



# Life as a Public Company

*Overview of Requirements, New SEC Rules/Actions and What to Expect Next*

# Introductions

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## Moderator

- Shashi Khiani, Shareholder at Polsinelli PC

## Panelists

- Todd Aman, Senior Vice President, General Counsel & Secretary at FiscalNote Holdings, Inc.
- Danielle Carter, VP, Compliance & Global Trade at Hewlett Packard Enterprise



# SEC Filings

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 Form 10-K

 Form 10-Q

 Proxy Statement & Annual Shareholders Meeting

 Form 8-Ks

 Section 16 Filings

# SEC Filings (continued)

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## Form 10-K and Form 10-Q

- The Form 10-K is the Annual Report which includes audited annual financial statements
  - Includes disclosure on background of the Company's business, risk factors, management's discussion and analysis of financial results (MD&A) and certain governance disclosures (though in most instances these governance disclosures will be disclosed in the subsequently filed proxy statement and incorporated into the 10-K)
  - Due dates range from 60 days (for Large Accelerated Filers) to 75 days (Accelerated Filer) to 90 days (Non-Accelerated Filer) after fiscal year end
- The Form 10-Q is the Quarterly Report which includes unaudited interim financial statements
  - Typically only includes unaudited interim financial statements and provides updates to risk factors, MD&A, internal controls, etc.
  - Due dates are either 40 days (for Large Accelerated Filers and Accelerated Filers) or 45 days (Non-Accelerated Filer) after fiscal quarter end

# SEC Filings (continued)

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## Proxy Statements and Annual Shareholders Meeting

- Proxy statements are prepared and delivered typically in connection with the annual shareholders meeting to elect directors; however, they are used any time that the Board needs to solicit stockholder approval of a matter, merger, certain stock issuances, etc.
- In contrast to periodic reports, the due date for filing/mailling proxy statement is driven by a state law and a Company's governance documents (e.g. bylaws); however, the SEC does have a requirement to file the proxy statement no later than 120 days after fiscal year end if you are seeking to incorporate by reference into the 10-K
- Disclosures include the date/time of the meeting, record date for shareholders entitled to vote, instructions on how to vote, the items being voted upon and the required votes, etc.; however, the proxy rules on what must disclosed depends on the specific proposals being voted upon
- For proxy statements filed in connection with the election of directors, companies generally must provide disclosures on the following, among other matters:
  - director biographies and qualifications
  - the company's governance framework
  - executive compensation
  - related party transactions
  - beneficial ownership of company stock



# SEC Filings(continued)

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- The rules around disclosure in the proxy statement, particularly in the context of executive compensation, can be extremely nuanced and specific
  - For example, in June 2023 the SEC settled charges with Stanley Black & Decker for its failure to disclose over \$1 million of perquisites that predominantly consisted of expenses associated with the executives' use of corporate aircraft.
  - Failure to properly identify, track and calculate perquisites.
  - Shows need to vet internal processes and legal should serve as a check – cannot simply take numbers from internal teams without thoroughly vetting the numbers.



# SEC Filings(continued)

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## Form 8-Ks – Current reports

- Filed to report major events w/r/t the Company which the SEC (and sometimes the relevant stock exchange) requires be disclosed to the public
- Typically, have four business days to file after the event date
  - ✓ Time is of the essence and failure to file could impact ability to raise capital in the future

## Section 16 Filings (Forms 3, 4 and 5)

- Disclose transactions in the issuer's securities by directors, executive officers, and 10% holders
- Initially a Form 3 is due 10 days from becoming an insider to disclose holdings at time of becoming an insider and subsequently Form 4s are due two business days from transaction which is being disclosed
- Form 5 (if applicable) – within 45 days of the end of the Issuer's fiscal year



# Earnings Release and Investor Communications

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## Earnings Calls and Releases

- Several days in advance, issue press release announcing earnings release:
  - Date, time, subject matter, how to access the call/webcast and where to find financial information on company website
- Issue Earnings Release no more than 48 hours prior to the earnings call
- Furnish earnings release on Form 8-K prior to the earnings call
- Post Financial (GAAP and Non-GAAP) information on website prior to earnings call
- Typically 10-K/10-Q is filed same day, however, can be filed up to the relevant deadline



# Earnings Release and Investor Communications (cont'd)

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- ❖ Most earnings releases include forward looking information either in the form of forward-looking financial guidance or statements on plans and intentions of the Company in the future
  - Federal securities laws include a safe-harbor for such forward-looking statements to limit a company's liability in the event actual results differ
  - In order to take advantage, companies must include specific language explaining forward-looking statements, how to identify such statements and factors that could cause actual results to differ
- ❖ Most companies include non-GAAP measures in their earnings materials
  - Regulation G has very specific rules re: the use of non-GAAP measures
    - Equal or Greater Prominence of GAAP Measure
    - Reconciliation with GAAP Measure
    - Why management believes the non-GAAP measure is useful to investors
    - Any other purposes for which management uses non-GAAP measure



# Corporate Governance Policies

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## Code of Business Conduct and Ethics

- Applies to directors, officers and employees and is designed to deter wrongdoing and promote honest and ethical conduct
- Typically addresses matters such as conflicts of interest, corporate opportunities, confidentiality, etc.
- Whistleblower policy is sometimes a part of this or a separate policy

## Committee Charters: Audit, Compensation and Nominating and Governance

- Sets forth the roles and responsibilities of the applicable committee

## Corporate Governance Guidelines

- Designed to help board fulfill its responsibility to stockholders to provide general direction and oversight of management of the business
- Typically addresses matters such as director qualification standards, director responsibilities, annual performance evaluation of the board, etc.



# Corporate Governance Policies (cont'd)

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## Related Person Transaction Policy

- Sets forth the requirements and processes applicable to approving transactions with related persons
- Related persons generally includes directors, executive officers and 5% stockholders

## Insider Trading Policy

- Sets forth the restrictions and requirements to trading in the Company's securities
  - Trading Windows and Blackout Periods
  - Section 16 Reporting Expectations
- Typically applies to directors, executive officers, employees and in some cases consultants

# SEC New Rule re: 10b5-1 Trading Plans

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# SEC New Rule re: 10b5-1 Trading Plans (cont'd)

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❖ SEC adopted new 10b5-1 Rules that went into effect February 28, 2023

❑ Cooling Off Period

- For directors and officers: later of 90 days following adoption or modification or 2 business days following the quarterly report for the period in which the plan was adopted or modified.
- 30 day cooling off period for persons other than Issuers or Directors

❑ No Overlapping Plans

❑ One Plan per 12-month period

❑ Must act in good faith



# SEC New Rule re: Cybersecurity Disclosure

SEC adopted new Cybersecurity Disclosure Rules on July 26, 2023.

Form 8-K disclosure within four business days of the company's determination that cybersecurity event is *material*

- Company must make materiality determination without unreasonable delay after discovery of the incident

Form 10-K will require disclosure of:

- risk management and strategy
- whether company has been materially affected by cybersecurity risks/threats
- company's cybersecurity governance, including with respect to oversight by the board and management

Compliance dates

- Form 8-K: December 18, 2023 (SRCs have extension till June 15, 2024)
- Form 10-K: All companies are required to comply on their next annual report for the fiscal year ending on or after December 15, 2023

# SEC New Rule re: Clawback Policies



SEC adopted new clawback requirements that went into effect February 28, 2023. Listing Standards were postponed and will go into effect October 2, 2023



Companies have until December 1, 2023 to adopt compliant clawback policies



Must adopt clawback policy for recovery of incentive-based compensation erroneously received by current or former executive officers during the three immediately preceding completed fiscal years



Payments must be recovered even if there was no misconduct or failure of oversight by the executive officer



Disclosure Requirements



- File written clawback policies as exhibit to annual report
- New checkbox on cover page of annual report to indicate whether the filing reflects a correction of an error to previously issued financials and whether it requires analysis under clawback policy
- How has clawback policy been applied since the start of the last completed fiscal year



Clawback Policy is triggered by both “Big R” and “Little R” restatements

# Illustrative SEC Enforcement

## *In re Activision Blizzard*

- \$35 million settlement in wake of workplace misconduct that was not adequately tracked and disclosed.
- Activision Blizzard failed to have proper “disclosure controls and procedures designed to ensure that information related to employee complaints of workplace misconduct would be communicated to Activision Blizzard’s disclosure personnel to allow for timely assessment on its disclosures.”
- Activision Blizzard’s categories of “potentially material information” were too narrow, excluding incidents of workplace misconduct.
- Case was not about fraud or investor harm but about getting the company SEC disclosure committee the information it needs.

## *SEC v. Panuwat*

- Insider of Company X purchased options in Company Y (a competitor) after learning his Company would be acquired (MNPI). Insider anticipated that the acquisition of his Company X would also lead to an increase in the share price of Company Y, which he knew was listed as a comp by the investment bankers.
- Using MNPI to trade securities of other companies was expressly forbidden by Company Insider Trading Policy.
- Language of Insider Trading Policy can broaden scope of duties for Insiders as the SEC brought this case upon a theory of “shadow insider trading.”

# SEC's Focus on Non-GAAP Measures

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- ❖ Regulation G – Affects any public disclosure (e.g., SEC filings, earnings call, press release) of material information that includes Non-GAAP financial measures
- ❖ Requirements of Regulation G
  - Equal or Greater Prominence of comparable GAAP Measure
  - Reconciliation with comparable GAAP Measure
  - Why management believes the non-GAAP measure is useful to investors
  - Any other purposes management uses non-GAAP measure for
- ❖ In re: DXC – \$8 million penalty for excluding adjustments called transaction, separation, and integration-related (TSI) costs from non-GAAP earnings. The Company's expense classifications were not consistent with its own public description of TSI costs
- ❖ Review [C&DIs](#) – this area is a point of emphasis since the end of 2022



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