etc.)
- Balanced disclosure – include good and bad news.
- Use plain English.
- Remember that Form 10-K and Form 10-Q are disclosure documents, not marketing documents.

General Preparation

- Review changes in the company's business and industry during the most recently completed fiscal year (10-K).
  - Review your 8-Ks, press releases, investor/analyst presentations and other announcements.
  - Read new agreements and amendments to material agreements.
  - Consider what peer companies are discussing in their reports.
- Consider how the business might reasonably likely change in the future.
- Get up to speed on recent rule changes (see the section above).

Key Disclosures: Business Section

- How business has changed over past fiscal year (include prior periods if material to understanding changes).
  - Describe the company's business, including its main products and services, subsidiaries it owns, and markets it operates in; may include recent events, competition, applicable regulations, labor issues, special operating costs, or seasonal factors.
- How the business might reasonably likely change in the future.
- Consider 2020 changes to Item 101 of Reg S-K, particularly the addition of a requirement to disclose information regarding human capital resources.
  - Ensure human capital-related disclosures are consistent with disclosures made elsewhere (e.g., in corporate sustainability reports and proxy statements).

Key Disclosures: MD&A

- Management's Discussion & Analysis (MD&A) gives the company's perspective on the business results of the past period.
- Include information (including forward-looking information) necessary to understand the company's financial situation from management's perspective in a balanced, executive-level discussion.
    - Analyze, don't just repeat, financial information.
    - Include discussion and analysis of known material trends, events, demands, commitments and uncertainties.
    - Disclose key performance indicators, including non-financial performance indicators, that management uses to manage the business.

Key Disclosures: MD&A (cont.)

- Operations and financial results, including info about liquidity and capital resources and any known trends or uncertainties that are reasonably likely to affect the company's results, as well as management's views of key business risks and what it is doing to address them.
  - Have all known material liquidity, capital resources, and results of operations trends been disclosed?
  - Despite eliminating the standalone requirement, inflation disclosure is still required if it is the underlying reason for material changes in line items of the financial statements.
- Critical Accounting Estimates should not be a copy and paste from the financial statement footnotes.
- Watch your use of non-GAAP measures (see the section above).

Key Disclosures: Selected Sections (cont.)

- "***Other Information***" includes any information the company failed to disclose in a timely manner on Form 8-K.
  - Common misses include:
    - Material agreements or material amendments to material agreements.
    - Material changes to how stockholders recommend board nominees.
  - If a 10-K or 10-Q is filed within the time required to file an 8-K, a triggering event may be disclosed in the 10-K or 10-Q (in lieu of an 8-K) in most cases.
- "***Other Information***" now also includes director and officer 10b5-1 trading arrangement disclosure.

Other Part I Items

- Item 3. Legal Proceedings.
  - Cautionary tale (*City of Fort Lauderdale Police and Firefighters' Retirement System v. Pegasystems Inc.*) – The plaintiffs' complaint survived a motion to dismiss (and is still pending) in this case where the public company characterized pending litigation as "without merit" where there was subsequently a $2 billion jury verdict against the company.
  - Companies making public statements about pending litigation should be very cautious when characterizing their views on the merits or prospects of that litigation.

Other Part II Items

- Item 5. Market for Registrant’s Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities.
  - Performance Graph (S-K 201(e))
    - Including in Part II, Item 5 will not satisfy the performance graph requirement unless Part II, Item 5 is included in the annual report to stockholders (e.g., in the 10-K wrap).
  - Ensure that newly public companies are making the disclosures required by S-K 701(f) (Use of Proceeds).
  - Issuer repurchases and unregistered sales.

Disclosure Hot Topics

- Use of financial projections in SEC filings
  - In connection with the adoption of rules governing SPAC transactions, the SEC also adopted amendments to Item 10(b) of Regulation S-K governing the use of financial projections in all SEC filings, not just filings related to a SPAC or de-SPAC transaction. The amended guidance in Item 10(b)(2) requires:
    - any projected measures that are not based on historical financial results or operating history to be clearly distinguished from projected measures based on such results or operating history, as applicable;
    - any projected measures based on historical financial results or operating history to be presented with such historical measure or operating history, as applicable, and with no greater prominence than such measure or history; and
    - any projections that include a non-GAAP financial measure to include a clear definition or explanation of the measure, a description of the GAAP financial measure to which it is most directly comparable and an explanation as to why the non-GAAP financial measure was used instead of the GAAP financial measure.
- Impact of climate change
  - The SEC has been commenting on climate change disclosures, including:
    - inconsistencies between a company's corporate social responsibility report and its SEC filings; the lack of disclosure in a company's SEC filing of the risks, trends, and impact of climate change for the company and its business; and the lack of disclosure in a company's SEC filings related to pending, or existing climate-related legislation and regulations that could have a material impact on a company's business.

Ensure Your Earnings Script And Earnings Release Material Disclosures Are Consistent With Your Form 10-K Disclosures

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Earnings Release Considerations: Top Tips

- The SEC continues to compare earnings call transcripts and other earnings materials to what is reported in the MD&A - issuers should ensure that disclosures are consistent in all material respects when discussing drivers of historical results and future trends, whether such disclosures are contained in SEC filings or other oral or written communications related to earnings.
- Confirm that a company's process for releasing operating results and posting related information on its website meets the requirements of Regulation FD.
- Ensure compliance with Regulation G and Item 10(e)(1) for non-GAAP financial measures.
- Confirm that "meaningful cautionary statements" accompany the forward-looking statements and are updated and specific to the forward-looking statements that are actually made in the earnings release or are to be made during the earnings call/webcast.
- Determine if earnings guidance refers to the same measures from period to period.
- If KPIs are disclosed, make sure they are accompanied by explanatory disclosure and consider whether they have been used consistently.
- If the earnings release is not furnished on Form 8-K prior to the earnings call, file the call transcript and other materials disclosed during the call.

Earnings Release Contents

- Results of operations, financial condition, earnings guidance and key performance indicators.
- A safe harbor statement that expressly identifies forward-looking statements and provides cautionary statements identifying important factors that could cause actual results to differ materially from the results projected in forward-looking statements.
- Access details for a related earnings call/webcast.
- If non-GAAP financial measures are included:
  - the most directly comparable GAAP measure, with equal or greater prominence;
  - a reconciliation to the comparable GAAP measure; a statement disclosing why management believes the non-GAAP measure is useful to investors; and
  - a statement disclosing any additional material purposes for which management uses the non-GAAP measure.

Earnings Release Considerations: Form 8-K Requirements

- Item 2.02(b) of Form 8-K does not require disclosure of material non-public information conveyed orally during an earnings call/webcast if the following four conditions are met:
  - the information is provided as part of a call/webcast that is complementary to, and initially occurs within 48 hours after, the related earnings release is furnished on an Item 2.02 Form 8-K prior to the presentation;
  - the call/webcast is broadly accessible to the public;
  - financial and other statistical information contained in the call/webcast is posted on the company's website, together with any information that would be required under Regulation G (i.e., for non-GAAP financial measures, the inclusion of the comparable GAAP measures and related reconciliation); and
  - the call/webcast was announced by a widely disseminated press release, which included instructions as to when and how to access the call/webcast and where the information would be available on the company's website.
- If a company does not meet these conditions, the earnings release must be furnished under Item 2.02 within four business days after it is issued.
  - Transcript for the call/webcast or slides, together with a summary of any additional material information disclosed during the call or webcast, also must be furnished.

Earnings Release Considerations: Regulation FD

- Regulation FD was adopted to address the selective disclosure of material non-public information by issuers to certain audiences.
- If disclosure is made to such persons, public disclosure is required simultaneously (if disclosure was intentional) or promptly (if disclosure was unintentional).
- Public disclosure requirement of Regulation FD can be satisfied by issuing the release via a wire service or furnishing the release on Form 8-K, or through other recognized channels of Regulation FD compliant methods (such as website if investors know the company’s practices is to issue material information there).

Earnings Call/Webcast Considerations

- Earnings calls/webcasts are typically scripted given federal securities law implications from a liability perspective.
- The script should be reviewed in advance of the call, considering:
  - Forward-looking statements about company performance should be aspirational in tone
  - Similarly, statements that are opinions should be framed with “we believe” qualifiers
  - Company’s market position/opportunity should have third party support
  - KPIs should be consistently disclosed quarter to quarter and in the company’s filings
  - Script talk track should align with MD&A in periodic or annual report, and any material information provided in the script should be added to the MD&A in the applicable periodic report
- If material information is disclosed unexpectedly during the call such as during Q&A, the information disclosed should be promptly posted on the company’s website.

Earnings Guidance Considerations

- Some companies include guidance in their earnings releases and/or during earnings calls.
- If guidance includes a non-GAAP financial measure and a quantitative reconciliation cannot be obtained without “unreasonable efforts,” that fact should be disclosed, and the information that is unavailable should be identified along with its probable significance, in an equal and prominent way.
- While there is generally no duty to update, if events cause prior guidance to become materially inaccurate, consideration should be given to whether such guidance should be updated, even if the prior guidance was reasonable when made.
- Revisions to or retractions of earnings guidance, or termination of the practice of providing guidance should be explained and disclosed in a Regulation FD compliant manner.

Keep An Eye On The Exhibit Index

Exhibits

- Must file all material contracts (or incorporate by reference from a prior filing) that were entered into or became effective during the applicable period.
  - This includes material contracts that were not material when entered into but that subsequently became material during the applicable period, ***regardless of whether those contracts are no longer deemed material at the time of the filing***.
- Must also file all material and immaterial amendments to a previously filed material contract that were entered into or became effective during the applicable period.
- Review all 8-Ks filed during the current and prior fiscal year to check for disclosure of material contracts/material amendments as well as for new or amended compensatory arrangements.
- Check the last 10-K/10-Q to see whether any material contracts were filed "early" with that 10-K/10-Q but that were entered into or became effective during the year/quarter for which the current 10-K/10-Q is being filed.

Exhibits (cont.)

- Confirm no changes to the Description of Securities that requires refiling the description (Item 4(vi))
- Auditor Consent (Item 23)
  - Confirm that the auditor consent references all Forms S-8 and Forms S-3 (or potentially resale S-1s) filed by the company that are still effective.
- Section 302 Certifications
  - Must be in exact form promulgated by the SEC. Per the SEC:
    - “The certification required by new Exchange Act Rules 13a-14 and 15d-14 must be in the exact form set forth in the amendments to the affected reports. The wording of the required certification may not be changed in any respect (even if the change would appear to be inconsequential in nature).”
  - Note that an issuer is permitted to omit the portion of the introductory language in paragraph 4 as well as language in paragraph 4(b) of the 302 certification that refers to the certifying officers’ responsibility for designing, establishing and maintaining internal control over financial reporting for the company, until it its first annual report required to includes a report by management on the effectiveness of the company’s internal control. **Remember to add it back when the company is no longer eligible to omit it!**
- Reminder: file insider trading policy as Exhibit 19 to Form 10-K and clawback policy as Exhibit 97 to Form 10-K

Exhibits (cont.)

- Ensure iXBRL exhibits are all listed –iXBRL is required for all companies.
- Consider whether the company is availing itself of any accommodations for exhibits.
  - Schedules or similar attachments can be omitted if not material to an investment decision, but the exhibit must include a list briefly identifying the content of the omitted schedules.
  - Personally identifiable information can be redacted.
  - Redactions permitted where information is not material and is the type of information that the company treats as private or confidential.

Get Up To Speed On Recent Trends In SEC Comment Letters

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SEC Comment Letter Trends: Generally

- Overall volume of comment letters was largely consistent with last year (but recall that overall volume last year was significantly higher than in previous years)[1]
- Top 5 categories[2]:
  - (1) Non-GAAP Financial Measures
  - (2) MD&A
  - (3) Segment Reporting
  - (4) Revenue Recognition
  - (5) Business Combinations

1. EY – *SEC Reporting Update, Highlights of trends in 2024 SEC staff comment letters* (2024)
2. PwC Viewpoint, *SEC Comment Letter Trends* (2024)

SEC Comment Letter Trends: Non-GAAP Financial Measures

- Common focus areas of the comments include:
  - The presentation with equal or greater prominence of the most directly comparable GAAP financial measure;
  - The reconciliation to the most comparable GAAP financial measure;
  - The appropriateness of adjustments to eliminate or smooth items identified as non-recurring, infrequent, or unusual;
  - The use of individually tailored accounting principles; and
  - The disclosure of why management believes the non-GAAP presentation provides useful information to investors regarding the financial condition or results of operations of the company.

SEC Comment Letter Trends: MD&A

- Common focus areas of the comments include:
  - Discussion and analysis of results of operations, including the description and quantification of each material factor, offsetting factors, unusual or infrequent events, and economic changes causing changes in results between periods;
  - Discussion of known trends or uncertainties that are reasonably expected to impact future results both in the near and long term;
  - Metrics used by management in assessing performance, including how they are calculated and period over period comparisons;
  - Critical accounting estimates, including the judgments made in the application of significant accounting policies, sensitivity to change, and the likelihood of materially different reported results if different assumptions were used; and
  - Liquidity and capital resources, including clear discussion of drivers of cash flows and the trends and uncertainties related to meeting known or reasonably likely future cash requirements.

SEC Comment Letter Trends: Accounting Comments

- Segment reporting, and revenue recognition, and business combinations are other prevalent topics of SEC comments in recent years.
  - The comments relating to segment reporting have often focused on the required disclosure of revenues from external customers for each group of similar products and services and revenues from external customers and long-lived assets attributable to the public entity's country of domicile and individual foreign countries that are material.
  - The areas addressed in the comments relating to revenue recognition include performance obligations, transaction price, variable consideration, recognizing revenue, gross versus net presentation and disaggregated revenue.
  - The comments relating to business combinations have often focused on how the company assessed the considerations of asset acquisition vs. business combination, why the company omitted the disclosures required by ASC 805, such as amounts of post-acquisition revenues and earnings and supplemental pro forma financial information, and compliance with the Regulation S-X Article 11 pro forma financial information and Regulation S-X Article 3-05 financial statements of businesses acquired or to be acquired.

Questions?

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Your Speakers

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