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Preparing your 2023 Form 20-F

December 20, 2023 | Client Update

This client update highlights key considerations for the preparation of your 2023 annual report on Form 20-F. As in previous years, we discuss both disclosure developments and continued areas of focus for the U.S. Securities and Exchange Commission (SEC). In addition, we highlight certain U.S.-related enforcement matters and certain other developments of interest to foreign private issuers (FPIs).

What's new for the 2023 Form 20-F

Cybersecurity

In July 2023, the SEC adopted final rules that mandate cybersecurity incident and risk management disclosures for public companies. These final rules require FPIs to make annual disclosures on Form 20-F to describe the company's (i) processes to assess, identify and manage cybersecurity risks, (ii) board oversight of such risks, (iii) management's role and expertise in assessing and managing such risks and (iv) assessment of whether any risks from cybersecurity threats have materially affected, or are reasonably likely to materially affect, the company (see new item 16K of Form 20-F).

In addition, the final rules require FPIs to disclose certain information about a material cybersecurity incident on Form 6-K. FPIs already have an obligation to disclose material information on Form 6-K that they make or are required to make public pursuant to their home country law, file or are required to file with a stock exchange or otherwise distribute or are required to distribute to their security holders, and the new rules simply add material cybersecurity incidents to the list of material information included in the form. In practice, this does not change FPIs' disclosure obligation on Form 6-K.

FPIs are required to comply with the annual cybersecurity disclosure requirements on Form 20-F beginning with the 2023 20-F for calendar year companies and the incident disclosure requirements on Form 6-K beginning on December 18, 2023. Companies must tag required 20-F disclosures in Inline XBRL beginning one year after the initial compliance date for the related disclosure requirement.

The new cybersecurity risk management and governance disclosure is likely to be closely scrutinized by private plaintiffs and the SEC staff in the event of a material cybersecurity incident. As such, companies should ensure that their disclosure describes their actual existing processes, and take care not to overstate the company's defenses, expertise, processes or readiness to address a cybersecurity threat.

Read our client update SEC adopts cybersecurity disclosure mandates for public companies for further detail.

Clawback rule

The SEC adopted final rules in October 2022 that directed U.S. stock exchanges to adopt listing standards requiring all listed companies to adopt and comply with a written clawback policy requiring public companies to recover excess incentive compensation from executive officers if such amounts were "based" on material misstatements in financial reports.

In June 2023, the NYSE and Nasdaq amended their proposed listing standards relating to clawbacks setting October 2, 2023 as the effective date for the new listing standards, which means all listed companies, including FPIs, must have a compliant clawback policy by December 1, 2023. The clawback policy will apply to compensation "received" from and after the October 2, 2023 effective date and must be filed as an exhibit to the 2023 Form 20-F (NYSE-listed companies are also required to confirm via

Insights

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Listing Manager either that they have adopted a clawback policy or that they are relying on an applicable exemption by December 31, 2023).

Form 20-F was amended to include check boxes indicating (i) whether the financial statements of the company included in the filing reflect the correction of any error to previously issued financial statements, and (ii) whether any of those error corrections are restatements that required recovery analysis of incentive compensation. The requirement to check the applicable checkboxes relating to a restatement or recovery analysis of incentive compensation, and provide the related disclosure, will apply beginning with the 2023 Form 20-F.

Read our client updates Final clawback rule adopted by SEC and NYSE and Nasdaq delay effective date of clawback rule to October 2, 2023 for more detailed information about the rule and listing standards.

Disclosure focus areas

Non-GAAP financial measures

In December 2022, the SEC's Division of Corporation Finance posted new and updated C&DIs on non-GAAP financial measures that companies should review, in particular if they present non-GAAP measures (which term includes non-IFRS measures) in their Form 20-F. Non-GAAP measures feature prominently in SEC comment letters and could benefit from careful review for compliance with the relevant rules and guidance.

As a reminder, Item 10(e) of Regulation S-K applies to Form 20-F filings. It requires:

- Presentation of the most directly comparable GAAP metric "with equal or greater prominence."
- A quantitative reconciliation of the differences between the non-GAAP and GAAP metrics "by schedule or other clearly understandable method."
- Explanation of the reasons management believes the non-GAAP metric provides useful information to investors.
- Explanation of the additional purposes, if any, for which management uses the non-GAAP metric.

Item 10(e) of Regulation S-K prohibits:

- Excluding any charge or liability that requires cash settlement from a non-GAAP liquidity measure, other than EBIT and EBITDA.
- Adjusting a non-GAAP performance measure to omit an item identified as "non-recurring," "infrequent" or "unusual," if the item is reasonably likely to recur within two years or there was a similar item in the past two years.
- Presenting a non-GAAP metric on the face of the GAAP financial statements or in the accompanying notes, or on the face of any required pro forma financial statements.
- Using titles or descriptions that are the same as, or confusingly similar to, titles or descriptions for GAAP financial measures.

SEC staff have informally indicated that the lack of "equal or greater prominence" (which generally means GAAP discussion should precede non-GAAP discussion) continues to be a top area where they identify noncompliance with the rules.

Refresh forward-looking statements, OFR trends and risk factors

Forward-looking statements. Companies can gain protection from liability by taking advantage of the safe harbor for forward-looking statements. But to do so, the cautionary language relating to any forward-looking statement should identify important factors that could cause actual results to differ materially from those in the forward-looking statements and be specifically tailored to the particular forward-looking statements. General boilerplate warnings are not sufficient. Consider whether the factors identified in last year's 20-F continue to apply, and whether others might be added particularly to reflect updates made to risk factors.

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Operating and financial review and prospects. Companies are required to describe in their operating and financial review and prospects, or OFR, any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations, as well as any known trends or demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the company's liquidity increasing or decreasing in any material way and any known material trends, favorable or unfavorable, in the company's capital resources.

Refer to our client update SEC issues disclosure guidance on key performance indicators and metrics in MD&A for a discussion of the SEC's 2020 interpretive guidance.

Risk factors. Companies are required to include a discussion of the material factors that make an investment in the company speculative or risky. Risks that have begun to materialize should not be described as hypothetical. This means companies should take care not to say certain events "could" or "may" occur if they have already occurred. Instead, risk factors should describe how a risk has materialized and what the impact has been on the company. The risk factors disclosure could benefit from a fresh review to ensure material risks facing the company are appropriately disclosed, including risks stemming from emerging areas like artificial intelligence (such as risks and opportunities relating to using or not using generative AI), as well as any risks facing a company from the potential broadening or escalation of the current conflict in the Middle East.

Climate

As discussed in our Preparing Your 2022 Form 20-F client update, climate remains a focus area of the SEC. In September 2021, the Division of Corporation Finance published a sample comment letter that it may issue to companies regarding their climate-related disclosure (or lack thereof). Among others, the SEC reiterated that a number of its rules may require disclosure related to climate change-related risks and opportunities in a company's description of business, legal proceedings, risk factors and OFR.

See below under "*Disclosure Mandates on the Horizon—Climate Rules*" for a discussion of the SEC's proposed sweeping climate disclosure regime. According to the SEC's Spring 2023 regulatory agenda, adoption of final rules was expected in October 2023, and it is unclear as of the date of this client update when final rules will be adopted. Pending adoption of final rules, companies should heed existing SEC guidance on climate disclosure, including guidance stemming from the September 2021 sample comment letter, as the SEC staff continue to issue comments relating to climate disclosure.

In addition, companies are considering how an SEC climate disclosure mandate will coexist with disclosure mandates adopted in the European Union, as well the recently enacted series of climate-related legislation in California. Unlike the Climate Corporate Data Accountability Act and the Climate-Related Financial Risk Act, the Voluntary Carbon Market Disclosures Act, or VCMDA, is not limited to companies incorporated in the U.S. and does not require additional rulemaking and becomes effective on January 1, 2024. The VCMDA is intended to address "greenwashing" by requiring detailed disclosure of the methodology for tracking and verifying claims made within California by entities operating within California regarding net zero, carbon neutrality or significant greenhouse gas emissions reductions, as well as disclosure regarding voluntary carbon offsets purchased, used, marketed or sold within California. The VCMDA will require any covered disclosures to be updated at least annually, and companies should consider carefully how these disclosure requirements might affect their disclosures in SEC filings, including their 20-F. The other two California laws, the Climate Corporate Data Accountability Act and the Climate-Related Financial Risk Act, are limited to legal entities incorporated in the U.S. Accordingly, U.S. subsidiaries of FPIs may be subject to those laws as well.

For more detail on the California legislation, see our client updates Major California climate-related disclosure bills poised to become law and California enacts anti-greenwashing requirements for climate-related claims and carbon markets.

Russia-Ukraine conflict

As discussed in our Preparing Your 2022 Form 20-F client update, the Division of Corporation Finance published a sample comment letter in May 2022, stating 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 thereto have had or may have on their business.

Since Russia's invasion of Ukraine, 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 they have operations in Russia, Belarus, or Ukraine) that may warrant disclosure.

Israel-Hamas conflict

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While the Division of Corporation Finance has not yet published a sample comment letter on the conflict in Israel, the staff has issued comments on registration statements relating to the conflict and its impact on a company's business similar to comments it issued in relation to the impact of the war in Ukraine. If a company has any business exposure in Israel or in the Middle East more broadly, it should consider including disclosure of the potential (or actual) impact on its business and related risks stemming from any escalation or broadening of the conflict.

Inflation and interest rates

Inflation has affected and continues to affect companies in different industries. While inflationary pressures may have eased somewhat, current economic conditions might require additional disclosure beyond what has historically been provided in a more steady-state economic environment. Companies should consider additional disclosure in OFR trends, or otherwise in the period-on-period discussion, focused for example on how these trends have affected results of operations, sales, profits, capital expenditures or a company's business and pricing strategy in the face of rising costs.

In addition, as interest rates have risen, the cost of borrowing has increased for many companies. The current environment continues to present challenges for companies seeking to raise funds through the capital markets, which may lead companies to pursue strategies that may be less capital-intensive in the near term. Companies should consider updating disclosure (particularly in risk factors and OFR) to reflect any impact that the company is experiencing from high interest rates and its ability to access capital markets.

China-specific disclosure

In July 2023, the Division of Corporation Finance published a sample comment letter regarding the disclosure obligations of companies based in or with a majority of their operations in the People's Republic of China.

The comment letter focuses on three areas of disclosure related to China-specific matters:

- Reminding companies of their disclosure obligations under the Holding Foreign Companies Accountable Act, or HFCAA. Public companies identified as Commission-Identified Issuers under the HFCAA must comply with the submission and disclosure requirements under the HFCAA and SEC rules for each year in which they are identified, as discussed in our Preparing Your 2022 Form 20-F client update.
- Seeking more specific and prominent disclosure about material risks related to the role of the government of the People's Republic of China in the operations of China-based companies.
- Noting that companies may need to make disclosures related to material impacts of certain statutes, such as the Uyghur Forced Labor Prevention Act.

Crypto assets disclosure

In December 2022, the Division of Corporation Finance published a sample comment letter to companies regarding crypto asset market-related disclosure obligations.

The letter includes non-exhaustive sample comments the Division of Corporation Finance may issue to companies about their disclosures (or the lack thereof) generally, as well as in the business description, risk factors and OFR sections. Companies should evaluate whether their businesses experienced or may be affected by recent developments in crypto assets, including exposure to liquidity risks, financing risks and risks related to legal proceedings, investigations or regulatory changes, and update their disclosures accordingly.

Sanctions

In past years, the SEC has sent numerous comment letters to public companies seeking more detail about disclosures related to dealings in countries that are the subject of U.S. sanctions enforced by the Treasury Department's Office of Foreign Assets Control (OFAC). OFAC continues to administer and enforce comprehensive sanctions with respect to Cuba, Iran, North Korea, Syria, the Crimea region of Ukraine and the government of Venezuela, as well as against targeted individuals and entities involved in narcotics trafficking, terrorism and terrorist financing, transnational crime, proliferation of weapons of mass destruction, malicious cyber activities and election interference, or corruption and human rights abuses. In addition, targeted sanctions apply to individuals and entities in or related to former regimes in the Balkans, Iraq, Libya and Ukraine and current regimes in Afghanistan, Belarus, Burma, the Democratic Republic of the Congo, Eritrea and Ethiopia, Nicaragua, Russia, South Sudan, Venezuela and Zimbabwe, individuals and entities engaged in specific acts in or related to the Central African

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Republic, Darfur, Hong Kong, Lebanon, Mali, Somalia, Sudan, and Yemen, and targeted individuals and entities operating in certain sectors of the Russian economy, and to publicly traded securities of or linked to certain companies that have been identified as part of China's military-industrial complex.

In response to the Russian invasion of Ukraine in February 2022, the U.S. government imposed significant new sanctions against Russia, including territorial embargoes on the Donetsk People's Republic and Luhansk People's Republic regions of Ukraine, prohibitions on trade in certain goods and services between the United States and Russia and new investment in Russia by U.S. persons, asset blocking sanctions on a number of Russian individuals and entities, restrictions on transactions involving certain Russian financial institutions and Russia's Central Bank, National Wealth Fund and Ministry of Finance, and restrictions on dealing in Russian sovereign debt and debt or equity of certain Russian companies. Additional or expanded sanctions may be imposed in the future. FPIs should ensure their sanctions policies, procedures and systems are up to date and that they are compliant with U.S. law and, to the extent they are doing business in sanctioned countries or territories or with sanctioned persons (even if permissible without violating applicable U.S. law), they should consider whether disclosure of such activities, or associated risks, is appropriate.

Human capital management

In August 2020, the SEC adopted amendments to Item 101 of Regulation S-K to require that companies describe—to the extent such disclosure would be material—their human capital resources, including human capital measures or objectives that the company focuses on in conducting business (such as, depending on the nature of the company's business and workforce, measures or objectives that address the development, attraction and retention of personnel). While these amendments do not apply to FPIs, the SEC staff is focused on enhancing human capital resources disclosure and had indicated October 2023 as the expected date to propose new human capital management disclosure rules in its Spring 2023 regulatory agenda, but these are not out yet as of the date of this client update, and current timing and scope of any new rule proposals is unclear.

Nasdaq board diversity rules

As discussed in our Preparing Your 2022 Form 20-F client update, on August 6, 2021, the SEC approved Nasdaq's proposed diversity rules defining diversity objectives and requiring all companies subject to Nasdaq rules, including FPIs, to publicly disclose in matrix form information on directors' voluntary self-identified gender and racial characteristics, and LGBTQ+ status.

The new rules became effective in August 2022 (with simplified compliance deadlines adopted in December 2022). Each listed company must have, or explain why it does not have, at least one diverse director by December 31, 2023 and two diverse directors by December 31, 2025 (December 31, 2026 for the Nasdaq Capital Market). The rules also require annual disclosure of a company's diversity matrix by December 31. The compliance deadlines are subject to transition and phase-in accommodations for companies listed on or after August 6, 2021 as detailed in a Nasdaq listing center summary.

For FPIs, the disclosure must be provided in the Form 20-F. Alternatively, the information may be provided on the company's website, provided the company posts the disclosure concurrently with its annual SEC filing and submits a URL link to the disclosure via email (drivingdiversity@nasdaq.com) or through the Nasdaq Listing Center, within one business day after such posting.

Read our client update Nasdaq board diversity rules approved by SEC for more information on the topic, as well as Nasdaq's FAQs.

Disclosure mandates on the horizon

Climate rules

In March 2022, the SEC proposed a sweeping climate disclosure regime requiring disclosure of climate-related risks, greenhouse gas emissions and climate-related financial metrics not previously required by the SEC. According to the SEC's Spring 2023 regulatory agenda, adoption of final rules was expected in October 2023, but it is unclear as of the date of this client update when final rules will be adopted. The SEC and staff of the Division of Corporation Finance have indicated that they continue to consider the thousands of comment letters they received in response to the rule proposal.

You can refer to our client update SEC proposes climate disclosure regime for additional detail about the rule as proposed, and our related comment letter.

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Human capital management

In its Spring 2023 regulatory agenda, the SEC had also indicated October 2023 as the expected date to propose new human capital management disclosure rules, but these are not out yet as of the date of this client update, and current timing for any new rule proposal is unclear. Human capital management was the subject of discussion and a recent recommendation by the SEC's Investor Advisory Committee.

Resource extraction rules

In December 2020, the SEC adopted amendments that would require resource extraction companies to disclose payments made to foreign governments or to the U.S. federal government for the commercial development of oil, natural gas or minerals. By requiring disclosure at the national and major subnational political jurisdiction levels, rather than the contract level, this version of the final rules mandates less disclosure than the SEC's previous resource extraction disclosure rules. The initial compliance date for a company with a December 31 fiscal year-end is September 30, 2024 (270 days after its fiscal year ending December 31, 2023). For a more detailed discussion, refer to our client update Third time a charm: SEC enacts resource extraction disclosure rules.

D&O 10b5-1 trading plans and insider trading policies

In December 2022, the SEC adopted final rules focused on Rule 10b5-1 trading arrangements and other securities transactions involving corporate insiders, including directors and officers. The new rules amended Form 20-F to require annual disclosure relating to whether the company has adopted (and if not, an explanation of why not) insider trading policies and procedures for directors, officers and employees, that are reasonably designed to promote compliance with insider trading laws, and for the company to file its insider trading policy as an exhibit to the Form 20-F. The SEC also highlighted in the adopting release that these disclosures will be subject to the certifications required by the Sarbanes-Oxley Act of 2002, requiring principal executive and financial officers to attest to the accuracy of the statements in Form 20-F.

The final rules became effective on February 27, 2023. The amendments to Rule 10b5-1 do not affect plans adopted prior to the effective date. FPIs will be required to comply with the new disclosure requirements on Form 20-F in the first filing that covers the first full fiscal period that begins on or after April 1, 2023, which means the 2024 Form 20-F filed in 2025 for companies reporting on the calendar year (see new item 16J and paragraph 11(b) of item 19 of Form 20-F).

Read our client update SEC adopts major changes for insider transactions for further detail.

Share repurchase rule vacated on December 19, 2023

Soon after the SEC adopted its share repurchase rule in May 2023, the U.S. Chamber of Commerce (along with other petitioners) challenged the rule in federal court. On October 31, 2023, the Fifth Circuit issued an opinion finding that the "SEC acted arbitrarily and capriciously, in violation of the [Administrative Procedure Act], when it failed to respond to petitioners' comments and failed to conduct a proper cost-benefit analysis." The court gave the SEC 30 days to correct deficiencies in the rule. After the SEC's request for more time (opposed by the petitioners) was denied by the court, the SEC advised the court that it was unable to address the deficiencies, and on December 19, 2023, the court vacated the SEC's share buyback rule.

The court's decision means that public companies, including FPIs, do not need to comply with the new share buyback disclosure mandate – and this includes all the new requirements that were included in the share repurchase adopting release. It remains to be seen what action the SEC will take in response to the court's decision or whether this will impact the SEC's approach to its regulatory agenda. For now, companies should continue to comply with existing disclosure requirements relating to share repurchases as in effect prior to adoption of the share repurchase rule.

Read our client update Fifth Circuit vacates SEC buyback rule for further detail.

Enforcement actions and litigation

The SEC's Division of Enforcement has had an active year in 2023. A key recurring theme in SEC enforcement actions that is relevant to the preparation of this year's Form 20-F relates to inadequate disclosure controls.

Enforcement actions have focused both on disclosure and disclosure controls and procedures, including in areas such as human capital, non-GAAP measures, share buybacks, related party transactions and

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cybersecurity, and the SEC Climate and ESG Task Force entered into its first settlement with a mining company a few months ago.

There is not a one size fits all takeaway from these enforcement actions since companies should evaluate the implications of each case in light of their existing internal processes and procedures, and their related disclosures. But because the SEC is likely to continue to focus on areas such as climate, cybersecurity, and increasingly, human capital, companies should consider whether any of their own disclosure controls in these and other areas need revisiting.

In addition, a growing number of lawsuits have been filed against companies and their boards relating to ESG disclosures and policies. Securities lawsuits have targeted statements made in ESG disclosures on a variety of issues, including "greenwashing," workplace culture, and diversity, equity and inclusion, or DEI disclosure. Companies should review carefully their ESG-related disclosures (whether in the 20-F, other SEC filings or public statements, such as sustainability reports) to ensure the accuracy and consistency of, and appropriate basis for, ESG-related statements.

Read our client update When gaming runs afoul of disclosure controls and whistleblower rights for more detail on an SEC enforcement action earlier this year.

Selected reminders for FPIs

Electronic submission of Form 144 and glossy annual reports

As discussed in our Preparing Your 2022 Form 20-F client update, in June 2022, the SEC adopted a final rule that requires electronic submission of certain documents on EDGAR, including Forms 144, "glossy" annual reports and Forms 6-K, that were permitted to be filed in a paper format. Notably, the new rule requires companies, including FPIs, to submit on EDGAR:

- Glossy annual reports: The new rules require companies to furnish their annual reports on Form 6-K electronically on EDGAR in a PDF format not later than the date on which the report is first sent or given to shareholders. The PDF format cannot be reformatted, resized or otherwise redesigned from the original format. The submission is not deemed "filed" unless the company explicitly incorporates the report by reference.
- Form 144: Affiliates of a company who sell their stock into the U.S. public markets typically rely on Rule 144, which imposes a number of requirements, including the filing of a Form 144. All Forms 144 for the sale of securities of reporting companies are now required to be filed electronically, rather than through a paper filing. For FPIs who are not subject to Section 16 reporting, insider sales have typically not been reported on EDGAR (as insiders need not file Forms 3, 4 and 5) but paper Forms 144 were submitted via email to the SEC. Now, Forms 144 for insiders must be filed on EDGAR and will likely receive more immediate public coverage.

An initial subset of the changes, including with respect to the submission of glossy annual reports, became effective on January 11, 2023, and the rule for Form 144 electronic filing became effective on April 13, 2023. Insiders who plan to rely on Rule 144 should apply for individual EDGAR codes. For further information, please see our client update SEC to require electronic filing of Form 144 and glossy annual reports.

In addition, the SEC adopted an amendment to Regulation S-T on February 21, 2023, extending the electronic filing deadline for Form 144 from 5:30 p.m. to 10 p.m. for the document to be deemed filed the day it was submitted. This amendment is already in effect.

Modernization of beneficial ownership reporting

As discussed in our Preparing Your 2022 Form 20-F client update, the SEC proposed rule amendments to modernize the rules governing beneficial ownership reporting. On October 10, 2023, the SEC adopted amendments that, among others, shorten the reporting deadlines for beneficial ownership reports on Schedules 13D and 13G.

For Schedule 13D, the amendments shorten the initial filing deadline from 10 days to five business days and require that amendments be filed within two business days. For certain Schedule 13G filers (i.e., qualified institutional investors and exempt investors), the amendments shorten the initial filing deadline from 45 days after the end of a calendar year to 45 days after the end of the calendar quarter in which the investor beneficially owns more than 5% of the covered class. For other Schedule 13G filers (i.e.,

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passive investors), the amendments shorten the initial filing deadline from 10 days to five business days. In addition, for all Schedule 13G filers, the amendments generally require that an amendment be filed 45 days after the calendar quarter in which a material change occurred rather than 45 days after the calendar year in which any change occurred. Finally, the amendments accelerate the Schedule 13G amendment obligations for qualified institutional investors and passive investors when their beneficial ownership exceeds 10% or increases or decreases by 5%.

As a welcome change, the filing cut-off times for Schedules 13D and 13G will change from 5:30 p.m. to 10:00 p.m. Eastern time. The adopting release also includes guidance on the application of the legal standard in the Securities Exchange Act of 1934 (Exchange Act) Sections 13(d)(3) and 13(g)(3) with respect to the formation of a "group". Additionally, to make it easier for investors and markets to access, compile, and analyze information disclosed on Schedules 13D and 13G, the amendments require that these filings use a structured, machine-readable data language. This requirement applies to all information disclosed on Schedules 13D and 13G (other than exhibits).

Compliance with the revised Schedule 13D filing deadlines will be required beginning on February 5, 2024, and compliance with the revised Schedule 13G filing deadlines will be required beginning on September 30, 2024. Compliance with the structured data requirement for Schedules 13D and 13G will be required beginning from December 18, 2024.

Possible expansion of Section 16 to FPIs and increased enforcement

On July 27, 2023, the U.S. Senate passed its version of the National Defense Authorization Act for Fiscal Year 2024. The Senate and House of Representatives are now in the process of resolving differences between their respective versions of the bill. Section 6081 of the Senate bill would extend the application of Section 16 of the Exchange Act to FPIs.

Section 16 of the Exchange Act applies to directors, officers and any person who beneficially owns more than 10% of any registered class of a company's equity securities (commonly referred to as "insiders"). It requires insiders to immediately report transactions in company securities and disgorge imputed profits from short-term trading in those securities.

Securities of FPI insiders are currently exempt from these reporting requirements, and such insiders are not subject to the short-swing disgorgement rules that apply to insiders of domestic public companies. In addition, compensation of FPI directors and officers is currently only disclosed on an aggregate basis unless individual disclosure is made in the home country, and share ownership of each director and officer is disclosed only if it is greater than 1% of a class of shares. Equity compensation can be a significant component of director and officer compensation, and the proposed change to Section 16 would require disclosure of equity compensation information that such insiders may never have previously publicly disclosed. This would represent a significant change from existing FPI insider disclosure obligations.

The expansion of Section 16 to FPIs becomes more important when considered together with the recent increase in the SEC's enforcement actions in this area. On September 27, 2023, the SEC announced a new "sweep" of enforcement actions against six insiders for failing to timely file multiple reports under Section 16. This sweep of actions is part of an ongoing enforcement initiative by the SEC that commenced in 2014 and demonstrates the SEC's continued focus on enforcing Section 16 reporting requirements, particularly against repeated delinquent filers. The SEC's enforcement initiative may become relevant to FPIs if the recent Senate bill becomes law.

For further information, please see our client update Senate defense bill's Section 16 expansion would be a significant change for foreign private issuers and our client update SEC announces new "sweep" of enforcement actions aimed at failures to make timely Section 16 reports.

Changes in Nasdaq code of conduct waiver requirements

Nasdaq amended its Listing Rules 5610 and IM-5610 related to codes of conduct to provide that (i) waivers of the code of conduct for directors or executive officers may be approved by a board committee rather than exclusively by the board and (ii) FPIs must disclose such waivers within four business days by distributing a press release, filing a Form 6-K or disclosing on the FPI's website in a manner that satisfies the requirements of Item 5.05(c) of Form 8-K (a change from the existing rule that did not have a deadline). The amendments have been effective since September 20, 2023 for Nasdaq-listed FPIs and differ from the rules applicable to NYSE-listed FPIs who can continue to follow home country practice. The purpose of the change, according to Nasdaq, is to give issuers the flexibility to place the oversight of an issuer's code of conduct within the jurisdiction of a particular committee if that structure is more effective and appropriate, and to require disclosure of code of conduct waivers for FPIs on the same timeframe as domestic issuers.

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Mind your XBRL disclosure

Check with your financial printer to confirm how much lead-time will be required to complete XBRL tagging. The SEC has been expanding the scope and types of disclosure that require XBRL and/or inline XBRL tagging, including, for example, the new rules on clawbacks as well as for cybersecurity and 10b5-1 plans disclosure. The Division of Corporation Finance recently posted a sample comment letter regarding companies' XBRL and Inline XBRL disclosure obligations. Among other things, the letter reminds companies to properly tag their disclosure in Inline XBRL. The letter goes on to flag other XBRL requirements that companies may have overlooked in their filings.

Recent developments relevant to U.S. public securities offerings by FPIs

SEC filing fees were increased

In August 2023, the SEC issued its first fee rate advisory for the 2024 fiscal year. Effective October 1, 2023, the filing fee that issuers must pay to register their securities with the SEC increased, from $110.20 per million dollars to $147.60 per million dollars. The SEC makes annual adjustments to the rates for fees and the annual rate changes take effect on the first day of each U.S. government fiscal year, i.e., October 1.

SEC adopted shortened settlement cycle

As discussed in our Preparing Your 2022 Form 20-F client update, in February 2022, the SEC proposed to shorten the standard settlement cycle for securities transactions from two business days after the trade date (T+2) to one business day after the trade date (T+1), beginning March 31, 2024.

On February 15, 2023, the SEC adopted the final rule to shorten the standard settlement cycle for most securities transactions from two business days (T+2) to one business day following the trade date (T+1). The SEC adopted a May 28, 2024 compliance date, an extension of two months from the initially proposed rule.

For further information, please see our client update SEC adopts T+1 settlement effective May 2024.

References to credit ratings were removed from Regulation M

On June 7, 2023, the SEC adopted amendments to eliminate the exceptions in Rules 101 and 102 of Regulation M for investment grade securities and replace them with an exception based on a probability of default standard determined using a structural credit risk model. Instead of an investment grade rating, the new exception relies on an issuer's probability of default as determined by the lead manager in a distribution (for example, the lead underwriter) using a "structural credit risk model" as defined under the amendments. The probability of default, which must be calculated as of the sixth business day before pricing and over 12 full calendar months from that day, is to be 0.055% or less. For further information, please see our client update SEC removes references to credit ratings from Regulation M.

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