10-Q and K Disclosure Prep Series:

Latest Trends in SEC Disclosure

December 2023

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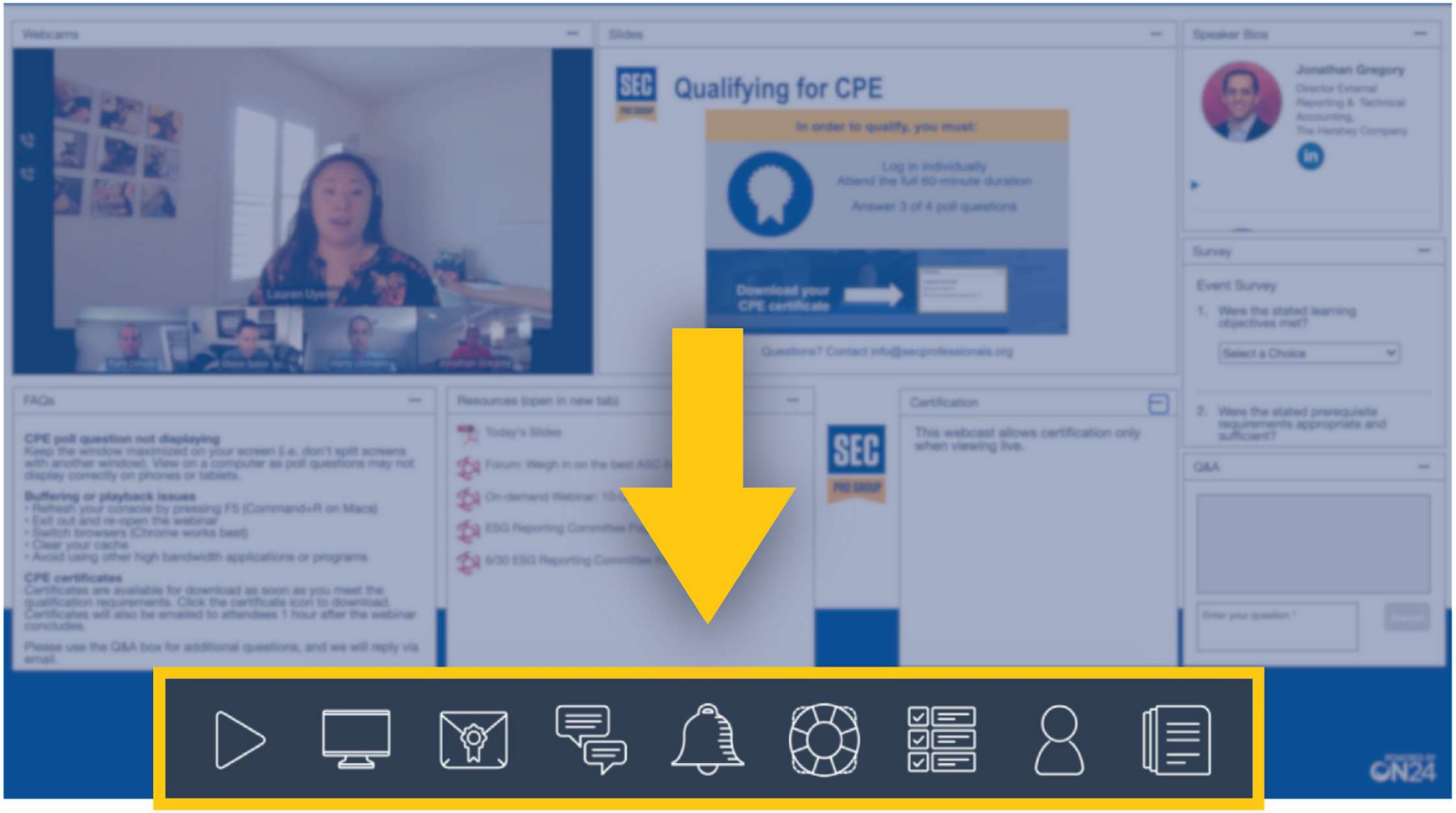
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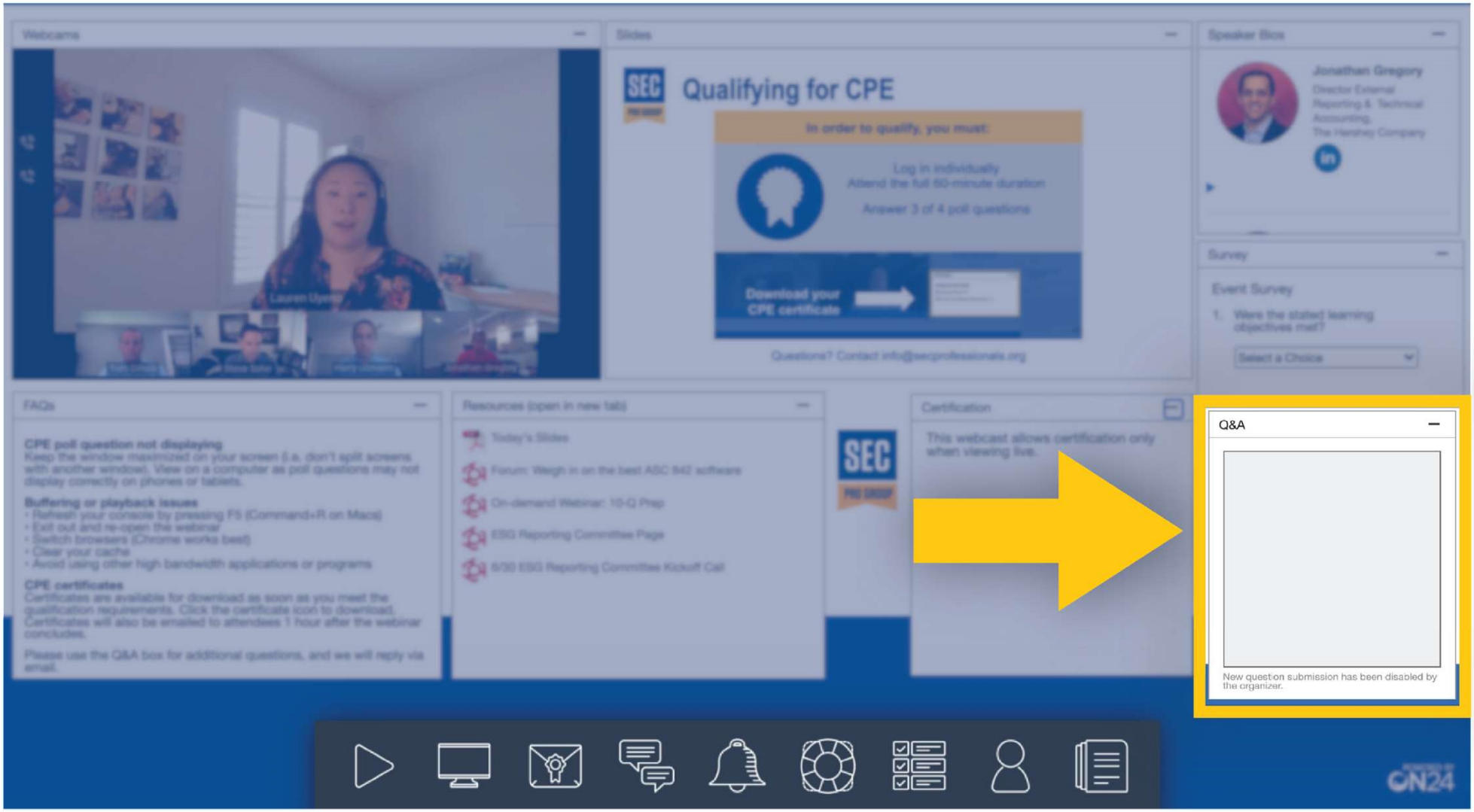
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- Stay up-to-date on upcoming events & program announcements
- Connect with other members, resources & your local chapter
- Follow instructions in the document in the Resources panel
- Reach out to info@secprofessionals.org with any questions

Thank you to AICPA attendees & SEC Pro Group chapter leaders

- AICPA attendees – for stopping by the booth, and attending our networking event!
- Chapter leaders – for hosting meetings with your members this quarter!

Happy anniversary to the Community Manager of SEC Pro, Morgan Witt!

Today's Speakers

Alan J. Wilson

Counsel, Transactional Dept
WilmerHale

Ganesh Rajappan

Founder & CEO
MyLogIQ

Steve Soter

Executive Advisor
SEC Professionals Group

Event Agenda

During this session, we will

- Discuss recent SEC rulemaking and changes for upcoming disclosures
- Review selected 10-K disclosure developments and potential disclosure trends
- Identify and discuss other SEC staff focus areas

Your questions are important!

Recent SEC Rulemaking Activities & 10-K Changes

SEC's Rulemaking Agenda – Division of Corporation Finance

Recently Adopted Rule Changes (Adoption Date)	Proposed Rule Changes Not Yet Adopted (Proposal Date)	Expected Future Rule Proposals
• Modernization of Beneficial Ownership Reporting (10/23) • **Cybersecurity Disclosures (7/23)** • **Share Repurchase Disclosure Modification (5/23) (Stayed Nov. 22, 2023)** • **Insider Trading and Related Disclosures (12/22)** • **Listing Standards for Recovery of Erroneously Awarded Compensation (10/22)** • Pay Versus Performance (8/22)	• Rule 14a-8 Amendments (7/22) • Climate Change Disclosure (5/22) • Special Purpose Acquisition Companies (3/22)	• Human Capital Management Disclosure • Corporate Board Diversity • Rule 144 Holding Periods • Disclosure of Payments by Resource Extraction Issuers

Form 10-K Previews

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WHAT'S NEW

Year Ending December 31, 2023

- Cybersecurity risk management, strategy and governance (Item 1C)
- ***Issuer buybacks (Items 5, 9B & 15) (TBD)***
- Trading arrangements of officers and directors (Item 9B)
- Actions taken to recover erroneously awarded incentive-based compensation (Item 11)*
- Exhibit 97: Clawback policy (Item 15)
- New cover page check boxes re: restatements and clawbacks

LOOKING AHEAD

Year Ending December 31, 2024

- Insider trading policies and procedures (Item 10)*
- Stock option granting practices (Item 11)*
- Exhibit 19: Insider trading policies and procedures (Item 15)
- Inline tagging of cybersecurity risk management, strategy and governance disclosure

** Part III information: can be incorporated by reference from proxy statement*

Cybersecurity Risk Management & Strategy

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Required Form 10-K Disclosures

Reg S-K Item 106(b) – Narrative disclosure of:

- "[P]rocesses, if any, for assessing, identifying, and managing material risks from cybersecurity threats"
- "[W]hether 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 registrant, including its business strategy, results of operations, or financial condition and if so, how"

Companies should address, as applicable:

- If and how cybersecurity processes have been integrated into the company's overall risk management system or processes
- If auditors, consultants, assessors, or other third parties are engaged in connection with cybersecurity processes
- Processes, if any, to oversee and identify cybersecurity risks from the use of any third-party service providers
- Any other information necessary for a "reasonable investor" to understand the company's cybersecurity processes

Cybersecurity Governance (Board)

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Required Form 10-K Disclosures

Reg S-K Item 106(c) – Narrative disclosure of:

- "[T]he board of directors' oversight of risks from cybersecurity threats"

Disclosure of board cybersecurity expertise is not required

- Board cybersecurity risk oversight disclosure includes:
  - Which committee or subcommittee, if any, oversees cybersecurity risk
  - Processes used by the board or committee, if any, to be informed of risks from cybersecurity threats
- We expect companies will also generally continue to address the Board's oversight of cybersecurity risk management in the proxy statement to address investor focus on the topic
  - The required Form 10-K disclosures cannot be forward-incorporated from the proxy statement

Cybersecurity Governance (Management)

Required Form 10-K Disclosures

Reg S-K Item 106(c) – Narrative disclosure of:

- "[M]anagement's role in assessing and managing the registrant's material risks from cybersecurity threats"

Relevant experience of members of management who are responsible for assessing and managing cybersecurity risk must be disclosed in such detail as "necessary to fully describe the nature of the expertise", including:

- Management personnel or committees responsible for cybersecurity risk management and such persons' expertise (e.g., prior cybersecurity work experience, any relevant degrees or certifications, or any knowledge, skills or additional background in cybersecurity)
- Processes used by management to be informed about and monitor cybersecurity incidents
- Whether management reports cybersecurity risk information to the board

Cybersecurity | Breach Disclosures

Updated key findings (from prior disclosure requirements):

- 84% use a dedicated 8-K for incident disclosure
- More than ~33% did not disclose the nature of the incident
- Less than 50% disclosed in four days
- 59% assign cybersecurity oversight to their audit committee
- 9% of directors have cybersecurity expertise
- 39% of companies have cybersecurity expertise on their boards
- 84% are large accelerated filers
- ~25% are technology companies

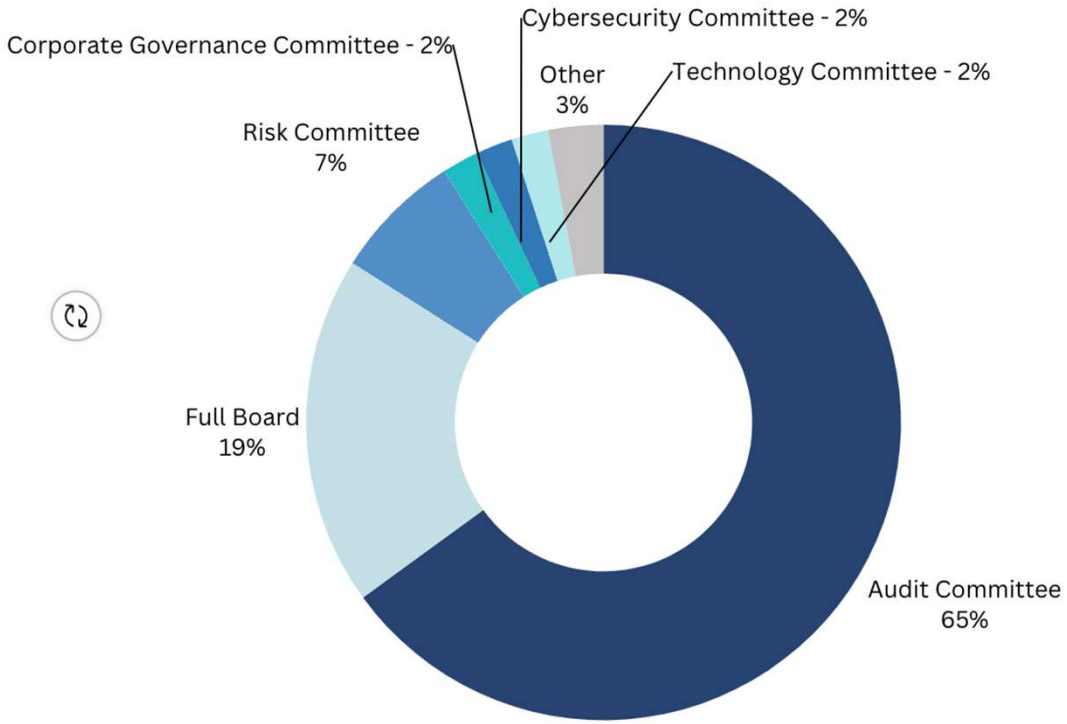
Cybersecurity Oversight | Comment Letter

We note that you reported a data breach to the Commonwealth of Massachusetts in 2022, as discussed here: https:www.mass.govdocdata-breach-report-2022download. However, your periodic reports, including this Form 10-Q and your Form 10-K for the fiscal year ended December 31, 2022, only include risk factor disclosure stating that you may experience cyber-attacks and other security incidents. In light of the data breach, please update this risk factor language that characterizes this risk as potential or hypothetical to note that you have experienced a data breach and describe it as necessary. Additionally, please tell us whether you believe this data breach was material and explain how you reached this conclusion. Lastly, consider updating your discussion of how your board administers its risk oversight function in overseeing cybersecurity risks. For additional guidance, consider the Commission Statement and Guidance on Public Company Cybersecurity Disclosures (SEC Release No. 33-10459), available at: https:www.sec.govrulesinterp201833-10459.pdf).

Cybersecurity Oversight | At the Board Level

Audit Committee Still Dominates

- Nearly two-thirds of Russell 3000 disclosing companies have assigned responsibility at the board level for overseeing cybersecurity to their Audit Committees
- Other committees include Compliance, Safety, and sub-Committees



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Polling Question #1

WILMERHALE MYLOGIQ

SIDEBAR: Reporting Material Incidents | Form 8-K (Item 1.05)

Disclosure Trigger

- Form 8-K is due within 4 business days after company's determination that a cybersecurity incident is material
- Narrow national security and public safety delay upon written determination of U.S. Attorney General

Required Disclosures

- "[M]aterial aspects of the nature, scope, and timing of the incident"
- "[M]aterial impact or reasonably likely material impact on the registrant, including its financial condition and results of operations"

- Materiality assessed under traditional securities law standard and must be made "without unreasonable delay"
- If any required information is not known when the Form 8-K is due, must state that and amend filing within four business days after the missing information is determined
- Cybersecurity incident is defined broadly and covers third-party systems used by the company and accidental, non-malicious incidents
- Not required to discuss remediation status, whether data were compromised, specific or technical information about the company's planned response or its cybersecurity systems, or potential system vulnerabilities to such a degree of detail as would impede incident response or remediation
- Untimely filing does not impact S-3 eligibility
- Limited safe harbor under §10(b) and Rule 10b-5 applies

SIDEBAR: Assessment Materiality | Common Considerations

Quantitative Considerations	Qualitative Considerations	Considerations that Will Not Be Relevant
• Reasonably expected percentage impact on revenue due to lost sales of products or services • Reasonably expected percentage impact on net income due to lost revenues, expenses associated with containing and remediating the incident (including, as applicable, any ransom payment) and other expected expenses (including responding to regulatory and legal proceedings and any voluntary actions to mitigate harm to affected individuals) • Reasonably expected percentage impact on total and current assets of expenses associated with the incident	• Importance of affected systems to company's operations (including effect of the incident on key systems or information that the company considers its "crown jewels") • Duration of the incident, method of incident detection and readiness of the response to halt the incident • Ability to restore affected systems and the expected integrity of those systems once restored • Nature and scope/magnitude of the information that has been improperly accessed or exfiltrated • Harm to the company's reputation and brand perception • Impact on relationships with customers, suppliers and other business partners (both near-term and long-term) • Likelihood of regulatory actions and private litigation	• Whether the affected system was owned or operated by the company or a third-party • Inability to determine the full extent of the incident • Ongoing nature of the company's internal investigation • Timing of sharing information about the incident with governmental authorities or others

Company Stock Repurchases
(EFFECTIVENESS STAYED AS OF 11/22/2023)

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Required Form 10-K Disclosures

- Tabular disclosure in new Exhibit 26 with daily quantitative repurchase data for repurchases made during Q4 by or on behalf of the company or any affiliated purchaser
- Indication in a checkbox in Exhibit 26 above the tabular disclosure whether any Section 16 officers or directors purchased or sold company securities within 4 business days before or after the company's announcement of a repurchase plan or program or an increase to an existing repurchase plan or program
- Narrative disclosure pursuant to Reg S-K Items 703 and 408(d)

Narrative disclosure under Reg S-K Item 703 includes:

- objectives or rationales for each repurchase program and process or criteria used to determine the amount of repurchases;
- any policies and procedures relating to purchases and sales of the company's securities during a repurchase program by officers and directors, including any restriction on such transactions;
- the number of shares purchased other than through a publicly announced program, and the nature of the transaction; and
- for publicly announced repurchase programs: date each program was announced, dollar amount (or share amount) approved, expiration date (if any), each program that has expired during the applicable quarter, and each program the company has determined to terminate prior to expiration or under which the company does not intend to make further purchases

Narrative disclosure under Reg S-K Item 408(d) includes:

- description of the material terms of any Rule 10b5-1 trading arrangement adopted or terminated during the covered fiscal quarter, such as the date the arrangement was adopted or terminated by the company, the duration of the arrangement and the aggregate number of securities purchased or sold pursuant to the arrangement (price terms are not required to be disclosed)

Exhibit 26 Tabular Disclosure and Checkbox
(EFFECTIVENESS STAYED AS OF 11/22/2023)

ISSUER PURCHASES OF EQUITY SECURITIES

Use the checkbox to indicate if any officer or director reporting pursuant to section 16(a) of the Exchange Act (15 U.S.C. 78p(a)), or for foreign private issuers as defined by Rule 3b-4(c) (17 CFR 240.3b-4(c)), any director or member of senior management who would be identified pursuant to Item 1 of Form 20-F (17 CFR 249.220f), purchased or sold shares or other units of the class of the issuer's equity securities that are registered pursuant to section 12 of the Exchange Act and subject of a publicly announced plan or program within four (4) business days before or after the issuer's announcement of such repurchase plan or program or the announcement of an increase of an existing share repurchase plan or program.

(a) Execution Date	(b) Class of Shares (or Units)	(c) Total Number of Shares (or Units) Purchased	(d) Average Price Paid per Share (or Unit)	(e) Total Number of Shares (or Units) Purchased as Part of Publicly Announced Plans or Programs	(f) Aggregate Maximum Number (or Approximate Dollar Value) of Shares (or Units) that May Yet Be Purchased Under the Publicly Announced Plans or Programs	(g) Total Number of Shares (or Units) Purchased on the Open Market	(h) Total Number of Shares (or Units) Purchased that are Intended to Qualify for the Safe Harbor in Rule 10b-18	(i) Total Number of Shares (or Units) Purchased Pursuant to a Plan that is Intended to Satisfy the Affirmative Defense Conditions of Rule 10b5-1(c)
[Insert additional rows as necessary for each day on which a repurchase was executed]								
Total								

Insider Trading & Option Granting Policies | FYE 2024

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Required Form 10-K Disclosures for FYE 2024

- Reg S-K Item 408(b) – Narrative disclosure of whether the company has adopted insider trading policies and procedures
- Reg S-K Item 402(x) – Narrative disclosure of company's policies and practices on the timing of awards of options in relation to the disclosure of MNPI and tabular disclosure of awards made to named executive officers
- Filing of Insider Trading Policy as new Exhibit 19

Narrative disclosure under Reg S-K Item 402(x) includes:

- A discussion of how the board determines when to grant awards of options, SARs and other similar option-like instruments
- Whether and how the board or compensation committee considers MNPI when determining the timing and terms of an award
- Whether the company has timed the disclosure of MNPI to affect the value of executive compensation

Tabular disclosure under Reg S-K Item 402(x) required for awards made to named executive officers for the period beginning 4 business days before filing of a 10-K or 10-Q, or an 8-K that discloses MNPI (other than an 8-K disclosing a material new option award grant under Form 8-K Item 5.02(e)), and ending one business day after

Compensation Clawbacks

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Required Form 10-K Disclosures

- Indication in two new checkboxes added to the cover page of Form 10-K whether the company had a restatement requiring a clawback
- Filing of clawback policy as new Exhibit 97
- Narrative disclosure pursuant to Reg S-K Item 402(w) for each restatement during or after the last completed fiscal year (or during a prior fiscal year if there is an outstanding balance of compensation to be recovered)

New listing standards took effect on October 2, 2023 and require a compliant clawback policy no later than December 1, 2023 (or face delisting)

Narrative disclosure under Reg S-K Item 402(w) includes:

- For each restatement, the date the company was required to prepare it, the aggregate dollar amount of erroneously awarded compensation, how such dollar amount was calculated, and the dollar amount that remains outstanding at the end of the last completed fiscal year
- If erroneously awarded compensation has been outstanding for 180 days or longer since the date the company has determined that such amount was owed by a current or former NEO, additional disclosure of the exact dollar amount owed by each such individual
- If company deems recovery impracticable, disclosure of the amount of recovery foregone for each current and former NEO and for all other current and former executive officers as a group and the reasons for not pursuing recovery

10-K Cover Page | Restatement & Clawback Information

If securities are registered pursuant to Section 12(b) of the Act, indicate by check mark whether the financial statements of the registrant included in the filing reflect the correction of an error to previously issued financial statements. ☐

Indicate by check mark whether any of those error corrections are restatements that required a recovery analysis of incentive-based compensation received by any of the registrant's executive officers during the relevant recovery period pursuant to §240.10D-1(b). ☐

The first box should be checked if there is any change from previously reported financials that is due to correction of an error in accordance with Accounting Standards Codification (ASC) 250, even if that change does not trigger a clawback.

Note also that an out-of-period adjustment that does not revise numbers in previously issued financial statements does not require checking the first box and would not trigger the Dodd-Frank clawback requirement.

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Polling Question #2

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Selected 10-K Reporting Reminders & Considerations

XBRL

SEC staff posted a sampled comment letter on September 7, 2023, reminding issuers about XBRL compliance:

- Including required Inline XBRL presentation under Item 405 of Regulation S-T
- Applying proper scaling to the same tagged data, e.g., shares outstanding reported on the cover page and in the balance sheet
- Tagging pay versus performance data in proxy statements
- Providing separate XBRL tags for each required item in pay versus performance disclosure, even if combined in one table, graph or other format
- Using consistent XBRL elements to tag the same reported line item on the income statement from period to period, unless a change is necessitated
- Using custom tags only when an appropriate tag does not exist in the standard taxonomy

Non-GAAP Financial Measures

- **Non-GAAP disclosures remains a top area of SEC comment**
- **Keep the non-GAAP disclosure framework in mind based on the disclosure location:**

Three Layers of SEC Rules	SEC Filing	Earnings Release/ Form 8-K Item 2.02	Any Public Disclosures
Regulation G (Include comparable GAAP measure and reconciliation; Include any additional information needed to avoid being misleading)	X	X	X
S-K Item 10(e) – Additional Disclosures (Present GAAP measure with equal or greater prominence; Include reasons non-GAAP measure is useful and how it is used by management)	X	X	
S-K Item 10(e) – Prohibitions (Liquidity measures generally cannot exclude cash items; Performance measures cannot mischaracterize adjustments as being non-recurring; No non-GAAP on face of financial statements; No non-GAAP titles that are confusingly similar to GAAP titles)	X		

Non-GAAP Financial Measures (continued)

- **SEC staff updated non-GAAP Compliance and Disclosure Interpretations in December 2022.**
- **Notable highlights:**
  - Staff clearly expressed its view that some non-GAAP measures could mislead investors to such a degree that even extensive, detailed disclosure about the nature and effect of each adjustment is insufficient.
  - Extra scrutiny will be applied to operating expenses: "Presenting a non-GAAP performance measure that excludes normal, recurring, cash operating expenses necessary to operate a registrant's business is one example of a measure that could be misleading."
  - Staff expanded the list of examples, beyond revenue adjustments, that could result in the application of prohibited individually tailored accounting principles
  - Staff expanded its illustration of instances that could violate equal or greater prominence

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Polling Question #3

WILMERHALE MYLOGIQ

Item 7A. Quantitative and Qualitative Disclosures About Market Risk

- **Disclose quantitative and qualitative information about market risk as of the end of the latest fiscal year.**
- **Three presentation options for quantitative risks:**
  - Tabular
  - Sensitivity analysis
  - Value at risk
- **Consider market risk changes since last year, namely interest rates**

Segment Reporting | Final ASU 2023-07

- **November 27, 2023 – FASB issues final ASU to improve disclosures about reportable segments to provide that a public entity:**
  - Disclose, on an annual and interim basis, significant segment expenses that are regularly provided to CODM and included within each reported measure of segment profit or loss.
  - Disclose, on an annual and interim basis, an amount for other segment items by reportable segment and a description of its composition.
  - Provide all annual disclosures about a reportable segment's profit or loss and assets in interim periods.
  - Provide the measure of segment profit or loss that is most consistent with the measurement principles used in measuring the corresponding amounts in the public entity's consolidated financial statements, in instances where the CODM uses more than one measure of a segment's profit or loss in assessing segment performance and deciding how to allocate resources.
  - Disclose the title and position of the CODM and an explanation of how the CODM uses the reported measure(s) of segment profit or loss in assessing segment performance and deciding how to allocate resources.
  - Provide all the disclosures required by the amendments in the ASU and all existing segment disclosures in Topic 280 even if only one reporting segment.
- **All public entities will be required to report segment information in accordance with the new guidance starting in <u>annual periods beginning after December 15, 2023</u>**

SAB 74 (SAB Topic 11.M / ASC 250-10-S99-5)

- **Discuss the potential effects of adoption of recently issued accounting standards in registration statements and reports filed with the Commission, unless the impact on its financial position and results of operations is not expected to be material**
- **Disclosures should be included in MD&A and the financial statement footnotes**
- **The level of information will differ with respect to various standards and from one registrant to another**
- **Registrants should consider the following disclosures:**
  - A brief description of the new standard, the date that adoption is required and the date that the registrant plans to adopt, if earlier
  - A discussion of the methods of adoption allowed by the standard and the method expected to be utilized by the registrant, if determined
  - A discussion of the impact that adoption of the standard is expected to have on the financial statements of the registrant, unless not known or reasonably estimable. In that case, a statement to that effect may be made
  - Disclosure of the potential impact of other significant matters that the registrant believes might result from the adoption of the standard (such as technical violations of debt covenant agreements, planned or intended changes in business practices, etc.) is encouraged

“Reminders” from Recent SEC Enforcement Actions

- **Extra scrutiny is being applied to company risk assessments for ICFR**
- **Disclosure of perks and related person transactions remains a hot button**
  - Highlights importance of controls and procedures, including D&O questionnaires
- **Non-GAAP disclosure controls and procedures remain in focus**
  - Underscores need for controls around consistency and comparability
- **Failure to have adequate disclosure controls and procedures can lead to liability even when there are no allegations of fraud, misrepresentation, omission or investor harm**
- **When filing a Form 12b-25, remember the form is not simply a notice of inability to file a Form 10-K or 10-Q on a timely basis and/or a way to extend the due date, but rather a substantive disclosure document with required narrative and quantitative explanations**

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Polling Question #4

WILMERHALE MYLOGIQ

Disclosures Trends Summary |

Interest Rates Risk Factors

General/Non-Specific Example

- Our business and operations are subject to interest rate risks, and changes in interest rates can reduce demand for our products and increase borrowing costs.

High Risk Examples

- Interest Rate Risk Management. Changes in interest rates are our primary market risk as *our balance sheet is almost entirely comprised of interest-earning assets and interest-bearing liabilities* As such, fluctuations in interest rates have a significant impact not only upon our net income but also upon the cash flows related to those assets and liabilities and the market value of our assets and liabilities. In order to maintain what we believe to be acceptable levels of net interest income in varying interest rate environments, we actively manage our interest rate risk and assume a moderate amount of interest rate risk consistent with board policies.
- In addition to commodity hedge agreements, we utilize interest rate swap agreements to manage the net interest rate risk inherent in our sources of borrowing as well as foreign currency forward contracts to manage the exchange rate risk associated with certain intercompany loans with foreign subsidiaries and other approved transactional currency exposures. Utilizing these hedge agreements exposes us to certain *counterparty risks*. The failure of one or more of the counterparties to fulfill their obligations under the hedge agreements, whether as a result of weakening financial stability or otherwise, could adversely affect our financial condition, results of operations or cash flows.

Disclosures Trends Summary |

Segment Reporting Comment Letters

Example #1

- We note your response to comment 6. Please revise to clearly explain the nature of the significant amounts included in the "Corporate and Other" line item of operating profit (loss). In addition, ASC 280-10-50-30b) requires a reconciliation of the total of the reportable segments' measures of profit or loss to the public entity's consolidated income before income taxes. We note Corporate and Other does not appear to qualify as a reportable segment, and operating profit (loss) is not reconciled to the consolidated earnings before income taxes. Please revise your reconciliation to comply with this guidance.

Example #2

- We read your response to comment 4 and the disclosure revisions you made. Please remove total adjusted operating income, a non-GAAP measure, from your financial statements. Show us your revised disclosure. Refer to Item 10(e)(1)(ii)(C) of Regulation S-K.

Example #3

- You state that you operate and report financial information in one segment and your CODM reviews total company operating results to assess overall performance and allocate resources. Please tell us in detail how you concluded you have a single operating and reportable segment and it is your total company. In doing so, please also discuss: ' how the CODM goes about allocating resources, assessing operating performance and making key operating decisions using only total company operating results (and not lower level results), ' your management structure from the top down to the sports team level, including each person's roles and responsibilities, ' how budgets are prepared, who reviews and approves them, at what lower levels (e.g., sports team) they are prepared and the frequency, ' whether lower level financial information is reviewed by the CODM and/or Board and, if so, describe what it is and how often it is reviewed, and ' whether any managers are compensated based upon the performance of lower levels of the company and, if so, tell us who and explain how it works. Refer to ASC 280-10-05-3 and paragraphs 50-1 and 50-6 through 50-9 of ASC 280-10-50.

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Q&A

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Ganesh Rajappan
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MyLogIQ

WilmerHale MYLOGIQ

Reminders

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Earn free CPE, participate in live Q&A, hear the latest trends in regulatory guidance from experts

- **December 14 | Webinar** Controllership's Role in Proxy & Non-Financial Disclosures
- **December 19 | Webinar** XBRL® Insights for SEC Filing Teams

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