To Check The Box Or Not To Check The Box? That Is The Question

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By Jay Knight

One of the disclosure requirements from the SEC's clawback rules is a set of new checkboxes for the cover page of the Form 10-K, Form 20-F and Form 40-F, with one of those checkboxes indicating whether the financial statements included in the report reflect the correction of an error to previously issued financial statements, and another checkbox indicating whether any of the error corrections require a recovery analysis of incentive-based compensation under the company's clawback policy. The text associated with those checkboxes is as follows:

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). ☐

Now that listed issuers are required to have a recovery policy under the applicable listing standard, such issuers will need to begin assessing whether the boxes get checked or not during this next 10-K cycle.

Last week, various SEC Staff members participated at the AICPA Conference on Current SEC and PCAOB Developments, as well as the American Bar Association's Federal Regulation of Securities Winter Meeting. Based on statements made during those events, as well as my follow-up conversation with senior SEC staff on the topic, we are summarizing below a two-step process that preparers can use to determine whether the first box should be checked.

Step 1: Were there any revisions made to the "previously issued financial statements"? For example, with respect to a 10-K for FY23, "previously issued financial statements" would be the 2021 and 2022 periods (for most issuers). This would cover ANY revisions to those previously issued financials (e.g., "Big R," "little r," as well as any others (such as a $2 error)).

If NO revisions were made to those previously issued financials ➔ the

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analysis stops and the box is NOT checked.

If YES ➔ move to step 2

Step 2: Were the revisions made to the previously issued financial statements the result of accounting errors as defined under US GAAP? Importantly, not all revisions are because of accounting errors. Examples of a revision that is not an accounting error is the adoption of a new accounting principle that is pushed back into prior periods. Examples of revisions that are an accounting error are 1) corrections of mistakes in the application of US GAAP and 2) corrections of mathematical mistakes.

If NOT related to an accounting error ➔ the box is NOT checked.

If YES the revision was the result of an accounting error ➔ the box is checked.

We hope sharing this Staff interpretive guidance is helpful for 10-K preparers this upcoming season. For more information, please contact the Barnes & Thornburg attorney with whom you work or the author.