Blogs
January 31, 2023
Corp Fin Issues “Form 10-K Checkbox” Guidance

Last Friday, Corp Fin issued **four new Exchange Act CDI 121H.01-04** to provide some guidance relating to the new clawback rules that the SEC adopted in October. The first of these CDIs provides guidance on Form 10-K checkboxes, which is useful to understanding this transition period for the new rules. The new CDI states:

"Question 121H.01

Question: The form amendments adding check boxes to the cover page of Form 10-K, Form 20-F, and Form 40-F indicating whether the form includes the correction of an error in previously issued financial statements and a related recovery analysis are effective January 27, 2023. However, the listing standards are not required to be effective until November 28, 2023 and issuers subject to such listing standards will not be required to adopt a recovery policy for 60 days following the date on which the applicable listing standards become effective. Will issuers be required to mark the check boxes in 2023 before an issuer is required to adopt a recovery policy and comply with the applicable listing standards?

Answer: In the adopting release, the Commission indicated that it does not expect compliance with the disclosure requirements until issuers are required to have a recovery policy under the applicable exchange listing standard. While the check boxes and other disclosure requirements will be in the rules and forms in 2023, we do not expect issuers to provide such disclosure until they are required to have a recovery policy under the applicable listing standard. [January 27, 2023]"

What does that mean? Our best reading is that the checkboxes should be included on the cover of the 10-K, but companies don't need to consider whether or not to check them at this time. That said, there has been a mix of practice of including or excluding the checkboxes on 10-Ks filed on and after January 27th.

The second and third new CDIs relate to determining "NEOs" in the foreign private issuer context - and the fourth CDI clarifies the extent to which a compliant clawback policy under the SEC's rules could encompass compensation in plans other than tax-qualified retirement plans.

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