

# Preparing An Annual Report on Form 20-F – Guide for 2024

*December 19, 2023*

Form 20-F is the form used for an annual report of a foreign private issuer (“FPI”) filed with the U.S. Securities and Exchange Commission (the “SEC”). This alert memorandum summarizes considerations that will affect the preparation of the annual report on Form 20-F for the year ended December 31, 2023 (the “2023 20-F”) and certain other developments pertinent to FPIs.

Part I of this memorandum describes recent trends in the SEC’s treatment of FPIs. During 2023, there were substantial changes impacting Form 20-F and other FPI filings and obligations, and Part II of this memorandum reviews these changes. In Part III, we review upcoming changes and new rules proposed by the SEC, as well as related new laws and standards. Part IV addresses Form 20-F disclosure topics that are attracting particular attention in SEC public statements and recent comment letters, as well as other hot topics.

This memo generally assumes that a registrant has a calendar year-end. Non-calendar year-end filers should confirm their applicable compliance dates.

Please see additional details and references to sources in the endnotes.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

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## I. Evolution of the SEC's Treatment of FPIs

Traditionally, the SEC has treated FPIs with deference to the governance standards of their home countries and declined to impose certain governance and disclosure standards on them that are as stringent as those imposed on domestic issuers. For example, domestic issuers must provide quarterly internal control reporting while FPIs are only required to do so annually; domestic issuers must provide detailed executive compensation disclosure while FPIs are generally allowed to disclose executive compensation on an aggregate basis; domestic issuers are required to comply with specific quarterly and current reporting requirements, while FPIs are largely allowed to follow home-country reporting requirements; FPIs are exempt from the U.S. proxy rules, while domestic issuers are not; and domestic issuer insiders are subject to reporting requirements and short-swing profit liability under Section 16 of the Securities Exchange Act, while FPI company insiders have traditionally been exempted.

These accommodations reflect the philosophy that registrants should be subject to the corporate governance requirements of their home jurisdiction. Therefore, imposing an additional layer of disclosure and governance requirements was not thought to be necessary. Rather, it would be unduly burdensome. Additional requirements were also thought likely to discourage foreign issuers from accessing the U.S. capital markets and becoming subject to the U.S. securities disclosure and liability regime.

However, the current SEC has taken a different approach in certain areas and has proposed and/or implemented various changes that treat FPIs more akin to domestic issuers. The historical deference granted to FPIs was implicitly premised on maintaining both a U.S. and foreign listing, and the SEC's recent approach of demonstrating less deference to FPI home country governance appears to be motivated by the increase in sole U.S. listings and geopolitical considerations.<sup>1</sup> The SEC has also become much less receptive to comments arguing that proposed

amendments or changes would be difficult for FPIs to comply with or that such proposed amendments or changes would conflict with laws in FPIs' home countries. As an example, in the adopting release for the new compensation recovery rules, the SEC stated, "We believe that shareholders of FPIs listed in the United States should benefit from recovery of erroneously awarded compensation in the same manner as shareholders of domestic issuers ... Studies have shown that foreign companies present a similar risk of restatement as other companies."<sup>2</sup>

Amidst this backdrop of shifting SEC policy, the coming year brings a number of new disclosure requirements applicable to FPIs.

## II. Recent Changes to Form 20-F and the FPI Disclosure Regime

During 2023, substantial changes impacting the Form 20-F and other FPI reporting came into effect. These changes include: (A) cybersecurity disclosure, (B) compensation recovery ("clawback") policies and disclosure, (C) share repurchase disclosure modernization, (D) resource extraction payments disclosure, (E) changes to Nasdaq's rules on board diversity and waivers of corporate codes of conduct and (F) beneficial ownership reporting modernization.

### A. Cybersecurity

On July 26, 2023, the SEC formalized its longstanding focus on cybersecurity disclosure by adopting rules to enhance and standardize disclosure requirements related to cybersecurity incident reporting, along with cybersecurity risk management, strategy and governance.<sup>3</sup>

The final cybersecurity rules add disclosure requirements to both Form 20-F and Form 6-K. For December 31 fiscal year registrants, Form 20-F cybersecurity disclosures must be included for the first time in the 2023 20-F. Form 6-K cybersecurity disclosures are required starting on December 18, 2023.<sup>4</sup>

The final rules amend Form 6-K to add "cybersecurity incidents" as a reporting topic under General

Instruction B. The final rules also add Item 16K to Form 20-F and require annual disclosure regarding registrants' policies and procedures for identifying and managing cybersecurity risks and a description of registrants' cybersecurity governance. In particular, the rules require:

- **Risk Management and Strategy:** Registrants must describe their processes for managing material cybersecurity risks, including those relating to third parties. Registrants must also describe risks from current or previous cybersecurity threats that have materially affected them or are reasonably likely to do so.
- **Governance:** Registrants must describe the board's oversight of risk from cybersecurity threats, including any committee responsible for cybersecurity oversight. Registrants should also describe management's role in managing material risks from cybersecurity threats, including identifying responsible officers and providing relevant information on their expertise.<sup>5</sup>

All registrants must tag cybersecurity disclosures in both the Form 20-F and Form 6-K in Inline XBRL beginning one year after the initial compliance date.<sup>6</sup>

For more information on the final cybersecurity rules, see our alert memo, [available here](#). To receive assistance with preparing responsive disclosure, please contact your Cleary team.

Cybersecurity has long been a focus of the SEC, and registrants should not limit discussion of cybersecurity to Item 16K. Instead, they should also focus on cybersecurity disclosure in preparing various areas of the 20-F, including forward-looking statements, risk factors and MD&A, in addition to the disclosures required in new Item 16K.

## B. Compensation Recovery

On October 26, 2022, the SEC adopted amendments to Form 20-F implementing § 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 related to compensation recovery, or "clawback," disclosure.<sup>7</sup> The clawback rules apply only to NYSE and Nasdaq listed registrants, regardless of whether

they are domestic companies or FPIs.<sup>8</sup> Registrants were required to adopt a clawback policy by December 1, 2023,<sup>9</sup> and December 31 fiscal year registrants must include clawback disclosures for the first time in the 2023 20-F. Furthermore, NYSE listed registrants must confirm adoption of such a policy (or reliance on an exception) via Listing Manager by December 31, 2023.<sup>10</sup>

New clawback disclosure in the Form 20-F includes:

- **Two New Check Boxes (Cover Page):** Two new cover page check boxes require registrants to indicate (1) whether the financial statements included in the report correct any errors to previous statements; and (2) whether any corrections are restatements that required a recovery analysis of incentive-based compensation.
- **Disclosure of Action to Recover Erroneously Awarded Compensation (Item 6):** New Item 6.F requires registrants that were required to prepare an accounting restatement during the last fiscal year to disclose whether the restatement required recovery of previously awarded compensation pursuant to the registrant's compensation recovery policy. Certain other details relating to the restatement must also be disclosed.
- **Compensation Recovery Policy (Exhibits):** Registrants are required to submit their compensation recovery policy as an exhibit.

The clawback disclosures must be tagged using Inline XBRL. For more information on the compensation recovery rules, see our alert memo, [available here](#).

## C. Share Repurchases

In May 2023, the SEC adopted final rules requiring more detailed qualitative and quantitative disclosure regarding share repurchases (the "share repurchase rules").<sup>11</sup> These rules became effective in July 2023, and would have required disclosure in new Form F-SR (generally beginning 45 days after the end of 2Q24) and new Item 16E of Form 20-F (generally beginning in the 20-F for YE24).

However, in October of 2023, the Fifth Circuit Court of Appeals (the “Court”) held that the SEC violated the Administrative Procedure Act by acting arbitrarily and capriciously when it adopted the share repurchase rules.<sup>12</sup> As a result, in late November, the SEC announced it was postponing the effective date of the rules.<sup>13</sup> On December 19, 2023, the Court vacated the share repurchase rules.<sup>14</sup> The SEC could now appeal the decision to the Supreme Court or re-propose rules that attempt to fix the identified defects, if it wishes to pursue this disclosure requirement further.

The share repurchase rules had replaced the existing requirement under Item 16E to include a table disclosing monthly repurchase data in the Form 20-F. With the new rules vacated, registrants should continue to include this tabular disclosure in their Form 20-F, as they have done in the past.

#### **D. Resource Extraction Payments**

On December 16, 2020, the SEC adopted Rule 13(q)-1 requiring FPIs that engage in the commercial development of oil, natural gas or minerals (including exploration, extraction, processing and export of oil, natural gas or minerals or the acquisition of a license for any such activity) to provide annual disclosures of amounts paid to the U.S. Federal government or foreign governments for the purpose of such developments on Form SD.<sup>15</sup> This new disclosure requirement applies to oil, natural gas and mining companies, including state-owned entities. For purposes of this disclosure, “foreign governments” includes both any foreign subnational governments and companies that are majority owned by foreign national governments.

For the first time this year,<sup>16</sup> covered registrants are required to submit Form SD no later than 270 days following the end of the fiscal year.<sup>17</sup> As a result, a registrant with a December 31 fiscal year end will be required to submit disclosure for year end 2023 by September 30, 2024. No disclosure is required in the 2023 20-F as a result of the resource extraction payments rules.

Subject to certain conditions, there are exemptions available for conflicts with foreign laws, conflicts with pre-existing contracts, emerging growth companies, smaller reporting companies and a catchall exemption that registrants can seek on a case-by-case basis. All exemptions require a legal opinion to be filed on the Form SD to make use of them.

Registrants can meet their obligations by providing disclosure that complies with the requirements of certain approved alternative reporting regimes, including those in the EU, UK, Norway and Canada. If a registrant complies by submitting an alternative report, it may follow the alternative jurisdiction’s deadline as long as it submits a notice of intent to do so before the 270-day deadline and files within seven days of the alternative jurisdiction’s deadline.

Disclosure must be electronically tagged using XBRL (Inline XBRL is not required).<sup>18</sup>

For more information on the resource extraction payment final rules, see our alert memo, [available here](#).

#### **E. Nasdaq Rules**

This section discusses recent changes to the listing rules for companies listing on the Nasdaq Stock Exchange. Specifically, it discusses (1) the ongoing phase-in implementation of the Nasdaq board diversity rules and (2) changes to the Nasdaq rules on waivers of corporate codes of conduct.

##### **1. Nasdaq Board Diversity Rules**

On August 6, 2021, the SEC approved Nasdaq’s Board Diversity Rules (“Board Diversity Rules”), which Nasdaq instituted “to encourage a minimum board diversity objective” for companies and “provide stakeholders with consistent, comparable disclosures concerning a company’s current board composition.”<sup>19</sup>

The Board Diversity Rules require registrants listed on Nasdaq to publicly disclose board-level diversity statistics and either have, or explain why they do not have, a requisite number of diverse directors. Under the Board Diversity Rules, FPIs are required to have either: (i) two directors who are female or (ii) one

director who is female and one director who is an underrepresented individual<sup>20</sup> in the home country<sup>21</sup> jurisdiction. The Board Diversity Rules can be addressed directly in the 20-F or on the registrant's website, and the information must be provided using Nasdaq's prescribed matrix.<sup>22</sup>

Registrants typically use D&O questionnaires to obtain diversity information about members of their boards. Directors are not obligated to self-identify, and companies can indicate "N/A" for any director who chooses not to self-identify, but we expect registrants will want to highlight the diversity of their board members. Last year, Nasdaq required registrants to disclose diversity information about board members in a prescribed matrix.<sup>23</sup>

Below is a summary of the remaining transition period requirements for registrants listed on Nasdaq prior to August 6, 2021:<sup>24</sup>

- **20-F for year end 2023:** Have at least one diverse director or explain why not.<sup>25</sup>
- **20-F for year end 2025:** For registrants listed on the Nasdaq Global Select or Global Markets with at least six directors, have at least two diverse directors or explain why not.<sup>26</sup>
- **20-F for year end 2026:** For registrants listed on the Nasdaq Capital Market with at least six directors, have at least two diverse directors or explain why not.<sup>27</sup>

For helpful information specific to FPIs regarding the Board Diversity Rules, see Nasdaq's memo, [available here](#).

Although the NYSE does not currently have similar reporting requirements, some registrants have elected to voluntarily provide such information as a result of investor feedback.

## 2. Nasdaq Corporate Code of Conduct Waiver

Under Nasdaq Listing Rule 5610, "[e]ach Company shall adopt a code of conduct applicable to all directors, officers and employees, which shall be publicly available," and this code must "comply with the definition of a 'code of ethics' set out in Section

406(c) of the Sarbanes-Oxley Act."<sup>28</sup> This requirement applies to Nasdaq-listed FPIs.

Recently, Nasdaq amended its Listing Rules 5610 and IM-5610. Waivers of the code of conduct for directors or executive officers can now be approved by a board committee instead of only by the full board, and FPIs must disclose waivers within four business days of being granted, either by distributing a press release, including disclosure in a Form 6-K or posting on the registrant's website.

The new waiver requirements became operative on September 20, 2023.

NYSE-listed FPIs may continue to follow home country practice, but both NYSE and Nasdaq listed companies are still required to disclose whether they have adopted a code of ethics pursuant to Item 16B of Form 20-F.

## F. Beneficial Ownership Reporting Modernization

On October 10, 2023, the SEC adopted final rules modernizing beneficial ownership reporting requirements.<sup>29</sup>

The rules shorten the initial filing deadline for Schedule 13D from 10 to five business days and require that amendments be filed within two business days.<sup>30</sup>

The rules also accelerate the filing deadlines for Schedule 13G beneficial ownership reports.

- For qualified institutional investors and exempt investors filing on Schedule 13G, the initial filing deadline has been shortened 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 Schedule 13G passive investors, the initial filing deadline has been shortened from 10 days to five business days.
- All Schedule 13G filers will generally be required to file amendments 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.<sup>31</sup>

The SEC also clarified disclosure requirements with respect to derivative securities have also been clarified. Item 6 of Schedule 13D now makes it clear that a person is required to disclose interests in all derivative securities (including cash settled derivative securities) that use the issuer's equity security as a reference security.

The rules have extended the filing cut-off time for Schedules 13D and G from 5:30pm ET to 10pm ET.

The amendments will become effective on February 5, 2024, although compliance with the new Schedule 13G filing deadlines is not required until September 30, 2024.

Starting on December 18, 2024, registrants will also be required to make Schedule 13D and 13G filings using a structured, machine-readable data language (Inline XBRL is not required).

### III. Future and Proposed Changes

The following section summarizes adopted and proposed SEC rules that will or may directly impact 20-F reporting in future years, as well as other related changes in law. These upcoming changes and proposed rules relate to disclosure regarding (A) insider trading and (B) climate change.<sup>32</sup>

#### A. Insider Trading Arrangements

On December 14, 2022, the SEC adopted amendments to Exchange Act Rule 10b5-1 and related disclosure requirements.<sup>33</sup> Rule 10b5-1 provides affirmative defenses to trading on the basis of material nonpublic information in insider trading cases through the use of 10b5-1 plans. These plans are passive trading plans that allow companies and company insiders to transact in company securities so long as the plans were adopted in good faith before the insider became aware of material nonpublic information. The amendments "add new conditions to this rule that are designed to address concerns about abuse of the rule to trade securities opportunistically."

For December 31 fiscal year registrants, the disclosures will generally be required for the first time in the 20-F for 2024.<sup>34</sup> However, the related cooling-off period (described below) is already in effect. The amendments include:

- **Disclosure Regarding Insider Trading Policy (Item 16J)**: Pursuant to new Item 16J, registrants will be required to disclose whether they have adopted policies and procedures governing the purchase, sale and other dispositions of their securities by directors, officers, employees or the registrant itself that are reasonably designed to promote compliance with insider trading laws, rules, regulations and any listing standards applicable to the registrant. If a registrant has not adopted such insider trading policies and procedures, it must explain why it has not done so. This information will need to be reported in Inline XBRL.
- **Insider Trading Policy (Exhibits)**: The amendments will require the registrant to file a copy of its insider trading policies and procedures as an exhibit (the requirement is satisfied if such policies are already in the ethics policy filed pursuant to Item 16B). This information will need to be tagged using Inline XBRL.
- **Cooling Off Period**: For plans entered into or changed on or after February 27, 2023, the amendments impose a cooling-off period on 10b5-1 plan trades for directors and officers that lasts until the later of (1) 90 days after the adoption of the contract, instruction or plan or (2) two days after disclosure of financial results on Form 20-F or Form 6-K, but, in any event, the cooling off period shall not be longer than 120 days.<sup>35</sup> For all persons other than issuers, directors and officers, the cooling-off period is 30 days.<sup>36</sup>
- **Sarbanes-Oxley Section 302 (Certifications)**: The disclosures required above will be subject to the certifications required by Section 302 of the Sarbanes-Oxley Act of 2002.

For more information on the insider trading rule changes, see our alert memo, [available here](#).

## B. Climate Change

This section summarizes current trends in climate disclosure. It discusses (1) the proposed SEC rules on climate disclosure and recent developments regarding those proposed rules and (2) climate-related disclosure mandated by the European Union, new climate standards released by the International Financial Reporting Standards Foundation and a climate-disclosure proposal that became law in California.

### 1. The SEC

Over the last several years, the SEC has placed an increased focus on ESG and climate-related disclosure. An analysis of SEC domestic issuer annual report comment letters from 2022 to 2023 showed that the number of ESG-related comments increased by approximately 66%.<sup>37</sup>

On March 21, 2022, the SEC proposed rule amendments that would require registrants to include certain climate-related information in their Form 20-F.<sup>38</sup> The final release for the Climate-Related Disclosure rules was expected to be issued in October of 2023 after several delays, with Scope 3 emissions disclosures in particular having remained a hot-button topic.<sup>39</sup> However, despite political pressure from Democratic politicians to implement a strong final rule,<sup>40</sup> the rules have yet to be adopted.

On November 7, Commissioner Mark Uyeda said that, given the amount of comments received, the SEC should consider re-proposing the rule with updated text and economic analysis.<sup>41</sup> It is unclear if this will occur, and the content of the final rules remains unseen. On December 6, 2023, the SEC released its Reg-Flex Agenda for the fall of 2023, which indicated the final rules are now targeted for finalization by April 2024.<sup>42</sup> For further information on the proposed climate rules, see our alert memos, [available here](#).

Registrants should also generally continue to consider the Division of Corporation Finance's 2021 Sample

Letter to Companies Regarding Climate Change Disclosures, [available here](#).

### 2. Other Regulators

Even with the SEC's delay in adopting rules, climate continues to be an important focus of global and U.S. state regulation.

- **European Union:** On January 5, 2023, the European Parliament's Corporate Sustainability Reporting Directive ("CSRD") came into effect. The CSRD requires extensive sustainability and climate-related disclosure from various types of entities, including businesses whose securities trade on a regulated EU market and multinational companies with EU branches/subsidiaries that have over EUR 40 million in turnover.<sup>43</sup>
- **International Financial Reporting Standards:** On June 26, 2023, the International Financial Reporting Standards Foundation released a pair of standards dealing with sustainability and climate.<sup>44</sup> IFRS S1, [available here](#), requires entities to disclose information about sustainability-related risks and opportunities, while IFRS S2, [available here](#), requires entities to disclose information about climate-related risks and opportunities. Certain countries, including Brazil,<sup>45</sup> have begun to incorporate the IFRS standards into their own regulatory regimes.
- **California:** On October 7, 2023, the governor of California signed the Voluntary Carbon Market Disclosures Act ("VCMDA") into law.<sup>46</sup> The VCMDA becomes effective on January 1, 2024, and applies to entities that operate within California, regardless of where they are incorporated, thereby including FPIs with California operations.<sup>47</sup> The VCMDA requires annual *website* disclosures about:
  - **Claims about Emission Reduction:** Entities that make claims within California regarding net-zero emissions, carbon neutrality (or similar) and significant reductions in carbon or greenhouse gas emissions must disclose how the claim was determined to be accurate or

accurately accomplished, how interim progress towards the goal is measured and whether the data and claims were subject to third-party verification.

- **Claims and Use of Voluntary Carbon**

**Offsets:** Entities that purchase or use voluntary carbon offsets within California and make the claims set forth above must disclose detailed information relating to the offsets, the protocol used to estimate emissions reductions or removal benefits and whether the data and claims were subject to third-party verification.

- **Sale or Marketing of Voluntary Carbon**

**Offsets:** Entities that market or sell voluntary carbon offsets in California must disclose detailed information relating to the offsets and the underlying projects.

#### IV. Disclosure Trends and Other Considerations

The following is a list of issues that have drawn the attention of the SEC or are likely to do so and that should be considered in the preparation of the 2023 20-F. These issues include: (A) cryptocurrency, (B) armed conflicts, (C) economic conditions, (D) sanctions, (E) China-related disclosures, (F) artificial intelligence and (G) other regulatory updates.

##### A. Cryptocurrency

On December 8, 2022, the SEC's Division of Corporation Finance published a sample comment letter for companies on disclosure about material impacts of crypto asset market developments. The letter, [available here](#), contains examples of crypto-related comments that companies can use to help structure their disclosures. The sample comments, which are non-exhaustive, include comments about:

- Disclosing crypto asset market developments material to the registrant's business;
- The impact of bankruptcies on registrant's crypto business;
- Any steps taken to safeguard customer crypto assets and prevent conflicts of interest, if material;

- Whether crypto assets are being used in financing arrangements, if material; and
- Disclosing material risks to the registrant's business based use of crypto, exposure to crypto, crypto market conditions or regulation of crypto.

Registrants should focus on cryptocurrency disclosure in risk factors, particularly as such risks may relate to retail investors or compliance programs.

##### B. Armed Conflicts

This section discusses what registrants should consider when making disclosures dealing with ongoing armed conflicts. Specifically, this section covers: (1) the Middle East and (2) Russia-Ukraine.

###### 1. The Middle East

Since October 7, 2023, Israel and Hamas have been engaged in an armed conflict. This conflict has the potential to spill over into neighboring countries and destabilize the region on a wider scale.

Registrants that may have disclosure obligations related to the conflict in the Middle East should consider the following topics for inclusion in their required disclosures, which are based on SEC guidance for the Russia-Ukraine conflict:

- Direct or indirect exposure to the areas of conflict via operations, employee base, investments or securities;
- Direct or indirect reliance on goods or services sourced in the areas of conflict;
- Actual or potential disruptions in the company's supply chain; and
- Business relationships, connections to or assets in the areas of conflict or in neighboring countries.

The financial statements may also need to reflect and disclose the impairment of assets, changes in inventory valuation, deferred tax asset valuation allowance, disposal or exiting of a business, de-consolidation, changes in exchange rates and changes in contracts with customers or the ability to collect contract considerations.



Registrants should consider how the above topics affect management's evaluation of controls and procedures and the role of the board of directors in risk oversight.

Registrants without direct exposure may want to consider revising risk factors and forward-looking statements regarding geopolitics, armed conflicts and similar topics.

## 2. Russia-Ukraine

On May 3, 2022, the SEC's Division of Corporation Finance published a sample letter to companies regarding disclosures pertaining to Russia's invasion of Ukraine and related supply chain issues. The SEC's sample letter is [available here](#).

For analysis of the SEC letter and further information on what to consider when making Russia-Ukraine disclosure, please see our 2023 20-F Guide, available [here](#).

### C. Economic and Market Conditions

Although inflation cooled in the latter part of 2023, it remains high and an area of focus for SEC comment. SEC comments issued this year include (i) flagging generic references to the fact that inflation could impact the registrant and asking registrants to clarify whether recent inflationary pressures have in fact materially impacted them, (ii) requesting updates to disclosure to identify the principal factors contributing to any inflationary pressures experienced and to clarify the resulting impacts and (iii) requesting identification of actions planned or taken to mitigate inflationary pressures. Another recent SEC comment noted that a registrant referenced inflationary pressures impacting its results on its earnings call without including corresponding disclosure in its periodic reports.

Registrants should review all references to the impacts of inflation in their periodic reports and, in particular, should ensure it is appropriately addressed in the MD&A. In addition, registrants should review risk factor references to inflation for any required updates, remembering that the SEC expressly discourages generic risk factors and that any material impact of

inflation should not be discussed as a hypothetical if it has already impacted the registrant.

After a sustained period of low interest rates, interest rates rose drastically in 2022 and continued to rise in 2023 as the Federal Reserve and other global regulators sought to combat inflation. Higher interest rates can have multiple impacts on registrants, including on interest expense, investment strategy, liquidity, cost of funding and access to the capital markets, as well as on assumptions and estimates underlying certain financial statement line items. Registrants should carefully review their 2023 20-F for areas that should be updated to reflect the ongoing high interest rate environment and associated risks, including their quantitative and qualitative disclosure about market risk, financial statements, risk factors and MD&A.

### D. Iran Sanctions

While not directly noted in the Form 20-F, Exchange Act Section 13(r) imposes an obligation on registrants to report information regarding dealings with Iran and other sanctioned entities in their Form 20-F, including: (A) the nature and extent of the activity, (B) the gross revenues and net profits, if any, attributable to the activity and (C) whether the registrant or an affiliate of the registrant intends to continue the activity.<sup>48</sup>

While this is not a new requirement, registrants should be sure that they are aware of it and have appropriate screening in place, particularly given the proliferation of sanctioned entities in recent years.

### E. China-related Disclosures

On July 17, 2023, the Division of Corporation Finance at the SEC published a sample comment letter, [available here](#), about disclosure obligations of companies based in or with a majority of their operations in China. The letter lays out three priority areas of disclosure related to China: (1) obligations that companies have under the Holding Foreign Companies Accountable Act ("HFCAA"), (2) more specific and prominent disclosure about material risks related to the role of the government of China in the operations of China-based companies and

(3) disclosures required under certain statutes, such as the Uyghur Forced Labor Prevention Act, which became law in 2021.

Please see our 20-F Guide Memo from last year, available [here](#), for further discussion of the HFCAA and Item 16I on Form 20-F.

## F. Artificial Intelligence

Use of artificial intelligence and machine learning continued to rapidly evolve in 2023. Even if artificial intelligence and machine learning are not a significant aspect of a registrant's business, their assets or operations may still be impacted in a way that may expose the business to some material risk. Registrants will want to review their 2023 20-F and consider appropriate adjustments to reflect the ongoing development and deployment of artificial intelligence and machine learning. For many registrants, this is likely to involve fairly surgical updates to existing risk factors, possibly including those addressing competition, regulation, intellectual property, data privacy and cybersecurity matters. For some registrants, broader updates may be appropriate, including a discussion under regulatory matters generally, addressing these matters in their MD&A and adding a standalone risk factor. As with other developing disclosure areas, registrants should review

peers' disclosure in this area and make sure that they are generally in line with their industry.

## G. Other Regulatory Updates

Two other sets of rules adopted by the SEC during 2023 that may be of interest to FPIs are (1) rules shortening the settlement cycle and (2) amendments to Regulation M.

- On February 15, 2023, the SEC adopted final rules shortening the standard settlement cycle for most broker-dealer transactions from T+2 (two business days after the trade date) to T+1 (one business day after the trade date). The compliance date for the new rule is May 28, 2024.<sup>49</sup>
- On June 7, 2023, the SEC adopted final rules removing references to credit ratings from Rules 101 and 102 of Regulation M for investment grade securities and replacing them with alternate standards of creditworthiness. The rules became effective on August 21, 2023.<sup>50</sup>

As a final reminder, the remaining LIBOR tenors ceased publication after June 30, 2023. Registrants should review and update any disclosure related to LIBOR transition to reflect this.

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<sup>1</sup> For discussion of geopolitical considerations, see Robert J. Jackson Jr., Bradford Lynch and Daniel Taylor,  *Holding Foreign Insiders Accountable*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 1, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4168215](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4168215).

<sup>2</sup> Listing Standards for Recovery of Erroneously Awarded Compensation, Release Nos. 33-11126; 34-96159; IC-34732 (October 26, 2022) at 18-19, available at <https://www.sec.gov/rules/final/2022/33-11126.pdf>.

<sup>3</sup> Cybersecurity Risk Management, Strategy, Governance and Incident Disclosure, Release Nos. 33-11216; 34-97989 (July 26, 2023), available at <https://www.sec.gov/files/rules/final/2023/33-11216.pdf>.

<sup>4</sup> All registrants must provide the disclosures required under Item 16K of Form 20-F beginning with annual reports for fiscal years ending on or after December 15, 2023. *Id.* at 107.

<sup>5</sup> While the SEC declined to require that registrants disclose the cybersecurity expertise of board members (as originally proposed), many registrants already address this in filings given ongoing investor and SEC focus. We expect many registrants will include information relating to board cyber expertise as part of their description of board oversight, notwithstanding that it is not a line item requirement. Registrants should continue to include, or consider adding, questions around cybersecurity expertise in their D&O questionnaires in order to elicit potentially relevant information for inclusion.

<sup>6</sup> Tagging for Item 16-K on Form 20-F will begin with annual reports for fiscal years ending on or after December 15, 2024, and tagging on Form 6-K will begin on December 18, 2024. *Id.* at 107.

<sup>7</sup> Listing Standards for Recovery of Erroneously Awarded Compensation, Release Nos. 33-11126; 34-96159; IC-

34732 (October 26, 2022), available at <https://www.sec.gov/rules/final/2022/33-11126.pdf>.

<sup>8</sup> *Id.* at 130. Only limited exemptions from the clawback disclosures exist. *See id.* at 22-23, 25.

<sup>9</sup> The New York Stock Exchange (“NYSE”) and Nasdaq Stock Market (“Nasdaq”) final proposed listing standards were approved with effective dates of October 2, 2022. The SEC required registrants to adopt a recovery policy no later than 60 days following the effective date of the applicable listing standards, so registrants were required to implement such a policy by December 1, 2023. *See* Listing Standards for Recovery of Erroneously Awarded Compensation at 121.

<sup>10</sup> The NYSE announcement of this policy is [available here](#).

<sup>11</sup> Share Repurchase Disclosure Modernization, Release Nos. 34-97424; IC-34906 (May 3, 2023), available at <https://www.sec.gov/files/rules/final/2023/34-97424.pdf>.

<sup>12</sup> *Chamber of Com. of United States v. United States Sec. & Exch. Comm’n*, 85 F.4th 760 (5th Cir. 2023).

<sup>13</sup> Press Release, Announcement Regarding Share Repurchase Disclosure Modernization Rule, U.S. Sec. & Exch. Comm’n (Nov. 23, 2023), <https://www.sec.gov/corpfin/announcement/announcement-repurchase-disclosure-modernization-112223>.

<sup>14</sup> *Chamber of Com. of United States v. United States Sec. & Exch. Comm’n*, No. 23-60255, Dkt. # 150-1 (5th Cir. 2023).

<sup>15</sup> Disclosure of Payments by Resource Extraction Issuers, Release No. 34-90679 (December 16, 2020), available at <https://www.sec.gov/rules/final/2020/34-90679.pdf>.

<sup>16</sup> The effective date of the rule was March 16, 2021, and it was followed by a two-year transition period.

<sup>17</sup> Newly public companies are able to delay compliance with Section 13(q) until the first fiscal year following the fiscal year in which the acquisition or IPO occurred. *See id.* at 82-85. This transitional relief is also available for recently-acquired companies, but only if they were not previously subject to Section 13(q) or an alternative reporting regime that satisfies the 13(q) transparency objectives. *Id.* at 80-82.

<sup>18</sup> *Id.* at 138.

<sup>19</sup> Nasdaq Stock Market LLC Rules, Rule 5605(f) Diverse Board Representation, available at <https://www.sec.gov/rules/sro/nasdaq/2020/34-90574-ex5.pdf>.

<sup>20</sup> An underrepresented individual in the home country jurisdiction is defined as “a person who self-identifies as an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious, or linguistic identity in the country of the Foreign Issuer’s principal executive offices.” Nasdaq Stock Market LLC Rules, Rule 5605(f) Diverse Board Representation at 263.

<sup>21</sup> “Home country” refers to the jurisdiction in which the company is legally organized, incorporated or established

and, if different, the jurisdiction where it has its principal listing. General Instruction F of Form 20-F.

<sup>22</sup> The Nasdaq Board Diversity Matrix is [available here](#).

<sup>23</sup> This requirement became effective on August 8, 2022.

<sup>24</sup> Nasdaq Board Diversity Rule (last updated February 18, 2022), available at

<https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf>. For companies listed on or after August 6, 2021, transition periods are available at

<https://listingcenter.nasdaq.com/assets/New%20Companies%20Listing%20on%20Nasdaq.pdf>.

<sup>25</sup> This requirement became effective on August 7, 2023.

<sup>26</sup> This requirement becomes effective on August 6, 2025.

<sup>27</sup> This requirement becomes effective on August 6, 2026.

<sup>28</sup> Self Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Requirements Relating to the Waiver of The Code of Conduct in Listing Rule 5610 and IM-5610, Release No. 34-98285 (September 5, 2023), available at

<https://www.sec.gov/files/rules/sro/nasdaq/2023/34-98285.pdf>.

<sup>29</sup> Modernization of Beneficial Ownership Reporting, Release Nos. 33-11253; 34-98704 (Oct. 10, 2023), available at <https://www.sec.gov/files/rules/final/2023/33-11253.pdf>.

<sup>30</sup> Press Release, SEC Adopts Amendments to Rules Governing Beneficial Ownership Reporting, U.S. Sec. & Exch. Comm’n (Oct. 10, 2023), <https://www.sec.gov/news/press-release/2023-219>.

<sup>31</sup> The amendment obligations for qualified institutional investors and passive investors when their beneficial ownership exceeds 10% or increases or decreases by 5 percent has also been accelerated. *Id.*

<sup>32</sup> Section 6081 of the Senate version of the 2024 National Defense Authorization Act had proposed subjecting FPIs to the Section 16 short-swing profits regime. However, the proposal did not make it through conference and is dead for the foreseeable future. *See* Alan Dyle, *Proposal to Rescind Section 16 Exemption for Foreign Private Issuers Dies in Conference*, SECTION16.NET (Dec. 10, 2023), [available here](#).

<sup>33</sup> Insider Trading Arrangements and Related Disclosures, Release Nos. 33-11138; 34-96492 (December 14, 2022), available at <https://www.sec.gov/rules/final/2022/33-11138.pdf>.

<sup>34</sup> The amendments apply to the first filing that covers the first full fiscal period that begins after April 1, 2023. *Id.* at 107. Because these requirements do not apply to Form 6-K, the first filing subject to them for December 31 fiscal year registrants is the 20-F for the fiscal year ended December 31, 2024. *Id.* at 115. The amendments also defer the date of compliance by six months for smaller reporting companies. *Id.* at 107.

<sup>35</sup> 17 CFR § 240.10b5-1(c)(1)(ii)(B)(1).

<sup>36</sup> No required cooling off period was adopted for company 10b5-1 buyback plans, although the SEC noted it may revisit the issue in the future.

<sup>37</sup> *Compliance Matters: SEC's increasing focus on ESG-related disclosures*, INTELLIGIZE, [available here](#).

<sup>38</sup> The Enhancement and Standardization of Climate-Related Disclosures for Investors, Release Nos. 33-11042; 34-94478 (March 21, 2022), available at <https://www.sec.gov/files/rules/proposed/2022/33-11042.pdf>.

<sup>39</sup> Soyoung Ho, *SEC Delays Climate Change Disclosure Rulemaking*, THOMSON REUTERS (Jun. 15, 2023), <https://tax.thomsonreuters.com/news/sec-delays-climate-change-disclosure-rulemaking/>.

<sup>40</sup> A letter from Democratic politicians to Gary Gensler is [available here](#).

<sup>41</sup> Tom Zanki, *Commissioner Says SEC Should Consider New Climate Rules*, Law360 (Nov. 7, 2023), <https://www.law360.com/articles/1764521/commissioner-says-sec-should-consider-new-climate-rules>.

<sup>42</sup> The Reg-Flex Agenda is [available here](#) and the climate change rule page is [available here](#).

<sup>43</sup> The CRSD is [available here](#).

<sup>44</sup> *ISSB issues inaugural global sustainability disclosure standards*, IFRS (Jun. 26, 2023), <https://www.ifrs.org/news-and-events/news/2023/06/issb-issues-ifrs-s1-ifrs-s2/>.

<sup>45</sup> *Brazil adopts ISSB global baseline, as IFRS Foundation Trustees meet in Latin America*, IFRS (Oct. 20, 2023), <https://www.ifrs.org/news-and-events/news/2023/10/brazil-adopts-issb-global-baseline/>.

<sup>46</sup> The VCMDA is [available here](#).

<sup>47</sup> California recently passed two additional climate-disclosure related laws, the Climate Corporate Data Accountability Act, [available here](#), and the Climate-Related Financial Risk Act, [available here](#). These laws do not regulate non-U.S. entities, but they might apply to U.S. subsidiaries of FPIs.

<sup>48</sup> 15 U.S.C. § 78m.

<sup>49</sup> *Shortening the Securities Transaction Settlement Cycle*, Release Nos. 34-96930; IA-6239 (February 15, 2023), available at <https://www.sec.gov/files/rules/final/2023/34-96930.pdf>.

<sup>50</sup> *Removal of References to Credit Ratings from Regulation M*, Release Nos. 34-97657; S7-11-22 (June 7, 2023), available at <https://www.sec.gov/files/rules/final/2023/34-97657.pdf>.