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On the Radar

SEC Comment Letter Considerations, Including Industry Insights

The global business landscape has been changing rapidly, with higher interest rates, tightening credit, inflation, supply-chain and labor issues, geopolitical conflicts, and concerns about the real estate and banking sectors affecting markets worldwide over the past few years. As these trends persist, the transformative effects of generative artificial intelligence (often referred to as "gen AI") may also have a significant impact on financial markets. The SEC continues to undertake rulemaking and provide registrants with proactive guidance as needed to respond to recent market developments while conducting ongoing reviews and oversight to protect investors. Under the leadership of Chair Gary Gensler, who took office in April 2021, the Commission has pursued a comprehensive rulemaking agenda embodying three key themes: efficiency and competition, integrity and disclosure, and resiliency of the markets. In the past year, the SEC has issued final rules on disclosure topics such as cybersecurity, share repurchases, and "clawback" policies and has continued to consider feedback received on proposed rules related to climate-change disclosures and special-purpose acquisition companies (SPACs).[1] At the same time, the SEC has been addressing other issues in the marketplace, including significant growth in crypto assets and the rise of gen AI and data analytics.

To help the SEC meet its responsibilities under the Sarbanes-Oxley Act, the SEC's Division of Corporation Finance (the "Division") continues to selectively review documents filed by registrants under the Securities Act of 1933 and the Securities Exchange Act of 1934. Under the Division's filing review process, the Division performs some level of review of each registrant at least once every three years and may issue comments to such registrants.

[1] A SPAC is a newly formed company that raises cash in an initial public offering (IPO) and uses that cash, the equity of the SPAC, or both to fund the acquisition of a private operating company.

The analysis herein summarizes the comments the Division issued during its reviews of periodic filings of public companies.

Top 10 Topics in Reviews

The table below summarizes comment letter trends by topic in the 12-month period ended July 31, 2023 ("review year 2023" or the "current year").

Topic	Percentage of All Reviews	Rank	Change in Rank From Prior Year
MD&A	36%	1	—
Non-GAAP measures	33%	2	—
Segment reporting	12%	3	—
Revenue recognition	10%	4	—
Acquisitions, mergers, and business combinations (tie)	10%	5	↑ 5
Signatures, exhibits, and agreements (tie)	10%	5	—
Internal control over financial reporting	8%	7	—
Fair value	7%	8	↓ (2)
Inventory and cost of sales	7%	9	—
Debt	7%	10	↑ 2

The topics that constitute the current year's top 10 list are largely consistent with the prior year's list, with debt joining the top 10 list and climate change dropping out of the top 10.[2] Comments on MD&A and non-GAAP measure disclosures continue to increase in number, and these topics are still the two most significant sources of SEC comments. We also observed an increased number of comments related to acquisitions, mergers, and business combinations, which rose from 10th place in 2022 to 5th place in 2023 (tied for 5th with signatures, exhibits, and agreements) after a rise in merger and acquisition activity over the past several years. In addition, debt moved up two spots to 10th place.

Conversely, climate change (ranked 8th in 2022) fell just outside the top 10 list in 2023. The decrease in rank is largely due to the broad increase in SEC comments issued in the current year from prior years, which led to a decline in reviews with climate-change comments as a percentage of total SEC reviews that resulted in a comment letter. However, the SEC staff continues to issue comments on this topic and issued such comments to a similar number of registrants in both review year 2023 and review year 2022. The staff has begun to release climate-change-related comment letters for reviews conducted in the late summer and fall of 2023 and continues to focus on climate-change disclosures in advance of an expected final rule.

Further, although not identified as a separate top 10 topic, the impacts of higher interest rates, inflation, supply-chain issues, COVID-19, and the Russia-Ukraine war remained a source of SEC comments over the past year. Such comments have focused on disclosures related to the effects of these macroeconomic and geopolitical challenges on a registrant's (1) risk factors, (2) MD&A, (3) early-warning disclosures about impairments, and (4) adjustments to non-GAAP measures.

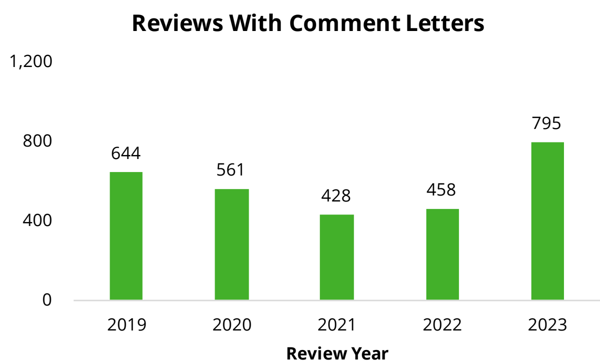
A number of the aforementioned trends are likely to continue in years to come since comment letter topics have been largely consistent year over year. While it is difficult to predict what new comment letter trends are on the horizon, we look to the Commission's priorities to help us predict topics of focus in the coming year. Recent SEC disclosure rules and interpretive guidance related to non-GAAP measures and key performance indicators and metrics may result in increased focus and scrutiny from the SEC staff. Given that the staff often focuses on compliance with new reporting requirements, we expect to see comments on disclosures about cybersecurity risks and share repurchases next year. As the SEC works toward issuing a final rule on climate-change

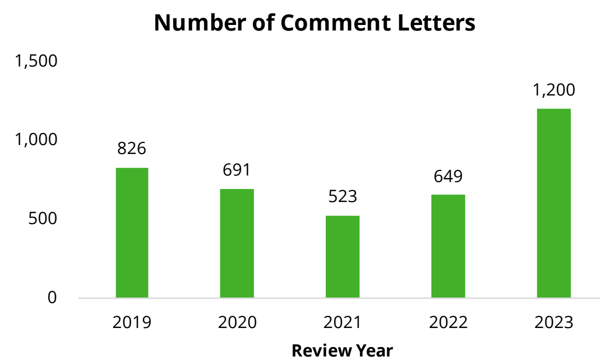
2 The number of reviews with a comment in 2023 may be subject to change as more 2023 reviews with comment letters are posted to EDGAR.

disclosures, we expect the Commission to remain focused on how registrants have complied with the existing interpretive guidance. In addition, we expect the SEC staff to continue monitoring the impacts of higher interest rates, tightening credit, inflation, supply-chain and labor issues, geopolitical conflicts, and concerns about the real estate and banking sectors, as well as other emerging market events, and perhaps focus future comments on accounting and reporting related to these matters. These events, coupled with the staff's focus on ensuring that MD&A provides useful information to investors, mean that comments on MD&A are likely to stay elevated. The staff may also comment on disclosures about the known trends and uncertainties related to income tax as a result of the Inflation Reduction Act and the implementation of the Pillar Two rules issued by the Organisation of Economic Co-operation and Development.

Long-Term Review Trends

Here's how the numbers have played out over the past five years:





As the charts above illustrate, while there was a notable decline in the number of reviews with comment letters and the number of comment letters issued on Forms 10-K and 10-Q from review year 2019 through review year 2021, the trend started to reverse in review year 2022, with an even greater increase in review year 2023. The volume of reviews and comment letters in the current year exceeds the volume seen in any given year since review year 2018, with the number of comment letters issued in review year 2023 exceeding the total number of comment letters issued in review years 2021 and 2022 combined. The current year's uptick in both reviews with comment letters (a 74 percent increase from the prior year) and the overall number of comment letters (an 85 percent increase from the prior year) is most likely the result of (1) an increase in the number of public companies, (2) a decline in traditional IPO and SPAC transaction activity, and (3) the use of comments by the SEC staff to elicit expanded disclosures related to emerging issues. Throughout calendar years 2020 and 2021, the volume of traditional IPOs and SPAC transactions reached record levels, with more than 800 companies going public during this time frame. Consequently, there was an increase in the number of Forms 10-K filed by public companies, which are now subject to recurring SEC staff review. We then saw a slowdown in the IPO and SPAC market beginning in 2022 and continuing throughout 2023, which may have allowed the SEC staff to devote more time to both triennial reviews required by the Sarbanes-Oxley Act and additional selective reviews of existing public companies. Further, over the past several years, the global economy has been affected by a variety of emerging market events, and the SEC staff often issues comments on these topics to request expanded disclosures aimed at providing decision-useful information and greater transparency to investors. We expect that each of the factors listed above will lead to continued increases in both the number of reviews with comment letters and the number of comment letters issued on Forms 10-K and 10-Q in subsequent years.

Priorities on the Horizon

Broader SEC priorities often influence comment letter trends. As registrants start to prepare for the 2023 annual reporting cycle, they may find it helpful to consider the following SEC priorities:

Investor protection	The SEC continues to focus on the investor protection pillar of its three-part mission — through the ongoing reviews described above as well as robust enforcement and examination activities. Enforcement actions, which have continued at historic levels, yielded $5 billion in judgments and orders in the SEC's fiscal year ended September 30, 2023.
Climate-change disclosures	In advance of any new rules on climate-change disclosures, the Division was directed to increase its focus on climate-related disclosures when reviewing public-company filings, such as by assessing the extent to which public companies have provided disclosures consistent with those described in the SEC's 2010 interpretive release. The Division has issued climate-related comments to more than 70 companies in a variety of industries and released a "Dear Issuer" letter[3] on the topic.
AI and predictive data analytics	While advances in technology and finance are providing greater access to the U.S. markets and spurring innovation and competition within those markets, the Commission is focused on ensuring that it can achieve its core public goals with appropriate protections for everyday investors. To that end, the SEC is investigating how the use of various AI models in the financial markets could affect market stability and is considering regulation related to such use. In addition, Chair Gensler has cautioned registrants that they should ensure that any material disclosures about AI opportunities and risk are not misleading.
Crypto finance	The Commission has a number of projects on crypto finance on its agenda, and Chair Gensler has made more robust oversight and investor protection in this area a priority. On March 31, 2022, the SEC issued SAB 121, which provides SEC staff guidance on safeguarding obligations related to crypto assets. In addition to rulemaking and issuing guidance, the SEC has undertaken enforcement matters related to digital asset offerings.
Disclosures about evolving risks	As global markets evolve, the Commission continues to focus on registrants' disclosures related to matters that management and the board of directors are monitoring, evaluating, and addressing. These matters include, but are not limited to, higher interest rates, tightening credit, inflation, supply-chain and labor issues, cybersecurity, geopolitical conflicts, and concerns about the real estate and banking sectors.

[3] *Sample Letter to Companies Regarding Climate Change Disclosures.*

(Table continued)

Recent final rules	Key final rules issued by the SEC that recently took effect, or take effect in the coming months, address the following topics: • *Clawback policies* — Under the SEC's October 26, 2022, final rule, an issuer whose filed financial results are subsequently restated because of material noncompliance with financial reporting requirements is required to "claw back" any excess compensation awarded on the basis of the previously filed results. The final rule also requires an issuer to disclose its recovery policy in an exhibit to its annual report and to include new checkboxes on the cover page of its annual report to indicate whether the financial statements include a restatement and whether a clawback analysis was required. The New York Stock Exchange's and Nasdaq's new listing standards requiring compliance with the SEC's final rule became effective on October 2, 2023. See Deloitte's November 14, 2022, ***Heads Up*** for more information. • *Share repurchase disclosures* — Under the SEC's May 3, 2023, final rule, registrants are required to disclose additional detail regarding the structure of and rationale for an issuer's repurchase program and file detailed quantitative daily repurchase data as an exhibit to its periodic reports. The final rule is effective for fiscal quarters starting on or after October 1, 2023 (e.g., it is effective for calendar-year-end companies beginning with the fourth quarter of 2023). On October 31, 2023, the U.S. Court of Appeals for the Fifth Circuit instructed the SEC to revise its cost-benefit analysis within 30 days. If the SEC does not successfully demonstrate that the benefits of implementing the final rule would outweigh the costs, the final rule may be vacated on the basis of a lawsuit filed by the U.S. Chamber of Commerce and other parties. It is unclear how this litigation may affect the timing or implementation of the final rule. • *Cybersecurity disclosures* — Under the SEC's July 26, 2023, final rule, a registrant is required to report the following: ◦ Material cybersecurity incidents — A registrant must file a Form 8-K to disclose material cybersecurity incidents within four business days after determining that the incident is material to the registrant. ◦ Annual cybersecurity disclosures — The final rule adds Item 1C, "Cybersecurity," to Form 10-K and requires disclosures about cybersecurity risk management, strategy, and governance. The Form 8-K disclosure requirements are effective as of December 18, 2023 (except for smaller reporting companies, for which the effective date is June 15, 2024), and the Form 10-K disclosure requirements are effective for fiscal years ending on or after December 15, 2023. See Deloitte's July 30, 2023, ***Heads Up*** for more information.

(Table continued)

Proposed rules	As previously noted, the Commission has pursued a comprehensive rulemaking agenda under the leadership of Chair Gensler, issuing more than 60 proposed rules. Registrants should monitor the status of key proposed rules, including those related to the following: • *Climate-related disclosures* — Under the SEC's March 21, 2022, proposed rule, a registrant would be required to provide disclosures about greenhouse gas emissions (with attestation for Scope 1 and Scope 2 disclosures), certain financial statement disclosures, and qualitative and governance disclosures in its registration statements and annual reports. See Deloitte's March 21, 2022 (updated March 29, 2022), ***Heads Up*** for an executive summary of the proposed rule and Deloitte's March 29, 2022, ***Heads Up*** for a comprehensive analysis of the proposed rule. Since climate-related disclosures are a priority for Chair Gensler, we would expect the SEC to continue progressing toward a final rule, though the timing is uncertain. • *SPACs* — Under the SEC's March 30, 2022, proposed rule, the financial statement reporting requirements applicable to SPAC merger transactions would be aligned more closely with the requirements for a traditional IPO. In addition, the proposed rule would require enhanced disclosures and provide additional investor protections related to SPAC IPOs and de-SPAC transactions. See Deloitte's October 2, 2020 (updated April 11, 2022), *Financial Reporting Alert* for more information.

For a comprehensive discussion of comment letter trends affecting SEC filers, see Deloitte's Roadmap *SEC Comment Letter Considerations, Including Industry Insights*.

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