Form 20-F for Fiscal Year 2022: What Foreign Private Issuers Should Keep in Mind

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There have been a number of notable recent developments in U.S. Securities and Exchange Commission (SEC) regulation of foreign private issuers (FPIs), including disclosure trends and rule changes that impact the annual report on Form 20-F for fiscal year 2022.

Below we discuss recent highlights in disclosure trends, rulemaking activity by and other areas of continued focus for the SEC and other developments that are relevant to FPIs.

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General Disclosure Trends — Current Macroeconomic Factors of SEC Focus

Senior members of the Staff of the Division of Corporation Finance (Staff) have indicated publicly that the Staff will focus on ensuring registrants make adequate disclosures in areas of emerging risk in their upcoming annual reports for the fiscal year 2022, including, among others, risks associated with inflation and rising interest rates, Russia's invasion of Ukraine, COVID-19, supply chain issues and climate change. FPIs should carefully consider the impacts that the macroeconomic factors have on their business and avoid generic or boiler-plate disclosures that could apply to any company.

Below is a summary of certain key disclosure considerations relating to macroeconomic factors that FPIs should keep in mind when preparing their Forms 20-F for fiscal year 2022.

Inflation and Interest Rate Pressures

The SEC expects to see disclosure in upcoming Form 20-F filings about:

- how companies have been or expect to be impacted by recent inflationary and interest rate pressures;
- what is causing these pressures; and
- responsive actions taken or planned to mitigate these pressures.

If inflation or rising interest rates have materially impacted a company's financial position, results of operations and/or liquidity, companies should explain:

- the factors contributing to these pressures;
- the nature and/or extent of the impact; and
- any actions taken or planned to mitigate these pressures.

In addition, companies should update risk factors previously characterized as hypothetical when inflationary and interest rate pressures have materially impacted operations. For example, companies often describe potential risks related to inflation or macroeconomic conditions, and applicable risk factors should identify the types of inflationary pressures a company is facing and how its business has been affected (such as effects on its prices and profit margins, demand for its products, etc.).

Russia's Invasion of Ukraine

In May 2022, the Staff published a "Sample Letter to Companies Regarding Disclosures Pertaining to Russia's Invasion of Ukraine and Related Supply Chain Issues," which includes an illustrative, nonexhaustive list of comments that the Staff may issue to FPIs about their disclosure pertaining to Russia's invasion of Ukraine or the absence of such disclosure in companies' annual reports on Form 20-F. The sample letter provides that companies may have disclosure obligations under the federal securities laws related to the direct or indirect impact that Russia's invasion of Ukraine and the international response have had or may have on their business.

The Staff notes that to satisfy these obligations, companies should, among other things, provide detailed disclosure, to the extent conditions are material or otherwise required, regarding:

a. direct or indirect exposure to Russia, Belarus or Ukraine through their operations, employee base, investments and securities trading;

b. direct or indirect exposure to sanctions against Russian or Belarusian individuals or entities, or legal or regulatory uncertainty associated with operating in or exiting Russia or Belarus;

c. direct or indirect reliance on goods or services sourced in Russia or Ukraine or, in some cases, in countries supportive of Russia;

d. actual or potential disruptions in the company's supply chain; or

e. business relationships, connections to or assets in Russia, Belarus or Ukraine.

The sample letter also highlights how many companies have experienced heightened cybersecurity risks, increased or ongoing supply chain challenges and volatility related to the trading prices of commodities, regardless of whether the companies have operations in Russia, Belarus or Ukraine, that warrant disclosure.

In preparing their 2022 Forms 20-F, FPIs should analyze each of the disclosure considerations highlighted by the Staff in the sample letter and provide appropriate disclosures if material.

COVID-19

In March 2020, the Staff published CF Disclosure Guidance Topic No. 9 and CF Disclosure Guidance Topic No. 9A a few months later to provide its views about disclosures companies should consider concerning business and market disruptions related to COVID-19.[1] SEC comments on COVID-related disclosures initially focused on risk factors, liquidity needs and known trends or uncertainties related to COVID-19. However, as the pandemic has subsided and economic activity has increased, additional risks have emerged:

- supply chain disruptions;
- manufacturing shortages (such as in semiconductors);
- increasing difficulty in workforce recruitment in certain markets; and
- inflation-related risks.

FPIs should continue to consider CF Disclosure Guidance Topics No. 9 and No. 9A in assessing their disclosures in light of any ongoing impacts they may be experiencing as a result of COVID-19. Note that FPIs that operate in different jurisdictions face different business and market disruptions. For example, China-based FPIs may be subject to more nuanced challenges due to strict implementation of the zero-COVID policy throughout 2022 and the recent lifting of restrictions under the policy in December 2022.

[1] See our client alerts "SEC Chairman and Division of Corporation Finance Director Urge Robust Disclosure Amid COVID-19 Uncertainty" (April 10, 2020) and "SEC Staff, Chief Accountant Provide Additional Guidance Related to COVID-19" (June 29, 2020) for additional information.

Supply Chain Issues

Companies have been experiencing supply chain issues resulting from the COVID-19 pandemic for several years now and the pandemic's effects on the economy persist to varying degrees. Supply chain disruptions, labor shortages, distribution delays and higher energy costs have developed and continued even as economies have reopened. These issues have also contributed to inflationary pressures, causing a significant strain on businesses and the economy.

When preparing their 2022 Forms 20-F, FPIs should evaluate whether and how they are impacted by supply chain disruptions:

- To the extent FPIs have experienced material supply chain disruptions or have a known supply chain issue, they should explain how supply chain disruptions have impacted their business and results of operations and the actions being taken to address these challenges.
- Companies should also update risks characterized as potential or hypothetical if recent supply chain disruptions have impacted operations.
- To the extent a company relies on a sole supplier or a single geography, the company should consider disclosing the risks of this reliance and any supply chain disruptions they have experienced due to such reliance.

Climate Change

The SEC recently bolstered its focus on climate-related disclosures.[2] Companies should evaluate their disclosure obligations concerning climate change matters, including risks associated with climate change, by reviewing the SEC's interpretive release "Commission Guidance Regarding Disclosure Related to Climate Change" (February 2, 2010) and consider whether any updates are relevant or necessary.[3] Companies should keep in mind that voluntary enhanced climate change disclosure, including a company's target metrics for activities related to climate change, could require additional disclosure in the future under the SEC's proposed rules.[4]

Impacts of the Inflation Reduction Act

On August 16, 2022, the Inflation Reduction Act of 2022 (IRA) was enacted, which introduced a 15% corporate minimum tax based on "adjusted financial statement income" exceeding

[2] See, *e.g.*, our April 30, 2021, client alert "SEC Primed To Act on ESG Disclosure."

[3] For further guidance, see the section of this guide titled "Areas of Frequent SEC Staff Comments — Climate Change and ESG."

[4] See the sections of this guide titled "Recent and Pending SEC Rulemakings — Proposed Rules on Climate-Related Disclosures," and "Other Matters of Interest — ESG Disclosure Controls" for additional information.

$1 billion, a 1% excise tax on net stock repurchases by U.S. public corporations and new and expanded energy-related tax credits. This law may materially impact certain companies' effective tax rate, cash tax or other tax liabilities.[5] Companies should evaluate whether any provisions under the IRA reasonably could be expected to have a material impact on their financial condition, results of operations and/or liquidity. If previous public statements indicated the IRA had or would have a positive effect on the company, the company should reflect that impact in the company's updated disclosures. Conversely, a company should also include disclosures if the previously stated positive impact did not materialize.

[5] See our September 21, 2022, client alert "Senate Passes Landmark Bill With Climate, Tax, Energy and Health Care Implications."

Updated SEC Filing Requirements

FPIs should be aware of the following updated SEC filing requirements.

EDGAR Filing of Glossy Annual Reports

In June 2022, the SEC adopted final rule amendments mandating the electronic filing on EDGAR of "glossy" annual reports and Forms 6-K.[6] The amendments apply to FPIs that disseminate glossy annual reports to shareholders on Form 6-K pursuant to Exchange Act Rule 13a-16 or 15d-16.

The amendments clarify that the electronic submission of glossy annual reports to the SEC should capture the graphics, styles of presentation and prominence of disclosures (including text size, placement, color and offset, as applicable) contained in the reports and should not reformat, resize or otherwise redesign the report for purposes of the submission on EDGAR. Currently, EDGAR only supports the use of portable data format (commonly referred to as PDF) for the filing of glossy annual reports. If EDGAR is upgraded in the future to accommodate alternative formats, the SEC will update the EDGAR Filer Manual accordingly.

The compliance date for the mandatory electronic filing of glossy annual reports is January 11, 2023. FPIs and their vendors should add this requirement to their 2022 Form 20-F annual checklist.

Mandatory Electronic Filing of Form 144

In June 2022, the SEC adopted rule and form amendments that require electronic filing of all Forms 144 on EDGAR. Previously, affiliates who were publicly reselling company securities in the U.S. could file Form 144 in paper format, which many reporting persons elected to use. Going forward, Forms 144 for affiliates who sell under the rule will need to file through EDGAR. The mandatory electronic filing of Forms 144 will commence on April 13, 2023.

For compliance with this rule change, individuals selling under Rule 144 will need to have the related necessary EDGAR codes. Directors and officers should confirm with their brokers whether any entities or trusts they are affiliated with require separate EDGAR codes. While brokers have typically handled the filing of Forms 144 for directors and officers, brokers may now ask companies to assist with the electronic filing of such forms. In that case, companies should make sure they have capacity and appropriate internal procedures to help company affiliates selling under Rule 144 comply with their reporting obligations.

Potential Exchange Act Disclosure Arising From Russia Sanctions

In response to Russia's invasion of Ukraine, the U.S. government has imposed an unprecedented number of sanctions and export control measures since early March 2021.[7] Specifically, numerous Russian entities (including the Federal Security Service of the Russian Federation) and individuals have been designated as subject to Executive Order No. 13382, bringing them within the scope of the disclosure requirements of the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA).

Public reporting companies doing business with Russia or Russian entities or individuals need to check for potential application of the disclosure requirements under the ITRA.

- For FPIs, the statute requires Form 20-F disclosure if, during the period covered by the report, the company or any affiliate, among other things, knowingly conducted any trans-

[6] See our June 22, 2022, client alert "SEC Modernizes Electronic Filing Requirements."

[7] See our various client alerts available under "Update on Russia Sanctions" (2022).

action or dealing with any person for whom the property and interests in property are subject to an applicable sanction.

- If a company is required to report this activity in its annual report, it must also separately file with the SEC, at the same time it files its annual report, a notice that such disclosure is contained in the report.

Disclosures Regarding HFCAA-Related Updates and Risks

Pursuant to the Holding Foreign Companies Accountable Act, as amended (HFCAA), if the SEC determines that the audit reports filed by an FPI registrant are issued by a registered public accounting firm that has not been subject to inspection or investigation by the Public Company Accounting Oversight Board (PCAOB) for two consecutive years because of a position taken by an authority in the foreign jurisdiction, the SEC will prohibit the securities of the FPI from being traded on a national securities exchange or in the over-the-counter trading market in the United States. FPIs that use registered public accounting firms headquartered in mainland China and Hong Kong were among the issuers initially most severely and directly affected by the HFCAA regime. On December 16, 2021, the PCAOB issued a report to notify the SEC of its determination that the PCAOB was unable to completely inspect or investigate registered public accounting firms headquartered in mainland China and Hong Kong. On December 15, 2022, however, the PCAOB removed mainland China and Hong Kong from the list of jurisdictions where it is unable to fully inspect or investigate registered public accounting firms. This latest positive development temporarily lifted the risk of imminent mandatory trading prohibition of securities of approximately 200 China-based issuers required under the HFCAA.

Each year, the PCAOB will determine whether it can fully inspect and investigate audit firms in foreign jurisdictions, including those in mainland China and Hong Kong. If the PCAOB determines in the future that it no longer has full access to inspect and investigate accounting firms in these jurisdictions, each FPI that continues to use an accounting firm headquartered in such jurisdictions to conduct audit work would be identified as a "Commission-Identified Issuer" following its filing of the annual report for the relevant fiscal year, and the two-year countdown regime under the HFCAA will reapply.

FPIs that continue to submit financial statements audited by accounting firms headquartered in mainland China and Hong Kong should include disclosure of HFCAA-related updates and risks in future 20-Fs. An FPI that was identified by the SEC as a Commission-Identified Issuer in 2022 needs to add new disclosure required under Item 16I — Disclosure Regarding Foreign Jurisdictions that Prevent Inspections of Form 20-F. Specifically, the Commission-Identified Issuer that is also a foreign issuer (Identified Foreign Issuer) will be required to disclose in its annual report:

- the PCAOB-identified firm that caused the issuer to be identified as a Commission-Identified Issuer during the period covered by the form;
- the percentage of the registrant's shares owned by governmental entities in the foreign jurisdiction in which the issuer is incorporated or otherwise organized;
- whether governmental entities in the foreign jurisdiction where that registered public accounting firm is located have a controlling financial interest in the issuer;
- the name of each official of the Chinese Communist Party (CCP) who is a member of the board of directors of the issuer or the operating entity with respect to the issuer; and
- whether the articles of incorporation of the issuer (or equivalent organizing document) contains any charter of the CCP, including the text of any such charter.

In addition to providing the required disclosures for the Commission-Identified Foreign Issuer, the FPI must review any variable-interest entity (VIE) or structure that results in additional foreign entities being consolidated in its financial statements and provide the required disclosures about any consolidated operating company or companies in the relevant jurisdiction.

Updates to Form 20-F or 40-F Cover Page

As noted in the section of this guide titled "Recent and Pending SEC Rulemakings — Final Clawback Rules Under Dodd-Frank," the new clawback rules amended the cover page of Form 20-F and 40-F to add the following two checkboxes related to those rules:

- 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). ☐

The addition of these checkboxes will become effective on January 27, 2023, although the stock exchanges will have until November 27, 2023, to adopt new clawback listing standards. It remains unclear whether the SEC would expect companies to include these checkboxes in their Form 20-F or 40-F filed after January 27, 2023, but before the effective date of the applicable stock exchange's listing standards.

Areas of Frequent SEC Staff Comments

During the 12-month period ended June 30, 2022, the Staff issued approximately 10% more comment letters on company filings compared to the prior year period.[8] This uptick in comment letters reversed the downward trend of recent years.

The use of non-GAAP financial measures generally remained the most frequent area generating Staff comment.

- Management's discussion and analysis of financial condition and results of operations (MD&A), segment reporting and revenue recognition ranked second, third and fourth, respectively, once again comprising the top four most frequent areas of comment.
- Climate-related disclosures were one of the top 10 areas of comment for the first time, primarily due to the Staff's application of the Sample Letter to Companies Regarding Climate Change Disclosures issued in September 2021.
- Comments on acquisitions and business combinations were also one of the top 10 comment areas in 2022 for the first time since 2019, mainly resulting from an increase in deal activity.

Comments on contingencies (ranked eighth in 2021) and income taxes (ranked 10th in 2021) were not among the top 10 comment areas in 2022. Below is a summary of the Staff's most noteworthy areas of focus.

Non-GAAP or Non-IFRS Financial Measures

In its review of Form 20-F annual reports, current reports on Forms 6-K and other disclosures by FPIs, the Staff continues to focus on non-GAAP and non-IFRS financial measures and compliance with the Staff's related interpretive guidance.

- Although Staff comments have remained focused on areas of historical interest, such as whether the most directly comparable GAAP or IFRS financial measure is presented with equal or greater prominence relative to the non-GAAP or non-IFRS measure, the Staff has also focused on adjustments to non-GAAP and non-IFRS measures that could be viewed as resulting in "individually tailored recognition and measurement methods."[9]
  - These comments have objected to, among other things, excluding the impact of recently revised accounting standards, such as those related to revenue recognition and credit losses.
- The Staff continues to question how pandemic-related non-GAAP and non-IFRS adjustments were incremental to and separable from normal operations.
- The Staff has also continued to object to the use of a particular non-GAAP or non-IFRS measure that it believes to be misleading and thus unable to be disclosed, notwithstanding compliance with the SEC's non-GAAP rules.

Although most of these comments involve the use of non-GAAP or non-IFRS measures in earnings releases and SEC filings, the Staff also reviews other materials, including information on company websites and in investor presentations. Therefore companies should ensure that any public disclosures of non-GAAP or non-IFRS financial measures comply with applicable SEC rules and Staff guidance and are presented consistently.

[8] See Ernst & Young's *SEC Reporting Update* "Highlights of Trends in 2022 SEC Comment Letters" (September 8, 2022).

[9] See the SEC staff's Compliance & Disclosure Interpretations for Non-GAAP Financial Measures Question 100.04 (May 17, 2016).

Finally, companies should familiarize themselves with the new and revised Compliance and Disclosure Interpretations (C&DIs) regarding the use of non-GAAP financial measures by companies in public disclosures and SEC filings. The C&DIs reflect the Staff's continued focus on non-GAAP financial measures and codify positions the Staff previously took in speeches and comment letters.

MD&A

The 12-month period ended June 30, 2022, represents the first period in which companies were required to comply with the amended MD&A disclosure requirements adopted by the SEC in November 2020.[10] While the Staff commented on the application of a number of the amended MD&A disclosure requirements during the period, Staff comments on MD&A continued to focus on historical areas of interest, with the most common topic being the results of operations. For example:

- The Staff continues to request that companies quantify material changes in operations and include offsetting factors.
- The Staff also continued to focus on key performance indicators (KPIs) and operating metrics, including period-over-period comparisons and whether companies have disclosed performance indicators used by management that would be material to investors.
  - KPIs can be financial or nonfinancial and vary based on a company's industry and business.
  - In January 2020, the SEC issued interpretive guidance regarding disclosures required for KPIs and other metrics in MD&A. While the guidance generally is consistent with prior statements from the Staff, the issuance of commission-level guidance was noteworthy in that it demonstrated a greater interest in the use and disclosure of KPIs.

The Staff comments on MD&A have also focused on known trends or uncertainties, particularly those related to macroeconomic factors such as inflation and rising interest rates, supply chain issues and Russia's invasion of Ukraine. For instance:

- In applying the Sample Letter to Companies Regarding Disclosures Pertaining to Russia's Invasion of Ukraine and Related Supply Chain Issues issued in May 2022, the Staff has asked registrants to describe any known trends and uncertainties "arising from, related to, or caused by the global disruption" resulting from Russia's actions.
- Staff comments have also asked about known and anticipated events and trends that may impact the company's future liquidity and capital resources as a result of supply chain disruptions.
- The Staff has asked companies to discuss in detail whether inflation or supply chain disruptions have materially affected their outlooks or business goals and to identify actions planned or taken, if any, to mitigate inflationary pressure or supply chain disruptions.
- The Staff has continued to ask registrants to discuss how they expect the pandemic will impact future results both in the near- and long-term, including whether they expect COVID-19 to impact future operations differently than it has affected the current period.

We expect to see more Staff comments on these macroeconomic trends in MD&A, given that supply chain disruptions and the Russia-Ukraine conflict continue, inflation remains at historically high levels and interest rates continue to rise. As a result, we encourage companies to continually reassess and update their MD&A disclosure in light of macroeconomic trends and uncertainties.

Companies should also think creatively about the kinds of forward-looking information they can provide to investors, as historical information may be relatively less significant given the economic and operational uncertainties resulting from macroeconomic trends. In doing so, companies should consider CF Disclosure Guidance Topics No. 9 and No. 9A related to COVID-19 and supply chains as well as the Staff's sample comment letter on the direct and indirect effects of Russia's invasion of Ukraine, as many of their disclosure considerations could apply to these macroeconomic trends. For further detail on SEC guidance on Russia's invasion of Ukraine, supply chain and inflation disclosures, see the section of this guide titled "General Disclosure Trends — Current Macroeconomic Factors of SEC Focus."

Disclosure for China-Based Companies

In December 2021, the Staff published a "Sample Letter to China-Based Companies" in response to events that highlighted the risks associated with investing in companies that are based in or have the majority of their operations in China (China-based companies). Many China-based companies voluntarily included disclosure required under the SEC sample letter in their annual reports for fiscal year 2021 that were filed in 2022. The Staff issued comments on these 2021 annual reports seeking more specific and prominent disclosure about the legal and operational risks associated with China-based companies throughout the second half of 2022.

[10] See our November 25, 2020, client alert "SEC Amends MD&A and Other Financial Disclosure Requirements" for more information on the amended MD&A disclosures requirements adopted by the SEC in November 2020.

- The Staff's comments to prior annual reports on Form 20-F focused on the need for clear and prominent disclosure regarding the structure of the company, including:
  - the relationship between the holding company and the entities conducting the operating activities;
  - risks associated with a company's use of the VIE structure; and
  - the potential impact on the company's operations and investors' interests if such structure were disallowed or the contracts were determined to be unenforceable.
- The Staff's comments also focused on additional legal, regulatory and enforcement risks that may apply to investments in China-based companies, such as the potential impact of the HFCAA and related rules and necessary permissions that a China-based company may need to operate its business or offer securities to foreign investors.
- Generally speaking, the SEC does not expect amendments to the annual reports, except where portions of the disclosure requested by the sample letter are missing altogether, such as failure to include the condensed consolidating schedule sought in sample comment 10. The Staff typically asks China-based companies to indicate how they intend to revise future filings to comply with the Staff's comments by asking them to provide their proposed disclosure in a response letter.

By December 2022, many China-based companies have received and cleared the Staff's comments on disclosures they made in their 2021 Forms 20-F in response to the Staff's sample letter. China-based companies should continue to monitor and analyze each of the disclosure considerations highlighted by the Staff in the sample letter and, as applicable, reflect updated disclosure as proposed in their responses to the Staff's comments in upcoming filings of Forms 20-F. FPIs should also note the **sample comments contained in the letter do not constitute an exhaustive list** of the issues that companies with the majority of their operations in China should consider. For instance, such companies should still consider the disclosure items addressed in CF Disclosure Guidance: Topic No. 10.

Climate Change and ESG

While companies and their advisers await further action on the groundbreaking SEC proposed rulemaking on climate change,[11] the SEC and Staff have been reminding companies that companies must disclose any material impact of matters related to climate change under the SEC's existing rules. For example, on February 2, 2010, the SEC issued interpretive guidance expressing its views regarding existing disclosure requirements as they apply to climate change matters. Also, on September 22, 2021, the Staff of the Division of Corporation Finance published a "Sample Letter to Companies Regarding Climate Change Disclosures," which includes an illustrative, nonexhaustive list of comments that the Staff has and may issue to companies about their climate-related disclosures or the absence of such disclosures in the companies' SEC filings.

Based on the guidance from the SEC and its Staff to date, companies should consider the following topics, among other things, in preparing their SEC filings and provide appropriate disclosures if conditions are material:

- whether and to what extent to incorporate into SEC filings climate change-related disclosures provided outside of SEC filings — such as those included in a stand-alone ESG, sustainability, corporate responsibility or similar report;[12]
- past or future capital expenditures for climate change-related initiatives;
- the physical effects of climate change on the company's property or operations;
- weather-related impacts on the cost or availability of insurance;
- compliance costs related to climate change, including costs associated with existing or pending legislation and regulation related to climate change;
- litigation risks related to climate change and the potential impact to the company;
- effects of transition risks related to climate change that may affect the company's business, financial condition and results of operations (*e.g.*, risks related to policy and regulatory changes that could impose operational and compliance burdens, market trends that may alter business opportunities, credit risks or technological changes); and
- the company's purchase or sale of carbon credits or offsets and any related effects on the company's business, financial condition and results of operations.

[11] See the section of this guide titled "Recent and Pending SEC Rulemakings — Proposed Rules on Climate-Related Disclosures" for further details.

[12] See the section of this guide titled "Other Matters of Interest — ESG Disclosure Controls" for further details.

Recent and Pending SEC Rulemakings

In 2022, the SEC issued a number of new proposed and final rules. Under SEC Chair Gary Gensler, the SEC has pursued a robust regulatory agenda and released new guidance on several key topics. Significant SEC regulatory developments are summarized below.

Final Rules for Rule 10b5-1 Plans

On December 14, 2022, the SEC unanimously adopted final rules relating to insider trading, including Exchange Act Rule 10b5-1, which will become effective on February 27, 2023, subject to the transition periods described below.[13]

The final rules impose new conditions to the availability of the affirmative defense to insider trading liability provided by Rule 10b5-1 trading plans, including:

- **A cooling-off period.** The final amendments will require a minimum cooling-off period between when the plan is adopted or modified and when trading commences. For directors and officers, the cooling-off period will be the greater of (i) 90 days following plan adoption or modification or (ii) two business days following the company's Form 20-F filing for the fiscal quarter in which the plan was adopted or modified (but in any event, the required cooling-off period cannot exceed 120 days following plan adoption or modification). For other persons (except the company), the cooling-off period will be 30 days before any trading can commence under the trading arrangement or modification. The SEC refrained for now from adopting a cooling-off period for issuer's share repurchase plans and is still considering if one is warranted.
- **Multiple, overlapping plans.** Having more than one Rule 10b5-1 trading plan for open market trades in any class of securities will not be eligible for the Rule 10b5-1 affirmative defense, subject to certain exceptions (*e.g.*, sell-to-cover transactions for tax withholding obligations in connection with vesting of an equity award).
- **Single-trade plans.** Single-trade plans will be limited to one such plan during any consecutive 12-month period, subject to certain exceptions (*e.g.*, sell-to-cover transactions described above).
- **An expanded good-faith requirement.** In addition to the current requirement that Rule 10b5-1 plans be entered into in good faith, the final amendments will add the condition that the good faith obligation will be ongoing, such that the plan must be both entered into and the person must act in good faith with respect to the plan.
- **New director and officer representation.** When adopting or modifying a Rule 10b5-1 plan, a director or officer will be required to include a representation in his or her plan, certifying that he or she is (i) not aware of any material nonpublic information about the issuer or security at the time of adoption and (ii) adopting the 10b5-1 plan in good faith and not as part of a plan or scheme to evade the insider trading prohibitions.

The final amendments apply to new plans entered into (or modified) on or after the effective date, February 27, 2023.

In addition, the final amendments introduce new Item 16J to Form 20-F, which will require FPIs to disclose, on an annual basis, their insider trading policies and procedures. If no such policies or procedures are in place, a company would need to explain why. The final amend-

[13] See our December 20, 2022, client alert "SEC Amends Rules for Rule 10b5-1 Trading Plans and Adds New Disclosure Requirements."

ments also require an FPI to file its insider trading policy as a new exhibit to Form 20-F pursuant to Instruction 11 to Form 20-F. An FPI will need to comply with these requirements in its first Form 20-F filing that covers the first full fiscal period beginning on or after April 1, 2023, *e.g.*, for calendar year companies, the Forms 20-F for the fiscal year ending December 31, 2024.

Final Clawback Rules Under Dodd-Frank

As discussed in our November 2, 2022, client alert "SEC Adopts Final Clawback Rules and Disclosure Requirements," the SEC adopted long-awaited final rules implementing the incentive-based compensation recovery (clawback) provisions of the Dodd-Frank Act in October 2022.

The final rules direct U.S. stock exchanges to establish listing standards requiring listed companies, including FPIs, to adopt a clawback policy providing for recovery of incentive-based compensation erroneously received by current or former executive officers during the three completed fiscal years immediately preceding the year in which the company is required to prepare an accounting restatement due to material noncompliance with financial reporting requirements. Under the final rules, listed companies will be required, among other things, to:

i. file their written clawback policies as exhibits to their Forms 20-F;

ii. indicate by checkboxes on the cover pages of their Forms 20-F whether the financial statements included in the filings reflect a correction of an error to previously issued financial statements and whether any of those error corrections are restatements requiring a recovery analysis of incentive-based compensation under their clawback policies; and

iii. disclose how they have applied their clawback policies during or after the last completed fiscal year.

Under the new rules, a company could be subject to delisting if it does not adopt a clawback policy that complies with the applicable listing standard, disclose the clawback policy and any application of the policy in accordance with SEC rules, or enforce the clawback policy's recovery provisions.

The SEC's final rules were published in the Federal Register on November 28, 2022, and will become effective on January 27, 2023. The impact is not immediate, however, as the stock exchanges have up to 90 days after publication to propose new listing standards, and those only need to become effective within one year following the publication date. Following the effective date of the new listing standards, listed companies will have 60 days to adopt the required clawback policy. A listed company must recover all erroneously awarded incentive-based compensation that is received on or after the effective date of the applicable listing standard. For further information, please see the client alert.

Proposed Rules on Climate-Related Disclosures

On March 21, 2022, the SEC proposed enhancement and standardization rules mandating climate-related disclosures in companies' annual reports, such as Forms 20-F, and registration statements.[14] The proposed rules would add extensive and prescriptive disclosure items requiring companies, including FPIs, to disclose climate-related risks and greenhouse gas (GHG) emissions. In addition, the rules would require the inclusion of certain climate-related financial metrics in a note to companies' audited financial statements.

We anticipate that final rules will be adopted in 2023, and litigation challenging such rules will likely follow. However, companies should still consider how to begin collecting 2023 GHG emissions data and other information necessary to comply with the potential disclosure and financial statement requirements. Similarly, companies should begin preparing for the new rules by evaluating:

- the impact of the updates on their existing disclosure controls and procedures; and
- internal controls over financial reporting with respect to GHG emissions and other climate-related disclosures.[15]

Proposed Rules on Cybersecurity Disclosures

On March 9, 2022, the SEC proposed rules intended to enhance and standardize disclosures regarding cybersecurity risk management, strategy, governance and incident reporting.[16] The proposed rules would amend Form 20-F and add Item 16J to require FPIs to disclose in their annual reports:

i. policies and procedures for cybersecurity risk assessment;

ii. management's cybersecurity expertise and its role in assessing and managing cybersecurity risk and implementing policies and procedures;

iii. board-level governance around cybersecurity risk; and

[14] See our March 24, 2022, client alert "SEC Proposes New Rules for Climate-Related Disclosures."

[15] For additional considerations, see our June 29, 2021, publication with the Society for Corporate Governance "Enhancing Disclosure Controls and Procedures Relating to Voluntary Environmental and Social Disclosures."

[16] See our March 11, 2022, client alert "SEC Proposes New Rules for Cybersecurity Risk Management, Strategy, Governance and Incident Disclosure."

iv. the cybersecurity expertise[17] of any members of the board, including the name(s) of the relevant director(s) and a description of the nature of the expertise.

In addition, the proposed rules would amend General Instruction B of Form 6-K to add material "cybersecurity incidents" [18] as a reporting topic that may trigger a current report on Form 6-K. According to the proposing release, the proposed change to Form 6-K is intended to provide timely cybersecurity incident disclosure in a manner that is consistent with the general purpose and use of Form 6-K. The proposed rules would also require companies to disclose in their annual reports on Form 20-F:

i. any material changes, additions or updates to prior disclosure reported on Form 6-K as a material cybersecurity incident; and

ii. any individually immaterial cybersecurity incidents not previously disclosed that become material in the aggregate.

Companies may want to consider how their disclosures would look under the proposed rules and whether their current cybersecurity incident response plans include adequate escalation and assessment protocols to meet applicable disclosure requirements.

Proposed Rules on Share Repurchases

In December 2021, the SEC proposed rule amendments relating to share repurchases.[19] The proposed share repurchase rules would significantly alter the current share repurchase disclosure framework by requiring next-business-day disclosure of repurchases on a new Form SR and enhancing existing share repurchase disclosure requirements under Form 20-F. We expect the adoption of final rules on share repurchases in 2023.

Potential Proposed Rules on Board Diversity

The SEC has indicated that it plans to propose rules to require enhanced board and workforce diversity disclosures. These rules would likely be similar to the Nasdaq Stock Market's (Nasdaq's) board diversity rules, which became effective in 2022. However, in light of the legal challenges to Nasdaq's board diversity and disclosure rules and uncertainty regarding the outcome, which are discussed further in the section of this guide titled "Other Matters of Interest — Nasdaq Board Diversity Rules," the SEC may take a wait-and-see approach before proposing new rules for diversity disclosures.

Potential Proposed Rules on Human Capital Management

In August 2020, the SEC amended Item 101 of Regulation S-K to require domestic U.S. issuers to describe in their annual reports — to the extent such disclosures would be material — their human capital resources, including any human capital measures or objectives that a registrant uses in managing the business (such as, depending on the nature of the registrant's business and workforce, measures or objectives that address the development, attraction and retention of personnel).[20] This requirement was not added to Form 20-F, but the amendment illustrates the SEC's and other stakeholders' increased focus on the topic.

The SEC has indicated that it plans to propose rules that would expand the human capital disclosure requirements adopted in 2020, but whether any such rules would apply to FPIs is not yet clear. Chair Gensler's remarks on June 23, 2021, stated that the rulemaking proposal "could include a number of topics, such as workforce turnover, skills and development training, compensation, benefits, workforce demographics, including diversity, and health and safety."[21] The SEC's sustained focus on board and workforce diversity disclosure and the inclusion of the topic in its spring 2022 short-term rulemaking agenda indicate that the Staff likely will take a closer look at companies' human capital disclosures leading up to the rulemaking stage. Therefore, while FPIs are not currently subject to any human capital disclosure requirements, FPIs may want to consider whether disclosure on these topics would be useful to investors and improve the company's overall disclosures, particularly as investors become more accustomed to seeing domestic U.S. companies make these disclosures.

[17] The proposed rule includes a nonexclusive list of criteria that companies would need to consider in reaching a determination on whether a director has expertise in cybersecurity. These criteria include: (i) whether the director has prior work experience in cybersecurity; (ii) whether the director has obtained a certification or degree in cybersecurity; and (iii) whether the director has knowledge, skills or other background in cybersecurity.

[18] "Cybersecurity incident" is defined in proposed Regulation S-K Item 106(a).

[19] See our December 20, 2021, client alert "SEC Announces Proposals Relating to Rule 10b5-1, Share Repurchases and Other Matters."

[20] See the SEC's adopting release "Modernization of Regulation S-K Items 101, 103, and 105" (August 26, 2020).

[21] See our June 28, 2021, client alert "Chair Gensler's Insight on the SEC's New Regulatory Agenda."

Other Matters of Interest

Cybersecurity

The SEC continues to make cybersecurity a priority. As discussed above, the SEC has made several rule proposals[22] and brought the below recent enforcement actions relating to cybersecurity. These actions should continue to serve as a warning to companies to evaluate the adequacy of their policies and procedures.

Recent SEC Enforcement Matters

In August 2021, the SEC settled charges against a London-based foreign private issuer that publishes educational materials and provides other services to school districts in the United States for misleading investors about a cybersecurity breach and having inadequate disclosure controls and procedures.[23] In September 2018, the company was notified of a vulnerability in its servers and that a patch was available to address the issue. The company took no action until March 2019 after it learned that several million rows of data were stolen, including personally identifying information (PII) stored on a server. The company implemented the patch to address the concern only after the breach. In July 2019, the company sent notice of the breach to impacted customer accounts without providing full details of the breach. Shortly after sending the notice, the company filed a Form 6-K that discussed its data privacy risks but did not disclose the fact that one had occurred. After receiving a media inquiry in late July 2019, the company only then issued a statement informing investors and the public about the breach, and the public disclosures made misstatements about the nature of the breach and the data involved. The SEC described the company's statement as understating the nature and scope of the breach and overstating the company's data protections. The company paid a $1 million penalty.

In August 2021, the SEC also settled charges with eight SEC-registered broker-dealers and/or investment advisors affiliated with three firms for various cybersecurity failures leading to the exposure of PII of thousands of customers and clients.[24] The alleged failures included failure to (i) protect accounts in a manner consistent with company policies; (ii) adopt and implement policies and procedures to review customer communications, leading to misleading statements to such customers; (iii) adopt and implement firmwide enhanced security measures until years after discovery of a breach; and (iv) adopt written policies and procedures in a timely manner after discovering a breach and implement those additional security measures firmwide. The firms paid penalties in an aggregate amount of $750,000.

In another action in June 2021, the SEC settled charges with a real estate settlement services company relating to disclosure controls and procedures violations with respect to a cybersecurity vulnerability that exposed over 800 million title and escrow document images, including images containing sensitive PII.[25] A journalist brought the vulnerability to the attention of the company. In response, the company issued a public statement and disclosed the event in a Form 8-K. However, the senior executives responsible for producing the public response were not informed of certain details relevant to their assessment in developing such a response. For example, the SEC found that the company's disclosure controls and procedures failed to inform the senior executives that the company's information security personnel were aware of

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[22] See the section of this guide titled "Recent and Pending SEC Rulemakings — Proposed Rules on Cybersecurity Disclosures" for further details.

[23] See the SEC's press release "SEC Charges Pearson plc for Misleading Investors About Cyber Breach" (August 16, 2021).

[24] See the SEC's press release "SEC Announces Three Actions Charging Deficient Cybersecurity Procedures" |(August 30, 2021).

[25] See the SEC's press release "SEC Charges Issuer With Cybersecurity Disclosure Controls Failures" (June 15, 2021).

the vulnerability months earlier and that the company failed to address the issue in accordance with its policies. The company paid a $487,616 penalty.

Recommended Actions

In light of these recent enforcement actions and the SEC's continued focus on cybersecurity:

- Companies should ensure that they have adequate policies and procedures in place to address their particular business needs, follow those policies and procedures and address any known threats or breaches in a timely manner.
- In particular, communicating information about threats or breaches to individuals responsible for making public disclosures is of paramount importance so that all relevant information can be evaluated when communicating to impacted customers and the public.
- Companies should also consider how recent SEC rule proposals may impact their current practices and policies.

ESG Disclosure Controls

In recent years, companies have expanded their disclosure about ESG matters largely on a voluntary basis (outside of SEC filings) in stand-alone ESG, sustainability, corporate responsibility or similar reports. Concurrently, more companies are providing ESG disclosures, particularly climate-related information, in their SEC filings.

Despite the voluntary nature of some of these disclosures, companies should remain vigilant about the accuracy of their ESG disclosures.

- Recent Staff comment letters have focused on the differential between ESG disclosures in SEC filings compared to more expansive ESG disclosures provided outside of SEC filings.
- In March 2021 the SEC established the Climate and ESG Task Force in the Division of Enforcement, with a mandate to identify any material gaps or misstatements in companies' disclosures regarding climate and other ESG matters under existing disclosure requirements. (See our April 30, 2021, client alert "SEC Primed To Act on ESG Disclosure.")

Since the establishment of the Climate and ESG Task Force, the Enforcement Division has been pursuing ESG actions and is expected to continue to hold companies accountable for material misstatements or omissions regarding ESG-related matters either in voluntary disclosures or SEC filings. For example, in April 2022, the SEC charged a Brazilian mining company with allegedly making false and misleading claims about the safety of its dams in the company's sustainability reports and in SEC periodic filings. Additionally, in September 2022, the SEC settled a charge against an American mineral producer for alleged material misstatements about the company's mine operations made on multiple earnings calls and SEC periodic filings, which the SEC attributed to failures in the company's disclosure controls and procedures.

In light of the foregoing, companies should reassess their disclose controls and procedures and consider whether any changes are needed to conform their ESG disclosures for accuracy across all outlets.

Mining Property Disclosure Rules

As discussed in our October 31, 2019, client alert "Form 20-F for Fiscal Year 2019: What Foreign Private Issuers Should Keep in Mind," in October 2018, the SEC adopted final rules in Subpart 1300 of Regulation S-K to modernize property disclosure requirements for registrants with material mining operations, applicable to registration statements and annual reports under the Securities Act and Exchange Act. The new mining property disclosure rules took effect beginning with a company's first fiscal year beginning on or after January 1, 2021, and therefore applied for the first time to FPI mining registrants on the 2021 Form 20-F for companies with a calendar year-end.

The mining property disclosure rules require, among others obligations, that a company:

- disclose both mineral resources and material exploration results in addition to mineral "reserves"; and
- file technical report summaries prepared by a qualified person for properties that are individually material, which identify the information reviewed and conclusions reached by each qualified person about the company's mineral resources or mineral reserves determined to be on each material property.

Mining registrants that filed a technical report summary in connection with the 2021 Form 20-F are not required to refile such technical report summary, unless there is a material change in previously disclosed estimates or results. Mining registrants are, however, required to provide updated disclosure with respect to mineral resources, material exploration results and mineral reserves.

For more information on the mining disclosure rules, please refer to the client alert.

Resource Extraction Disclosure

In December 2020, the SEC adopted rules that will require companies, including FPIs, engaged in the commercial development of oil, natural gas or minerals to provide annual disclosures of amounts paid to governments for the purpose of such developments. The new rules exempt smaller reporting companies and emerging growth companies from compliance, and newly public companies have a grace period of one fiscal year before they need to report. Two additional exemptions are also available where disclosure is prohibited by foreign law or by a preexisting contract. A company that relies on these two exemptions must disclose when it is relying upon them. The new rules became effective on March 16, 2021, and provide an extended mandatory compliance date. After a two-year transition period, a company will be required to annually submit the required disclosure not later than 270 days following the end of each fiscal year. A company with a December 31 fiscal year-end would be required to submit disclosure for the fiscal year ending December 31, 2023, by September 30, 2024.

Nasdaq Board Diversity Rules

In 2022, Nasdaq-listed companies, including FPIs, became subject to two new requirements and need to:

i. make annual public disclosure of board-level diversity statistics using a standardized matrix template under Nasdaq Rule 5606; and

ii. comply with, or disclose why they do not have, board diversity objectives under Nasdaq Rule 5605(f).

FPIs should be aware that controlled companies are not exempt from these rules.

Board Diversity Matrix

Nasdaq-listed companies are required to disclose, following a standardized matrix format, the number of directors who self-identify according to specified categories, including gender, race/ethnicity and LGBTQ+ status. Many companies solicited this information, as well as individual consent to use of such information in company disclosures, from directors and nominees through the annual D&O questionnaire process.[26] Each Nasdaq-listed company should continue to include the required matrix disclosure in its annual report on Form 20-F or on the company's website.[27]

[26] For additional guidance on gathering information to prepare the matrix, including sample questions, refer to Nasdaq's FAQ 1803 (August 24, 2021).

[27] For additional guidance on posting the matrix on a website, see Nasdaq's FAQ 1755 (August 6, 2021).

Comply or Explain Requirement

Nasdaq Rule 5605(f) requires companies to meet specified board diversity objectives or otherwise explain the company's reasons for not meeting such objectives. Subject to limited exemptions and transition periods, companies will be required to have, or explain why they do not have, one diverse director by December 31, 2023, and two diverse directors by December 31, 2025 or 2026, depending on the listing tier.[28] FPIs can reference Nasdaq's related FAQs to understand and assess compliance with the new rules.

Legal Challenges to New Rules

In 2021, shortly after the SEC issued a final order approving the Nasdaq proposed rule requiring board diversity, the Alliance for Fair Board Recruitment filed a petition for review in the Fifth U.S. Circuit Court of Appeals, arguing that Nasdaq Rule 5605(f) is unconstitutional because it will compel companies to unlawfully discriminate on the basis of gender, race and sexual orientation when selecting directors. The plaintiffs claim that the SEC's approval of this rule exceeds the agency's authority under federal securities law and violated the Equal Protection Clause of the U.S. Constitution and federal anti-discrimination laws.[29] The SEC has argued that the government has no role in enforcing the rule, and therefore the rule's constitutionality is not in question. The Fifth Circuit heard oral arguments on August 29, 2022, and the outcome of the suit remains to be seen.[30] Given the legal uncertainty surrounding Nasdaq's board diversity disclosure requirements, companies should continue to comply with Nasdaq rules and monitor legal challenges moving forward.

New Review Offices in the SEC's Disclosure Review Program

In September 2022, the Division of Corporation Finance announced the addition of two new review offices to the Disclosure Review Program (DRP) — the Office of Crypto Assets and the Office of Industrial Applications and Services.[31] The Office of Crypto Assets will continue the work currently performed across the DRP to review filings involving cryptoassets. The Office of Industrial Applications and Services will oversee filings currently assigned to the Office of Life Sciences for companies

[28] On December 14, 2022, the SEC posted a notice from Nasdaq amending the original August deadlines to December 31, effective immediately.

[29] See our January 19, 2022, client alert "Rulings in 2022 Could Bring Clarity on California and Nasdaq Board Diversity Mandates."

[30] See *Alliance for Fair Board Recruitment v. SEC*, 5th U.S. Circuit Court of Appeals, No. 21-60626.

[31] See the SEC's press release "SEC Division of Corporation Finance to Add Industry Offices Focused on Crypto Assets and Industrial Applications and Services" (September 9, 2022).

that are not pharma, biotech or medicinal products companies. The addition of these two new offices reflects the recent growth in the cryptoasset and the life sciences industries.

Disclosure of Recent Developments in Cryptoasset Markets

In the wake of the significant recent turmoil in cryptocurrency markets, the Staff in the SEC's Division of Corporation Finance published guidance and a "Sample Letter to Companies Regarding Recent Developments in Crypto Asset Markets" on December 8, 2022. The sample letter is intended to apply to companies with exposure to cryptoassets, but whether the Staff intends to target cryptoasset issuers or companies with broader exposure to such assets is unclear.

Relying on the catchall provision that companies must ensure that their disclosure is not misleading, the letter contains a lengthy list of sample comments that the Staff may issue regarding a wide array of topics. The sample letter includes, among other things, questions regarding a company's exposure to material impacts of cryptoasset market developments, including the downstream effect of bankruptcies; risks related to a company's liquidity and ability to obtain financing; risks related to providing custody storage of cryptoassets; and risks related to legal proceedings, investigations or regulatory impacts in the cryptoasset markets. In preparing their 2022 Forms 20-F, FPIs with exposure to cryptoassets should analyze the applicability of the guidance and the comments highlighted in the sample letter and provide responsive disclosure if material.

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