Form 20-F for Fiscal Year 2023: What Foreign Private Issuers Should Keep in Mind

Skadden

01 / 08 / 24

Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates

The Americas
Boston
Chicago
Houston
Los Angeles
New York
Palo Alto
São Paulo
Toronto
Washington, D.C.
Wilmington

Europe
Brussels
Frankfurt
London
Munich
Paris

Asia Pacific
Beijing
Hong Kong
Seoul
Shanghai
Singapore
Tokyo

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 2023.

We discuss in the guide that follows recent highlights in disclosure trends, other areas of continued focus for the SEC, updated filing requirements, SEC rulemaking activity and other developments that are relevant to FPIs.

Considerations for FPIs Filing Form 20-F for Fiscal Year 2023

Disclosure Trends and Areas of SEC Focus

Updated SEC Filing Requirements

Recent and Pending SEC Rulemakings

Other Matters of Interest

Disclosure Trends and Areas of SEC Focus

The staff of the Disclosure Review Program in the SEC's Division of Corporation Finance (the Staff) has remained extremely busy over the past year. During the 12-month period ended June 30, 2023, the Staff continued its trend from the prior year, issuing approximately 60% more comment letters on company filings this year.[1] The number of companies receiving comment letters also increased by more than 70% from the prior year, primarily due to the Staff issuing more comment letters to companies with a smaller market capitalization.[2]

Comment Trends

Non-GAAP and non-IFRS financial measures and management's discussion and analysis of financial condition and results of operations (MD&A) remained the most frequent areas generating Staff comment, with the volume of comment letters addressing non-GAAP and non-IFRS financial measures and MD&A increasing by more than 50% and 100%, respectively. Segment reporting and revenue recognition ranked third and fourth, respectively, once again rounding out the top four most frequent areas for comment. Climate-related disclosures remained in the top 10 areas of comment for the second consecutive year. The Staff's comments on this topic continued to apply the sample comments contained in the "Sample Letter to Companies Regarding Climate Change Disclosures" that the Staff issued in September 2021.

Below is a summary of the Staff's comments on the most noteworthy areas of focus.

Non-GAAP and 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 ensuring consistency with the Staff's updated "Compliance & Disclosure Interpretations (C&DIs) for Non-GAAP Financial Measures," published in December 2022. While the issuance of the new and updated C&DIs was intended to memorialize previously existing Staff views, nearly half of the Staff's comments on non-GAAP and non-IFRS measures referenced the updated C&DIs.[3] For example, Staff comments have addressed adjustments to non-GAAP and non-IFRS measures that remove or exclude cash operating expenses that the Staff views as "normal" or "recurring" in the operation of a company's business, and thereby resulted in a misleading measure under C&DI Question 100.01 (which the Staff updated in 2022 to provide additional context on what is a "normal" or "recurring" adjustment). Additionally, the Staff's comments have focused on the reasons for adjustments to non-GAAP and non-IFRS measures after the Staff added new C&DI Question 100.06 in its December 2022 updates to the C&DIs, which states that a non-GAAP or non-IFRS measure can still be misleading even if there is "extensive, detailed disclosure about the nature and effect of each adjustment." The Staff has also continued to issue comments to examine whether to identify certain key performance indicators (KPIs) as non-GAAP and non-IFRS measures and to request that companies present the most directly comparable GAAP or IFRS financial measure with equal or greater prominence relative to the non-GAAP or non-IFRS measure.

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. Accordingly, companies should ensure that any public disclosures of non-GAAP and non-IFRS financial measures comply with applicable SEC rules and Staff guidance.

[1] See Ernst & Young's *SEC Reporting Update* "Highlights of Trends in 2023 SEC Staff Comment Letters" (Sept. 14, 2023).

[2] See *id.*

[3] See PwC's *In Depth* "To GAAP or To Non-GAAP" (Nov. 2, 2023).

MD&A

The Staff continues to request that companies quantify material changes in operations and include offsetting factors. The Staff also continued to comment on KPIs and operating metrics, including on how they are calculated and period-over-period comparisons. Staff comments regularly raised questions about KPIs discussed in earnings releases and investor presentations and how these compare to the information disclosed in MD&A reporting.

The Staff comments on MD&A reporting have also continued to focus on known trends or uncertainties, particularly those related to macroeconomic factors such as inflation, interest rates and supply chain issues. For instance, Staff comments have inquired about known trends and uncertainties that have had or are reasonably likely to have a material effect on sales, expenses or income from continuing operations as a result of the impact of higher interest rates. Where reporting companies cited negative macroeconomic trends such as wage inflation, global supply chain issues and inflation affecting revenues as factors impacting results, Staff comments have requested that companies expand their MD&A disclosures to identify the principal factors contributing to these issues, clarify the resulting impact on the company and identify mitigating actions planned or taken with respect to these macroeconomic trends. Staff comments have also asked how known and anticipated macroeconomic events and trends may impact the company's future liquidity and capital resources.

We expect to see more Staff comments on these macroeconomic trends in MD&A reporting given that global conflicts and supply chain disruptions continue and inflation and interest rates remain highly volatile. As a result:

- We encourage companies to continually reassess and update their MD&A disclosures in light of new or evolving macroeconomic trends and uncertainties.
- Companies should continue to consider CF Disclosure Guidance Topic No. 9 and No. 9A related to COVID-19 and supply chains as well as the Staff's "Sample Letter to Companies Regarding Disclosures Pertaining to Russia's Invasion of Ukraine and Related Supply Chain Issues" issued in May 2022, as much of the guidance in these materials could apply to other macroeconomic trends.

Climate Change

The SEC and Staff continued to focus on climate-related disclosures (a more recent trend) in 2023, even before the SEC has finalized its proposed rulemaking on climate change-induced effects that would require more extensive disclosures.[4] Staff comments on this topic continued to focus on how companies comply with the SEC's existing rules, applying the sample comments contained in the "Sample Letter to Companies Regarding Climate Change Disclosures" that the Staff published in 2021. The letter's sample comments and guidance reiterates the Staff's view that information related to climate change-related risks and opportunities may be required in disclosures related to a company's description of business, legal proceedings, risk factors and MD&A under the Staff's interpretive release "Commission Guidance Regarding Disclosure Related to Climate Change" published in February 2010.

In applying the sample comments and guidance contained in the letter, the Staff's climate-related comments focused on the following, among other factors:

- Whether climate-related disclosures provided outside of SEC filings, such as those included in a company's corporate responsibility reports, should also be provided in the company's filings (such as Form 20-F).
- Litigation and regulatory risks and related impact on the company.
- The indirect consequences of climate-related regulation or business trends.
- The physical effects of climate change on the company's property or operations.
- Material expenditures for climate-related projects and compliance costs.

While companies and their advisors await further action on the SEC's proposed rulemaking addressing climate change, a company should evaluate its disclosure obligations concerning climate change matters, including risks associated with climate change, by reviewing the SEC's 2010 interpretive release and sample letter referenced above and consider whether any updates are relevant or necessary.

In addition, companies should consider the applicability of the European Union's and California's recently adopted climate-related disclosure rules and how these new rules will coexist with the SEC's climate-related disclosure framework. For further guidance on these new disclosure requirements, see the section of this guide titled "Other Matters of Interest — European Union's and California's New Climate Disclosure Requirements."

[4] For more information on the SEC's proposed rulemaking on climate change, see the section of this guide titled "Recent and Pending SEC Rulemakings — Proposed Rules on Climate-Related Disclosures."

Disclosure for China-Based Companies

In July 2023, the Staff published a "Sample Letter to Companies Regarding China-Specific Disclosures" focused on disclosure obligations of companies that are based in or have the majority of their operations in China (China-based companies). The sample letter and guidance reflect the Staff's continued vigilance in seeking more nuanced and prominent disclosure for companies with significant operations in China. The new guidance reiterates the Staff's efforts in three areas:

- Disclosure obligations under the Holding Foreign Companies Accountable Act.
- "Specific and prominent disclosure" about material risks related to the role of the government of China in the operations of China-based companies.
- Disclosures related to material impacts of certain statutes, including the Uyghur Forced Labor Prevention Act.

FPIs should note the sample comments contained in the letter do not constitute an exhaustive list of the issues that China-based companies should consider. For instance, such companies should still consider the disclosure items addressed in the SEC's "Sample Letter to China-Based Companies" published in December 2021[5] and in CF Disclosure Guidance: Topic No. 10.

Disclosure of Recent Developments in Cryptoasset Markets

As discussed in our January 10, 2023, client alert "Form 20-F for Fiscal Year 2022: What Foreign Private Issuers Should Keep in Mind," in December 2022, the Staff published a "Sample Letter to Companies Regarding Recent Developments in Crypto Asset Markets" in response to bankruptcies among cryptoasset market participants and related widespread disruption, noting that "companies may have disclosure obligations under the federal laws related to the direct or indirect impact that these events and collateral events have had or may have on their business[es]." In preparing their 2023 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.

XBRL Disclosure

The Staff has shown an increased focus on eXtensible Business Reporting Language (XBRL) and Inline XBRL disclosures recently. In September 2023, the Staff published a "Sample Letter to Companies Regarding XBRL Disclosures" to remind companies to ensure proper tagging of disclosures and data. More recently, the Staff published new interpretive guidance on hyperlinking exhibits filed in XBRL to clarify that exhibits filed in Inline XBRL must be hyperlinked in an exhibit index, unlike those filed in XBRL only.[6] In addition, the Staff's new rules on cybersecurity, clawbacks and insider trading expand the scope and types of disclosures that require XBRL and/or Inline XBRL tagging.

FPIs should confirm all XBRL and Inline XBRL disclosures in their upcoming Forms 20-F comply with the issues highlighted in the Staff's new interpretive guidance and sample letter. Companies also should prepare for new rules that will go into effect that will require XBRL tagging and/or Inline XBRL tagging and be aware of upcoming rules that will require XBRL subject to transition periods. For more information, see the sections of this guide titled "Updated SEC Filing Requirements — Cybersecurity Disclosure Requirements," "Clawback Policy Exhibit and Disclosures" and "Insider Trading Policies and Procedures Exhibit and Disclosures."

[5] For more information on the sample comments and guidance contained in this letter, see our January 10, 2023, client alert "Form 20-F for Fiscal Year 2022: What Foreign Private Issuers Should Keep in Mind."

[6] See SEC Staff's C&DIs for Regulation S-K, Question 146.18 (Nov. 20, 2023).

Updated SEC Filing Requirements

FPIs should be aware of the updated SEC filing requirements summarized below:

- Cybersecurity related disclosures in new Item 16K of Form 20-F.
- Clawback policies in new Item 6F of Form 20-F.
- Description of insider trading policies in Item 16J of Form 20-F.

Cybersecurity Disclosure Requirements

The SEC adopted final rules in 2023 intended to enhance and standardize disclosures regarding cybersecurity risk management, strategy, governance and incident reporting by public companies, including FPIs.[7]

New Disclosure Requirements

Specifically, the new rules amend Form 6-K by adding material cybersecurity incidents to the list of material information an FPI (i) makes or is required to make public pursuant to the law of the jurisdiction of its domicile or in which it is incorporated or organized, or (ii) files or is required to file with a stock exchange on which its securities are traded and that was made public by that exchange, or (iii) distributes or is required to distribute to its security holders.

In addition, new "Item 16K — Cybersecurity" to Form 20-F requires the following cybersecurity-related disclosures in annual reports on Form 20-F for fiscal years ending on or after December 15, 2023:

- **Risk management and strategy.** The company's processes, if any are established, for assessing, identifying and managing material risks from cybersecurity threats — in sufficient detail for a reasonable investor to understand those processes and whether any risks from cybersecurity threats, including as a result of any previous cybersecurity incidents, have materially affected or are reasonably likely to materially affect the company, including its business strategy, results of operations or financial condition, and if so, how.
- **Board's role.** The board's oversight of risks from cybersecurity threats and, if applicable, any board committee or subcommittee responsible for such oversight, as well as the processes by which the board or board committee is informed about such risks.
- **Management's role.** The management's role in assessing and managing the company's material risks from cybersecurity threats, which may include the following nonexclusive list of potential disclosure items:
  - Whether and which management positions or committees are responsible for assessing and managing such risks and the relevant expertise of these persons in sufficient detail to fully describe the nature of the expertise.
  - The processes by which such persons or committees are informed about and monitor the prevention, detection, mitigation and remediation of cybersecurity incidents.
  - Whether such persons or committees report information about such risks to the board of directors or a board committee or subcommittee.

Preparing for Compliance With New Rules

When preparing to comply with the new rules, companies should evaluate whether current cybersecurity incident response plans and procedures, as well as disclosure controls and procedures (DCPs), are designed to enable compliance with the new rules.

[7] See our July 27, 2023, client alert "SEC Adopts Rules for Cybersecurity Risk Management, Strategy, Governance and Incident Disclosure."

Materiality Analysis: In particular, companies should review materiality determination protocols, including whether they encompass assessment of both quantitative and qualitative costs that could arise when a cybersecurity incident occurs. In the adopting release, the SEC noted the following nonexclusive factors for companies to consider in making a materiality determination: "business interruption, lost revenue, ransom payments, remediation costs, liabilities to affected parties, cybersecurity protection costs, lost assets, litigation risks, and reputational damage." Companies should consider carefully reviewing existing incident response plans and procedures to determine whether these plans include a materiality analysis at an appropriate time in the fact-finding process considering the nature and scope of an incident. This review may also include an evaluation of existing DCPs to determine whether functions such as information technology, data security, cybersecurity and incident response are integrated and designed to facilitate streamlined communication between those functions, management and the board in the event of a cybersecurity incident.

Assessing Policies and Procedures: Companies should establish procedures for documenting board and committee discussions regarding cybersecurity risk oversight, including reports from management, which should provide the board or relevant committee with timely updates regarding the company's risk management program and any related developments. Companies should consider updating and maintaining clear and concise documentation of their cybersecurity risk management processes and oversight structures to facilitate consistent and accurate disclosure of those areas. Companies should also closely review existing governance documents, company policies and DCPs to evaluate whether their existing frameworks clearly articulate which members of management are responsible for managing cybersecurity risk and how such risks will escalate from employees to management, and then to the board.

Many companies already engage third-party vendors for certain aspects of cybersecurity risk management, including for security monitoring, managed services or incident response. Item 16K requires disclosure of whether the company engages assessors, consultants, auditors or other third parties in connection with any such processes as part of the description of the company's cybersecurity risk management and strategy. Therefore, in order to facilitate accurate and complete disclosures, to the extent that a company engages a third party, the company needs to document the engagement, scope of work and services provided. Lastly, companies should review their due diligence and third-party vendor oversight processes for cybersecurity vendors and third-party vendors generally, and disclose these processes under Item 16K.

Preparing Disclosures: Finally, companies should consider how to accurately describe the processes, if any are established, for assessing, identifying and managing material risks from cybersecurity threats and the board's and management's roles relating to cybersecurity risk management and oversight. As these disclosures will be required for the first time in 2024, we encourage companies to start this process early and provide company management, members of the board and external auditors with adequate time to review and provide feedback.

Clawback Policy Exhibit and Disclosures

In addition to adopting Dodd-Frank Act-compliant clawback policies (which companies should have completed by the SEC's December 1, 2023, deadline), listed companies should factor into their agendas the below clawback-related action items.[8]

Background

Most listed companies have adopted clawback policies[9] that meet the new New York Stock Exchange (NYSE) and Nasdaq listing standards issued in response to the SEC's final rules implementing the incentive-based compensation recovery (clawback) provisions of the Dodd-Frank Act.[10]

The final SEC rules, which were adopted in October 2022, directed the NYSE and Nasdaq to establish listing standards requiring companies to develop and implement policies providing for the recovery of erroneously awarded incentive-based compensation received by current or former executive officers (as defined in Rule 16a-1(f) under the Securities Exchange Act of 1934, as amended (the Exchange Act)) and to satisfy related disclosure obligations.

Short-Term Action Items

- **Confirm clawback policy adoption on NYSE's Listing Manager, if applicable.** NYSE-listed companies are required to confirm, via Listing Manager, either (i) their adoption of a clawback policy by December 1, 2023, or (ii) their reliance on an applicable exemption.
- **File the clawback policy as an annual report exhibit and ensure the annual report cover page is updated.** The Dodd-Frank clawback rules require listed FPIs to file their clawback

[8] For a review of the Dodd-Frank Act clawback rules and related disclosure requirements, see our November 2, 2022, client alert "SEC Adopts Final Clawback Rules and Disclosure Requirements" and our June 16, 2023, client alert "SEC Approves Stock Exchange Rules for Dodd-Frank Clawbacks."

[9] Listed companies have a range of clawback policies in practice, from garden-variety Dodd-Frank Act-compliant policies to policies that permit recovery in circumstances absent an accounting restatement. Unless otherwise noted, the term "clawback policy" in this section refers to a Dodd-Frank Act-compliant policy.

[10] The Dodd-Frank Act's clawback rules, together with the final SEC clawback rules and related stock exchanges' listing standards, are referred to collectively herein as "the Dodd-Frank clawback rules." See the SEC's final "Listing Standards for Recovery of Erroneously Awarded Compensation" (Oct. 26, 2022) and press release "SEC Adopts Compensation Recovery Listing Standards and Disclosure Rules" (Oct. 26, 2022).

policies as exhibits to their annual reports on Form 20-F or 40-F, as applicable. Companies can also consider whether to voluntarily file any stand-alone supplemental clawback policies that exceed the Dodd-Frank clawback rules' requirements.

Additionally, listed companies should indicate by checkboxes on the cover pages of their annual reports 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. The new disclosure on the cover page of the Form 20-F or 40-F must be tagged in interactive block text tag format using XBRL.

- **Obtain written acknowledgement of the clawback policy from executive officers, to the extent not previously obtained.** While executive officers at listed companies will be subject to their company's clawback policy regardless of whether they acknowledge and agree in writing to be bound by the policy, obtaining each executive officer's written acknowledgement that the officer knowingly, voluntarily and irrevocably consent to the clawback policy is a best practice to raise executive officer awareness of the policy, mitigate litigation risk and position the company to promptly recover compensation from executive officers.

Medium-Term Action Items

- **Determine which executive officer compensation is incentive-based compensation.** The Dodd-Frank clawback rules apply to "incentive-based compensation," which is "any compensation that is granted, earned, or vested based wholly or in part upon the attainment of any financial reporting measure."[11] Before an accounting restatement clouds the horizon, listed companies would be wise to reflect on which of their executive officer compensation arrangements are incentive-based compensation.
- **Reflect on the rationale for and documentation of forms of executive compensation.** Considering the "incentive-based compensation" definition in the context of the SEC's final clawback rule confirms that time-based equity awards, bonuses and other forms of compensation that do not contain performance metrics can fall into the category of "incentive-based compensation" if they are granted in consideration of attainment of a past financial reporting measure. Therefore, listed companies should be mindful when documenting the rationale for executive compensation in compensation committee resolutions, offer letters, public disclosures and otherwise.
- **Reinforce the importance of an open line of communication between your accounting, finance, HR and legal functions.** If an accounting restatement occurs, various functions, such as accounting, finance, HR and legal, along with the company's audit committee and compensation committee, will need to work hand in hand to determine whether, and the extent to which, the accounting restatement triggers application of the clawback policy and the process for compensation recovery, if applicable. Companies should ensure that their accounting, finance, HR and legal functions are knowledgeable about their clawback policies and aware of their interdependencies if an accounting restatement occurs.

Long-Term/As-Needed Action Items

- **If stock price or total shareholder return (TSR) is an input to incentive-based compensation, consider which advisor(s) to engage.** The Dodd-Frank clawback rules do not prescribe how to determine the amount of incentive-based compensation to recover if the underlying financial performance metric is stock price or TSR. Determining how an accounting restatement impacts stock price and TSR may entail technical expertise, specialized knowledge and significant assumptions. Given the complexity of the analysis and that aspects of the analysis will be disclosed externally, companies that have incentive-based compensation tied to stock price or TSR that experience an accounting restatement triggering the clawback policy should consider engaging a third-party valuation expert to assist.
- **Determine the means of recovering erroneously awarded incentive-based compensation.** Once erroneously awarded incentive-based compensation has been quantified, companies will need to assess how they intend to recover it, such as the means and timing of recovery. Listed companies should keep in mind that certain states, such as California, have laws that generally prohibit the recovery of wages that have already been paid.[12] While the Dodd-Frank clawback rules are currently expected to preempt conflicting state law, litigation activity in the coming years may definitively confirm whether the Dodd-Frank clawback rules preempt state law and indicate which means of recovery mitigate legal risk.
- **If the clawback policy is triggered, consider the tax consequences to the company and executive officers.** The Dodd-Frank clawback rules require recovery of erroneously awarded incentive-based compensation on a pretax basis. Therefore, if its clawback policy is triggered, a company will need to carefully assess how much of that compensation is or was properly deductible, and may be required to refund the Internal Revenue Service for deductions taken in previous years. Similarly, executive officers should work closely with tax advisors to determine how their taxes are impacted by the clawback policy's application.
- **Disclose how the clawback policy has been applied during or after the last completed fiscal year.** The following disclosure

[11] See the SEC's final "Listing Standards for Recovery of Erroneously Awarded Compensation" (Oct. 26, 2022).

[12] See California Labor Code § 221.

requirements apply under Item 6.F of Form 20-F or paragraph B.19 of Form 40-F, as applicable, and the disclosure must be tagged in XBRL:

- If during or after the last completed fiscal year the listed company was required to prepare a restatement that required recovery of erroneously awarded incentive-based compensation under the company's clawback policy, or there was an outstanding balance as of fiscal year-end of erroneously awarded incentive-based compensation to be recovered from a previous application of the policy, the listed company is required to disclose:
  - The date it was required to prepare the restatement.
  - The aggregate dollar amount of erroneously awarded incentive-based compensation, including an analysis of how the amount was calculated (with enhanced disclosure if the financial reporting measure related to stock price or TSR).
  - The aggregate dollar amount of erroneously awarded incentive-based compensation that remains outstanding at the end of the last completed fiscal year; provided that alternative disclosure would be required if the aggregate dollar amount of erroneously awarded incentive-based compensation had not yet been determined.
- If recovery would be impracticable in accordance with the narrow exceptions in the Dodd-Frank clawback rules, companies are required to briefly disclose why recovery was not pursued and the amount of recovery foregone for each current and former named executive officer and for all other current and former executive officers as a group.
- For each current and former named executive officer from whom, as of the end of the last completed fiscal year, erroneously awarded incentive-based compensation had been outstanding for 180 days or longer since the date the listed company determined the amount owed, the dollar amount of outstanding erroneously awarded incentive-based compensation due from each such individual should be disclosed.
- If the company was required to prepare a restatement during or after its last completed fiscal year and concluded that recovery of erroneously awarded incentive-based compensation was not required under the clawback policy, the company is required to briefly disclose the reasoning behind that conclusion.

- **Consider whether to amend or supplement the clawback policy.** Compensation committees (or boards of directors, if applicable) should consider at least annually whether the clawback policy should be updated in response to proxy advisory firm guidance, other clawback rules and other factors that arise in the coming years.

As clawback policies are implemented in 2024, prevailing recoupment practices and answers to open questions about the Dodd-Frank clawback rules are expected to emerge, shaping companies' approaches to implementing their clawback policies.

Insider Trading Policies and Procedures Exhibit and Disclosures

New Item 16J to Form 20-F requires FPIs to disclose, on an annual basis, their insider trading policies and procedures governing the purchase, sale and other dispositions of company securities by directors, senior management and employees. The SEC expects these policies and procedures to be reasonably designed to promote compliance with applicable insider trading laws, rules and regulations and with any applicable listing standards. If no such policies or procedures are in place, a company will need to explain why. Such disclosure must be tagged in XBRL.

In addition, FPIs are required to file their insider trading policies 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.*, Form 20-F for the fiscal year ending December 31, 2024, for calendar-year companies).

Recent and Pending SEC Rulemakings

In 2023, the SEC continued to pursue a robust regulatory agenda under SEC Chair Gary Gensler, as summarized below.

Final Rules for Rule 10b5-1 Plans and Other Recent Developments

The SEC continues to focus on insider trading issues. In December 2022, the SEC adopted several amendments to Exchange Act Rule 10b5-1, imposing new disclosure requirements intended to address what the agency perceives may be abusive practices relating to Rule 10b5-1 trading plans, certain equity awards and gifts of securities. The SEC continued to bring insider trading enforcement actions in 2023, including, for example, charges against an executive for trading pursuant to Rule 10b5-1 plans that he allegedly entered into while in possession of material nonpublic information.[13]

As discussed above, companies will be required to file their insider trading policies or explain why they do not have such policies. For companies that do not publicly disclose their insider trading policies today, the new exhibit requirement could result in the SEC's and investors' scrutiny of those policies.

In light of the Rule 10b5-1 amendments, related new disclosure requirements and the SEC's continuing focus on insider trading issues, particularly Rule 10b5-1 plans, companies should consider any necessary updates to their insider trading policies as well as related disclosure controls.

Rule 10b5-1 Plans

Before the December 2022 amendments, the Rule 10b5-1 affirmative defense against insider trading was generally available when a person adopted a Rule 10b5-1 plan while not in possession of material nonpublic information and the plan terms were set in advance without any subsequent influence by the person.

While many companies and brokers still imposed cooling-off periods between the date a Rule 10b5-1 plan is adopted or modified and when trading commences under the plan and under other parameters on Rule 10b5-1 plans, those periods were not legal requirements and were voluntarily adopted to help reduce potential insider trading liability. As a result, many insider trading policies either did not specifically address Rule 10b5-1 plans or addressed plan requirements only at a high level.

Rule 10b5-1, as amended, now specifies requirements that employees and companies must satisfy to avail themselves of the Rule 10b5-1 affirmative defense. As discussed in detail in our December 20, 2022, client alert "SEC Amends Rules for Rule 10b5-1 Trading Plans and Adds New Disclosure Requirements," these new requirements include:

- Minimum cooling-off periods.
- Director and officer representations regarding the adoption and operation of a Rule 10b5-1 plan.
- An expanded "good faith" requirement.
- Prohibitions against multiple, overlapping plans.
- Limitations on single-trade arrangements.

Accordingly, to the extent companies permit the use of Rule 10b5-1 plans by directors, executive officers or other employees, insider trading policies should address all the enumerated requirements under the amended Rule 10b5-1.

[13] See the SEC's settlement order.

In addition, companies should consider requiring preclearance for all Rule 10b5-1 plan adoptions and modifications to help ensure that proposed plans comply with all the Rule 10b5-1 requirements.

While Rule 10b5-1 does not restrict the early termination of a plan, such a termination could call into question whether the plan was adopted and operated in good faith, which could impact the availability of the Rule 10b5-1 affirmative defense with respect to the transactions that previously occurred under the terminated plan. For that reason, companies should consider requiring advance clearance for plan terminations and/or permitting plan terminations only when the person seeking to terminate a plan is not subject to a blackout period and not otherwise in possession of material nonpublic information.

Gifts of Securities

In both the proposing and adopting releases for the December 2022 amendments, the SEC indicated its concerns with potentially problematic practices involving gifts of securities, such as making stock gifts while in possession of material nonpublic information or backdating stock gifts in order to maximize the tax benefits associated with the gifts. In particular, the SEC noted that a scenario in which an insider gifts stock while aware of material nonpublic information and the recipient sells the gifted securities while the information remains nonpublic and material is economically equivalent to a scenario in which the insider trades on the basis of material nonpublic information and gifts the trading proceeds to the recipient.

Companies should consider imposing in their insider trading policies specific parameters on gifts. For example, companies can require advance clearance for gifts by directors, executive officers and certain employees who are subject to quarterly blackout periods, since these individuals are generally more likely to be in possession of material nonpublic information than other employees are. As a more conservative option, a company can treat gifts the same way the company treats ordinary open market purchases and sales, which would prohibit gifts of securities by anyone subject to the policy while subject to a blackout period or in possession of material nonpublic information.

Final (Vacated) Rules on Share Repurchases

As discussed in more detail in our earlier client alert, the SEC adopted new share repurchase rules in May 2023.[14] On October 31, 2023, the U.S. Court of Appeals for the Fifth Circuit ruled that the SEC violated the Administrative Procedure Act when the agency adopted the new rules, and the court remanded the matter to the SEC to correct the defects by November 30, 2023.[15]

On November 22, 2023, the SEC announced that it was postponing the effective date of the new share repurchase rules, and as a result, the rules would be stayed pending further SEC action.[16] After the court denied the SEC's request for an extension, the SEC conceded that it was not able to correct the defects by the court-imposed deadline.

On December 19, 2023, the court issued an opinion vacating the new share repurchase rules.[17] The SEC will have to decide whether to appeal the decision or issue a new proposal.

In the meantime, it is not clear that the prior share repurchase disclosure rules will spring back into effect. Absent additional guidance from the Staff, however, we believe it is advisable for FPIs to continue providing the disclosures required under Item 16E of Form 20-F prior to the amendments, consistent with past practice.

Final Rules on Beneficial Ownership (Schedules 13D and 13G)

On October 10, 2023, the SEC adopted amendments to its beneficial ownership rules. Pursuant to the adopted rule amendments, Schedules 13D and 13G will be filed on a more accelerated basis.[18] The new beneficial ownership rules become effective beginning on February 5, 2024. However, compliance with the new Schedule 13G deadlines commences on September 30, 2024.

Schedule 13D Deadlines

Schedule 13D will now be due within five business days after ownership crosses the 5% threshold (instead of within 10 calendar days). Any Schedule 13D amendments will be due within two business days of a material change (instead of being due "promptly," which is not currently defined).

Schedule 13G Deadlines

The Schedule 13G deadlines were also accelerated. There are three categories of Schedule 13G filings, each with its own filing deadlines and amendment requirements.

- Passive investors must file their initial Schedule 13Gs within five business days (instead of ten calendar days).

[14] See our May 5, 2023, client alert "SEC Adopts New Share Repurchase Disclosure Requirements."

[15] See *Chamber of Com. of the USA v. SEC*, No. 23-60255 (5th Cir. 2023).

[16] See the SEC's press release "Announcement Regarding Share Repurchase Disclosure Modernization Rule" (Nov. 22, 2023).

[17] See *Chamber of Com. of U.S. v. SEC*, No. 23-60255, 2023 WL 8747399, at *1-2 (5th Cir. Dec. 19, 2023).

[18] See our October 13, 2023, client alert "SEC Amends Beneficial Ownership Reporting Rules, Shortening Deadlines and Offering Guidance on 'Groups' and Cash-Settled Derivatives."

- Other initial Schedule 13Gs, including from qualified institutional investors, are eligible to be filed within 45 days after the end of the first calendar quarter-end in which a person beneficially owns more than 5% percent (instead of within 45 days after the end of the calendar year if over 5% at year-end).
- The exception is that a qualified institutional investor that beneficially owns more than 10% at the end of a calendar month must instead file its initial Schedule 13G within five business days after the end of such month (instead of within 10 calendar days after the end of such month).

One of the more impactful rule changes involves a shift to quarterly reporting for Schedule 13G amendments. Under the old rules, all Schedule 13Gs needed to be amended annually within 45 days after the end of the year, unless there was no change in the information previously reported. The SEC has now eliminated the annual amendment requirement for Schedule 13Gs. Instead, all Schedule 13Gs must be amended within 45 days after the end of a calendar quarter in which there is a material change in the information previously reported. The SEC did not define material changes for purposes of any quarter-end Schedule 13G amendments. However, the SEC signaled that any acquisitions or dispositions of 1% or more of the outstanding class of securities should be deemed material for purposes of amending a Schedule 13G, similar to the Schedule 13D amendment requirement for 1% changes prescribed under Rule 13d-2(a).

The accelerated deadlines are intended to help investors disclose positions and amend their filings more promptly. However, with no annual Schedule 13G requirement, some filings may not require amending as frequently if no material changes occurred over a period of time.

Cash-Settled Derivatives

The SEC had also proposed rules that would include cash-settled derivatives (other than security-based swaps) toward a person's beneficial ownership if such derivatives were held with a control purpose. However, these amendments were not adopted. The SEC did amend Schedule 13D to specifically require that any derivatives, including cash-settled derivatives, relating to an issuer's securities held by a reporting person be disclosed in Item 6 of the Schedule 13D. While many filers believed this was already required, some had argued otherwise.

Group Formation

The SEC had also proposed amending the definition of "group" for beneficial ownership purposes. The current rule states that a group is formed when two or more persons agree to act together for the purposes of acquiring, holding, voting or disposing of company equity securities (unlike Sections 13(d) and (g) of the Exchange Act which make no reference to an "agreement" to act together and only require that such persons act together as a group for such purposes). The SEC had proposed deleting the reference to "agreement" from the rule to bring the rule and statute in alignment. The SEC wanted to make clear that an explicit agreement is not required to establish that a group was formed; circumstantial evidence of two shareholders acting in concert as a group for one of the above purposes is sufficient. One SEC focus was "wolf pack" activities, where multiple activist investors act together regarding a company without entering into any explicit agreement. The SEC did not make these amendments, but emphasized that nonetheless, the agency's view is that no explicit agreement is required to form a group under the current rules.

The SEC also provided additional guidance and amendments to clarify other group issues.

Final Rules on Reporting of Short Positions and Daily Short Activity (New Form SHO)

On October 13, 2023, the SEC adopted new short sale position and activity reporting rules.[19] Pursuant to new Rule 13f-2 under the Exchange Act, institutional investment managers will be required to disclose certain short sale positions and certain net short-position trading activity on a new Form SHO.

Under the new rule, any required Form SHO will be due within 14 days after the end of a calendar month in which applicable short positions exceeded the below thresholds. Any errors that affect the accuracy of the information reported must be amended within 10 calendar days of discovery of such error. Form SHO is a confidential filing (*i.e.*, not available publicly on EDGAR).

The SEC will then take the details provided in the privately filed Forms SHO and publish at the end of each calendar month aggregate information on large short positions related to individual equity securities (gross position as of the end of such month and dollar value of such position) and net activity during the applicable month.

An institutional investment manager must file Form SHO to report each gross short position over which the investment manager and any person under the manager's control has investment discretion that collectively, after the end of a calendar month, has:

- For reporting issuers:
  - A monthly average gross short position at the close of regular trading hours in the equity security of at least $10 million; or
  - A monthly average gross short position at the close of regular trading hours as a percentage of shares outstanding in the equity security of at least 2.5%.

[19] See our October 27, 2023, client alert "SEC Adopts Short Sale Disclosure Rules."

- For nonreporting issuers:
  - A value that meets or exceeds $500,000 at the close of regular trading hours on any settlement date during the calendar month.

Institutional investment managers will need to determine whether they have Form SHO filing obligations on a month-by-month basis.

New Rule 13f-2 becomes effective on January 2, 2024. However, compliance begins on January 2, 2025, with public dissemination of the aggregated reporting data by the SEC to follow three months later.

Companies will not see the individual Form SHO filings but, beginning in 2025, will receive a monthly update from the SEC on aggregate gross short positions and daily net short trading activity with respect to their securities.

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.[20] 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 2024, and litigation challenging such rules will likely follow. However, companies should still consider how to begin collecting 2024 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 DCPs.
- Internal control over financial reporting with respect to GHG emissions and other climate-related disclosures.[21]

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

[21] 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."

Other Matters of Interest

Confidentiality Provisions in Employment/Separation Agreements and Related Documents

In light of increasing activity in recent SEC enforcement actions, companies should revisit confidentiality provisions in their employment and separation agreements, as well as related policies, to ensure both comply with the SEC's whistleblower protection rules under the Dodd-Frank Act.

Overview

Under the SEC's whistleblower rules, no person may take an action to impede an individual from communicating directly with the SEC about possible securities law violations, including by enforcing or threatening to enforce confidentiality agreements with respect to such communications, subject to certain limited exceptions.[22] Companies should note that the SEC interprets this provision broadly and has brought enforcement actions even where the problematic language did not, in fact, impede an employee from speaking to the SEC or where the employee did not interpret the language to restrict communications with the government.

Recent Enforcement Actions

Since 2015, the SEC has initiated over 20 enforcement actions alleging activity to impede reporting by potential whistleblowers. Companies should avoid the following types of provisions, which the SEC deemed problematic and which resulted in SEC settlements in 2023:

- Separation agreements requiring a waiver of rights to monetary whistleblower awards in connection with filing claims with or participating in investigations by government agencies.[23] The SEC's order found that such waiver impeded participation in the SEC's whistleblower program by requiring employees to "forgo important financial incentives that are intended to encourage people to communicate directly with SEC staff about possible securities law violations."
- Separation agreements requiring former employees to notify the company if they received a request from a government administrative agency in connection with a report or complaint.[24] The SEC's order found that this notice provision undermined the purpose of the whistleblower rules, notwithstanding a clause stating that nothing in the release would prevent the former employee from truthfully testifying or responding to a subpoena, or communicating with a government or regulatory entity such as the SEC.
- Requirements for employees to sign releases attesting that they had not filed complaints against the company with any federal agency.[25] The SEC's order determined that by conditioning separation pay on employees' signing the release, the company took action to impede potential whistleblowers from reporting complaints to the SEC. Another enforcement action related to similar releases for deferred compensation.[26]
- Requirements for employees to sign agreements prohibiting the disclosure of confidential corporate information to third parties, unless authorized by the company, without an exception for potential SEC whistleblowers.[27]

[22] Exchange Act Rule 12F-17(a).

[23] See the SEC's press releases "SEC Charges Privately Held Monolith Resources for Using Separation Agreements That Violated Whistleblower Protection Rules" (Sept. 8, 2023); "SEC Charges Internet Streaming Company for Overstating Paying Subscribers and Violating the Whistleblower Protection Provisions" (May 23, 2023).

[24] See the SEC's press release "Activision Blizzard To Pay $35 Million for Failing To Maintain Disclosure Controls Related to Complaints of Workplace Misconduct and Violating Whistleblower Protection Rule" (Feb. 3, 2023).

[25] See the SEC's press release "SEC Charges CBRE, Inc. With Violating Whistleblower Protection Rule" (Sept. 19, 2023).

[26] See the SEC's press release "SEC Charges D. E. Shaw With Violating Whistleblower Protection Rule" (Sept. 29, 2023).

[27] See *id.*

Additional Considerations

Companies should review their applicable agreements (which may include consulting agreements) and policies (*e.g.*, the code of conduct), and ensure consistency across all documents. Review should include coordination and consultation with appropriate regulatory counsel such as executive compensation/benefits, enforcement and labor/employment counsel. Companies may want to consider updating any existing provisions that the SEC could view as problematic and notifying relevant individuals of any such updates.

Disclosure Controls and Procedures

SEC rules require public companies to maintain and regularly evaluate the effectiveness of disclosure controls and procedures. Chief executive officers and chief financial officers also must certify the effectiveness of these company DCPs on a quarterly basis.[28] While these requirements are not new, a number of high-profile SEC enforcement actions were brought and settled based on the SEC's view that the companies failed to maintain adequate DCPs. As a result, we recommend that companies periodically reassess their DCPs and consider any necessary changes to help ensure the consistency, accuracy and reliability of their required and voluntary disclosures.

Third-Party Messaging Applications

Companies have increasingly been using third-party messaging applications, including those that allow users to send messages using end-to-end encryption and those that offer options for the automatic deletion of messages. Given this trend, companies should consider enhancing policies and procedures governing the use of such applications among employees to ensure that their practices comply with regulatory requirements. In particular, companies should be mindful of recordkeeping requirements related to the use of such applications and other risks associated with their use.

Exchange Act Section 13(b) requires companies to retain all records, including written communications that reflect the transactions and dispositions of the company's assets. Specifically, Section 13(b) requires companies to:

- Make and keep books, records and accounts that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the company.
- Devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:
  - Transactions are executed in accordance with management's general or specific authorization.
  - Transactions are recorded as necessary (i) to permit preparation of financial statements in conformity with GAAP (or the applicable accounting standard) and (ii) to maintain accountability for assets.
  - Access to assets is permitted only with management's general or specific authorization.
  - Recorded accountability for assets is compared with existing assets at reasonable intervals and appropriate action is taken with respect to any difference.
- Ensure that individuals may not knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record or account described above.

For the purpose of these provisions, the terms "reasonable assurances" and "reasonable detail" mean a level of detail and degree of assurance that would satisfy prudent officials in the conduct of their own affairs.

To date, the SEC has not brought any actions alleging violations of Section 13(b) in connection with the use of third-party messaging apps. Where the SEC has brought such actions, they have generally been limited to the more stringent broker/dealer-specific recordkeeping requirements. Nonetheless, companies should be mindful of Section 13(b) and remember that sensitive material that is not adequately recorded and archived could be subject to scrutiny, including claims that the company lacks adequate internal controls.

Considerations for Implementing More Robust DCPs

Given the ongoing SEC focus on the effectiveness of DCPs, companies should periodically reassess their DCPs to help ensure existing processes bring all potentially material information to management's attention in a timely manner and result in adequate disclosures. In particular, companies may consider adopting a policy that prohibits employees from using any third-party messaging platform not approved by the company for communications pertaining to the transactions and dispositions of the company's assets, per the SEC's recordkeeping requirement. Additionally, a policy may permit the company's legal department to authorize certain persons who are subject to the policy to use specified third-party messaging platforms for communications that fall outside the SEC's recordkeeping requirements.

[28] SEC rules define DCPs as controls and other procedures designed to ensure that information required to be disclosed in all SEC filings is (i) recorded, processed, summarized and reported within the time periods specified in the SEC's rules and forms; and (ii) accumulated and communicated to the company's management as appropriate to allow timely decisions regarding required disclosures. See Exchange Act Rules 13a-15(e) and 15d-15(e).

PCAOB's Proposal To Expand the Scope of Audits and the Role of Auditors

In June 2023, the Public Company Accounting Oversight Board (PCAOB) proposed sweeping amendments to its auditing standards.[29] If adopted, the amended standards would significantly expand the scope of audits and the role of auditors. The proposed amendments would, among other things, require auditors to:

- Identify laws and regulations with which noncompliance could reasonably have a material effect on the company's financial statements.
- Assess and respond to risks of material misstatements arising from noncompliance with laws and regulations.
- Identify whether there is information indicating noncompliance has, or may have, occurred.
- If auditors become aware of information indicating that noncompliance with laws and regulations has or may have occurred, evaluate and communicate those matters to the company's senior management and audit committee.

The proposal has proven controversial, as the PCAOB received nearly 140 comments on the amendments, with a number of accounting firms, public companies, professional membership associations and other key stakeholders raising concerns. In addition, in a rare occurrence, PCAOB board members Christina Ho and Duane DesParte — the only two certified public accountants on the board — issued public dissents when the PCAOB issued the proposal.

Common areas of concern raised in the comment letters included the following:

- Expanding the role of auditors in this manner would require auditors to undertake analyses and make judgments requiring expertise outside their core competencies.
- The proposal would substantially increase audit costs without any basis to evaluate whether the changes would provide commensurate benefits.
- Requests from auditors mandated by the proposed rules could compromise the attorney-client privilege.

Any final rule changes based on the proposal will require approval by the PCAOB, which has not stated publicly the status of the proposal or the timing of any further action. Whether or when the PCAOB might proceed with any final rule amendments remains unclear. Based on the strong negative feedback included in the comment letters, however, we anticipate that the PCAOB will proceed slowly and cautiously with the proposal.

[29] See our September 14, 2023, client alert "Comments Raise Concerns About PCAOB's Proposal To Expand the Scope of Audits and the Role of Auditors."

Furthermore, some comment letters contended that the PCAOB may lack statutory authority to expand auditors' responsibilities to include evaluating potential noncompliance with laws and regulations. Accordingly, if adopted as proposed, the new standards could face legal challenges, which, at a minimum, could delay implementation.

Given the potential significant impacts of the proposed changes, including the potential for substantial additional audit costs and internal controls and procedures, companies and their audit committees should track developments of the PCAOB's proposal.

The European Union's and California's New Climate Disclosure Requirements

Both the European Union and California have recently adopted respective climate-related disclosure rules at a time when the SEC is considering adopting rules that would mandate extensive and prescriptive climate-related disclosures in public companies' annual reports and registration statements. Companies should confirm the applicability of these rules and, if applicable, prepare to provide the requisite disclosures. Highlights of each rule are summarized below.

EU ESG Disclosure Rules

In late 2022, the European Union adopted the Corporate Sustainability Reporting Directive (CSRD) and, in July 2023, released the European Sustainability Reporting Standards (ESRS) implementing the CSRD, which will require comprehensive, detailed disclosures covering a broad spectrum of sustainability topics.

The ESRS consists of two general standards ("General Requirements" and "General Disclosures") and 10 "topical standards" — environmental, social and governance (ESG) matters where the company's impact must be assessed and, if material, disclosed. These range from climate change to pollution, water and marine resources, biodiversity, workers in the value chain, and consumers and end users.

Whether a company is obliged to report its impact under the 10 topical standards depends on whether the issue or standard is "material" for its business model and activity. In assessing "double materiality," a company must consider both (i) value creation for the company; and (ii) the wider impact the company has on the economy, environment, nature and communities. If, following a thorough assessment, a company determines information to be material, disclosure is mandatory. In addition, the CSRD requires third-party audits for all reported sustainability information.

Notably, the EU plans to allow disclosures made under similar rules in other jurisdictions to satisfy the EU requirements, which could reduce the risk of conflicting demands for multinational companies.

Initially, for financial year 2024, the CSRD will apply only to certain large EU-incorporated companies. However, starting in financial year 2025, large EU companies, including large subsidiaries of non-EU companies (defined by minimum EU revenues and asset thresholds), will need to commence reporting. The CSRD's scope will expand further for financial years starting on or after January 1, 2028, when non-EU companies, if they have a significant presence in the EU (again defined by minimum EU revenues and asset thresholds), must report. Companies are encouraged to begin preparation early.[30]

California's Climate-Related Disclosures

In October 2023, Gov. Gavin Newsom signed into California law sweeping climate disclosure rules that could impact certain FPIs, including Assembly Bill 1305, Voluntary Carbon Market Disclosures (AB 1305).[31] Notably, these rules will apply to many companies headquartered outside of California.

AB 1305 will require covered business entities to disclose on their company websites specified information related to, among other things, carbon offsets and net zero emissions claims. AB 1305 has broad applicability and covers business entities that (i) market or sell voluntary carbon offsets within California; or (ii) make claims within California regarding the achievement of net zero emissions, carbon neutrality, or significant reductions to the company's carbon dioxide or greenhouse gas emissions, or that the entity or a product does not add net carbon dioxide or greenhouse gases to the climate.

Initially, the legislation was anticipated to require companies to provide website disclosures by January 1, 2024. While not binding on courts or governmental agencies, the bill's author recently clarified that his intent was for the rule to become effective on January 1, 2025. Given this uncertainty, we anticipate that companies will comply by the later date.

Recent Developments Arising From U.S. Sanctions

The SEC has continued its historical practice of issuing 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 U.S. Treasury Department's Office of Foreign Assets Control (OFAC), which administers and enforces most economic and trade sanctions on behalf of the U.S. government.

OFAC currently administers and enforces comprehensive sanctions with respect to Cuba, Iran, North Korea, Syria and certain regions of Ukraine (Crimea, the so-called Donetsk People's Republic and the so-called Luhansk People's Republic), as well as against specific individuals and entities, including certain governments (such as the government of Venezuela). Targeted sanctions are also in place against those carrying out certain activities (*e.g.*, terrorism; transnational organized crime; narcotics trafficking; corruption; threatening the peace, security or stability of South Sudan; and activities that violate human rights). In addition, OFAC maintains sanctions that target categories of activity in certain jurisdictions (*e.g.*, new investment in Russia), and types of dealings with specified targets (*e.g.*, sectoral sanctions with respect to Russia or transactions involving publicly traded securities of certain Chinese military companies).

In response to the Russian invasion of Ukraine in February 2022, the U.S. government has imposed significant new sanctions against Russia, including prohibitions on trade in certain goods and services between the United States and Russia; prohibition of 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.

Companies should ensure that they have robust policies, procedures and systems to ensure compliance with U.S. law and sanctions. If a company is validly conducting business in sanctioned countries or territories or with persons covered by existing sanctions, the company must consider whether disclosure of such activities (and the attendant risks) is mandated or appropriate. For example, pursuant to Section 13(r) of the Exchange Act, certain transactions or dealings with individuals or entities sanctioned under sanctions authorities with respect to Iran, terrorism and weapons of mass destruction are required to be reported in an issuer's Form 20-F.

Resource Extraction Disclosure (Form SD)

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 conditionally 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.

[30] See our client alerts "The Informed Board, Summer 2023 — The EU's New ESG Disclosure Rules Could Spark Securities Litigation in the US" and "Skadden's 2024 Insights — Non-EU Companies Face Challenges Preparing for Europe's Corporate Sustainability Reporting Directive."

[31] Gov. Newsom also signed into law the following, which could apply to certain U.S. subsidiaries of FPIs: (i) Senate Bill 253, Climate Corporate Data Accountability Act; and (ii) Senate Bill 261, Greenhouse Gases: Climate-Related Financial Risk. For additional information, see our September 26, 2023, client alert "California Poised To Adopt Sweeping Climate Disclosure Rules."

Submit Responsive Disclosures via Form SD

Disclosures are required to be submitted on Form SD via the SEC's EDGAR system. Exhibit 2.01 of the Form SD should contain all substantive disclosure. The disclosures will be deemed "furnished" and not "filed." Accordingly, they will not be subject to liability under Section 18 of the Exchange Act.

Submission Due Dates

The new rules are effective and the extended compliance period has run. A covered resource extraction issuer will be required to annually submit the required disclosure on Form SD no later than 270 days following the end of each fiscal year. A company with a December 31 fiscal year-end is required to submit disclosure for the fiscal year ending December 31, 2023, by September 30, 2024.

Recent Efforts To Expand Section 16 to FPIs

On July 27, 2023, the U.S. Senate passed its version of the National Defense Authorization Act for Fiscal Year 2024. The Senate version of the bill included a provision that would have subjected FPIs to Section 16 of the Exchange Act (Section 16). The version of the bill passed by the U.S. House of Representatives did not include this provision. In December 2023, the Senate and House reconciled their bills, and the final version of the bill dropped the requirement to subject FPIs to Section 16.

If the requirement had been adopted, FPIs would have become subject to Section 16. Section 16 applies to an issuer's directors, officers (as defined in the rule) and 10% beneficial owners (collectively, insiders). Each insider must file reports (*i.e.*, Forms 3, 4 and 5) that disclose all equity securities of the issuer, including any derivatives thereof, upon becoming an insider on a Form 3. Thereafter, any transactions or other changes in their beneficial ownership of issuer securities are reported on a Form 4 within two business days. Some transactions may be reported on a Form 5 within 45 days after the end of the issuer's fiscal year. Transactions that are typically reported on a Form 4 within two business days include equity grants, certain vestings of equity awards, option exercises, purchases and sales of securities (whether traded privately or in the open market), transactions in derivative securities, shares withheld to cover tax liability in connection with the vesting or settlement of awards, certain charitable donations and certain tax, trust and estate planning transfers. These reports are publicly available on the SEC's electronic EDGAR system.

Additionally, Section 16 provides that any purchases and sales made within a six-month period (unless otherwise exempt) are matchable, and if the sale price is greater than the purchase price, the resulting "short swing" profits are disgorgeable to the issuer. The issuer can request these profits be paid to the issuer.

Additionally, an active Section 16 plaintiffs bar representing issuer shareholders polices the Section 16 reports and other SEC filings, looking for potential short-swing profits. If a plaintiff notifies the issuer that short-swing profits occurred and the issuer recovers such profits, these attorneys may be entitled to an attorney fee out of the recovered amount. If the issuer does not take any action within 60 days after being notified, the shareholder can bring a claim in federal court on behalf of the issuer and its shareholders to recover such profits.

Further, Section 16 prohibits insiders from engaging in short sales (though certain hedging is permitted in accordance with the rules).

Although the recent attempt to expand Section 16 to include FPIs did not succeed, whether there will be other attempts to expand the law's coverage is not clear.

Nasdaq Changes to Waiver Requirements

Nasdaq amended its listing standards to permit waivers of the code of conduct for directors and executive officers to be approved by a committee of a company's board of directors rather than exclusively by the board. According to Nasdaq, this expansion of authority "would give listed companies flexibility to place the oversight of a company's code of conduct within the jurisdiction of a particular committee if that structure is more effective and appropriate, while following the obligations of ethical conduct required by Listing Rules 5610 and IM-5610." The approach is also consistent with Listing Rule 5630 (regarding approval of related-party transactions by the audit committee or another independent body of the board) and with the requirements of NYSE Rule 303A.10.

The amended rules require an FPI to disclose any waivers of its code of conduct for directors or executive officers on its website, in a Form 6-K or by distributing a press release, within four business days. Prior to the changes, FPIs were not subject to a specific deadline for disclosing such waivers; an FPI was permitted to make the disclosures "promptly" in a Form 6-K (if triggered by home country disclosure requirements) or in its next Form 20-F or 40-F.

Under amended Rule 5610, FPIs have the option of website, Form 6-K or press release disclosure. If a company chooses website disclosure, it must satisfy the requirements of Item 5.05(c), which requires that the information remain available on the website for at least a 12-month period. Following the 12-month period, the company must retain the information for a period of not less than five years.

Nasdaq-listed companies should review their codes of conduct for any responsive changes, including whether transferring oversight of waivers to a board committee would be beneficial.

Contacts

Filipe B. Areno
Partner / Sao Paulo
55.11.3708.1848
filipe.areno@skadden.com

Brian V. Breheny
Partner / Washington, D.C.
202.371.7180
brian.breheny@skadden.com

Lorenzo Corte
Partner / London
44.20.7519.7025
lorenzo.corte@skadden.com

Shu Du
Partner / Hong Kong
852.3740.4858
shu.du@skadden.com

Raquel Fox
Partner / Washington, D.C.
202.371.7050
raquel.fox@skadden.com

Alejandro Gonzalez Lazzeri
Partner / New York
212.735.3318
alejandro.gonzalez.lazzeri@skadden.com

Stephan Hutter
Partner / Frankfurt
49.69.74220.170
stephan.hutter@skadden.com

Denis Klimentchenko
Partner / London
44.20.7519.7289
denis.klimentchenko@skadden.com

Haiping Li
Partner / Shanghai
86.21.6193.8210
haiping.li@skadden.com

James A. McDonald
Partner / London
44.20.7519.7183
james.mcdonald@skadden.com

Simon Toms
Partner / London
44.20.7519.7085
simon.toms@skadden.com

J. Mathias von Bernuth
Partner / Sao Paulo
55.11.3708.1840
mathias.vonbernuth@skadden.com

Yuting Wu
Partner / Shanghai
86.21.6193.8225
yuting.wu@skadden.com

Yilin Xu
Partner, Registered Foreign Lawyer
(New York) / Hong Kong
86.10.6535.5586
yilin.xu@skadden.com

Andrew J. Brady
Of Counsel / Washington, D.C.
202.371.7513
andrew.brady@skadden.com

Caroline S. Kim
Counsel / Washington, D.C.
202.371.7555
caroline.kim@skadden.com

Maria Protopapa
Counsel / London
44.20.7519.7072
maria.protopapa@skadden.com

Alejandro Ascencio Lucio
European Counsel / London
44.20.7519.7296
alejandro.ascencio@skadden.com

Associates **Liam F. Holohan, Nicholas D. Lamparski, Jean Aziz, Georgian C. Dimopoulos, Jacob C. Travers** and **David Wang** contributed to this guide.