STATEMENT

Disclosure of Cybersecurity Incidents Determined To Be Material and Other Cybersecurity Incidents

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The cybersecurity rules that the Commission adopted on July 26, 2023 require public companies to disclose material cybersecurity incidents under Item 1.05 of Form 8-K.[1] If a company chooses to disclose a cybersecurity incident for which it has not yet made a materiality determination, or a cybersecurity incident that the company determined was not material, the Division of Corporation Finance encourages the company to disclose that cybersecurity incident under a different item of Form 8-K (for example, Item 8.01). Although the text of Item 1.05 does not expressly prohibit voluntary filings, Item 1.05 was added to Form 8-K to require the disclosure of a cybersecurity incident "that is determined by the registrant to be material," and, in fact, the item is titled "Material Cybersecurity Incidents."[2] In addition, in adopting Item 1.05, the Commission stated that "Item 1.05 is not a voluntary disclosure, and it is by definition material because it is not triggered until the company determines the materiality of an incident."[3]

Therefore, it could be confusing for investors if companies disclose either immaterial cybersecurity incidents or incidents for which a materiality determination has not yet been made under Item 1.05.

This clarification is not intended to discourage companies from voluntarily disclosing cybersecurity incidents for which they have not yet made a materiality determination, or from disclosing incidents that companies determine to be immaterial. I recognize the value of such voluntary disclosures to investors, the marketplace, and ultimately to companies, and this statement is not intended to disincentivize companies from making those disclosures. Rather, this statement is intended to encourage the filing of such voluntary disclosures in a manner that does not result in investor confusion or dilute the value of Item 1.05 disclosures regarding material cybersecurity incidents.

Given the prevalence of cybersecurity incidents, this distinction between a Form 8-K filed under Item 1.05 for a cybersecurity incident determined by a company to be material and a Form 8-K voluntarily filed under Item 8.01 for other cybersecurity incidents will allow investors to more easily distinguish between the two and make better investment and voting decisions with respect to material cybersecurity incidents. By contrast, if all cybersecurity incidents are disclosed under Item 1.05, then there is a risk that investors will misperceive immaterial cybersecurity incidents as material, and vice versa.

If a company discloses an immaterial incident (or one for which it has not yet made a materiality determination) under Item 8.01 of Form 8-K, and then it subsequently determines that the incident is material, then it should file an Item 1.05 Form 8-K within four business days of such subsequent materiality determination.[4] That Form 8-K may refer to the earlier Item 8.01 Form 8-K, but the company would need to ensure that the disclosure in the subsequent filing satisfies the requirements of Item 1.05.

Finally, in determining whether a cybersecurity incident is material, and in assessing the incident's impact (or reasonably likely impact), companies should assess all relevant factors. As the Commission noted in the Adopting Release, that assessment should not be limited to the impact on "financial condition and results of operation," and "companies should consider qualitative factors alongside quantitative factors."[5] For example, companies should consider whether the incident will "harm . . . [its] reputation, customer or vendor relationships, or competitiveness."[6] Companies also should consider "the

possibility of litigation or regulatory investigations or actions, including regulatory actions by state and Federal Governmental authorities and non-U.S. authorities."[7] There also may be cases in which a cybersecurity incident is so significant that a company determines it to be material even though the company has not yet determined its impact (or reasonably likely impact). In those cases, the company should disclose the incident in an Item 1.05 Form 8-K, include a statement noting that the company has not yet determined the impact (or reasonably likely impact) of the incident, and amend the Form 8-K to disclose the impact once that information is available.[8] The initial Form 8-K filing, however, should provide investors with information necessary to understand the material aspects of the nature, scope, and timing of the incident, notwithstanding the company's inability to determine the incident's impact (or reasonably likely impact) at that time.

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[*] This statement is provided in the author's official capacity as the Commission's Director of the Division of Corporation Finance but does not necessarily reflect the views of the Commission, Commissioners, or other members of the staff. This statement is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved its content. This statement, like all staff statements, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person.

[1] *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure*, Release Nos. 33-11216; 34-97989 (July 26, 2023) [88 FR 51896 (Aug. 4, 2023)] (https://www.sec.gov/rules-regulations/2023/07/s7-09-22#33-11216) ("Adopting Release"). Market participants also should refer to my previous statement on these rules, which I issued last December (https://www.sec.gov/newsroom/speeches-statements/gerding-cybersecurity-disclosure-20231214),

[2] Form 8-K, Item 1.05.

[3] Adopting Release at 51907.

[4] For the avoidance of doubt, a company that discloses a cybersecurity incident under Item 8.01 of Form 8-K for which it has not yet made a materiality determination is still subsequently required, under Item 1.05 of Form 8-K, to determine, without unreasonable delay, whether the incident was material.

[5] Adopting Release at 51904.

[6] *Id.*

[7] *Id.*

[8] *See* Instruction 2 to Item 1.05 of Form 8-K ("To the extent that the information called for in Item 1.05(a) is not determined or is unavailable at the time of the required filing, the registrant shall include a statement to this effect in the filing and then must file an amendment to its Form 8-K filing under this Item 1.05 containing such information within four business days after the registrant, without unreasonable delay, determines such information or within four business days after such information becomes available.").

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