Form 20-F for Fiscal Year 2024: What Foreign Private Issuers Should Keep in Mind

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There have been a number of notable recent developments in U.S. Securities and Exchange Commission (SEC) regulation of foreign private issuers (FPIs), including disclosure trends and rule changes that impact the annual report on Form 20-F for fiscal year 2024.

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 2024

Disclosure Trends and Areas of SEC Focus

Updated SEC Filing Requirements

Other Matters of Interest

Disclosure Trends and Areas of SEC Focus

Cybersecurity Disclosures

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.[1]

Current and Annual Reporting Obligations

Specifically, the rules amended 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, "Item 16K — Cybersecurity" to Form 20-F currently requires the following cybersecurity-related disclosures in annual reports on Form 20-F:

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.

Staff Comments on Cybersecurity Risk Management and Governance Disclosures

To date, the SEC staff has issued comments on the cybersecurity disclosures referred to above (or the analogous requirements applicable to non-foreign private issuers) related to the following:

Omitting Item 16K disclosure. Where companies did not include the Item 16K disclosures in their annual report, the SEC staff issued comments reminding companies of the requirement to do so.

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

Enhancing disclosure of management expertise. For the Item 16K(c)(2)(i) disclosure of the management position(s) responsible for cybersecurity risk management, the SEC staff has requested additional detail on the expertise of such person(s). Such detail may include the number of years spent in prior roles for each person disclosed as responsible for managing cybersecurity risk.

Clarifying the role of third parties. Pursuant to Item 16K(b)(1)(ii), companies need to disclose whether they engage assessors, consultants or auditors in the company's management of cybersecurity risk. If third parties are engaged for this purpose, companies should describe the third party's role in assisting the company in identifying and managing cybersecurity risks.

Disclosing how cybersecurity risk management fits into a company's overall risk management framework. Item 16K(b)(1)(i) requires companies to specifically disclose whether and how the company's processes, if any, for assessing, identifying and managing material risks from cybersecurity threats are integrated into the registrant's overall risk management system. Companies should address this requirement with specificity, rather than, for example, describing how cybersecurity risk management fits into the company's business strategy more broadly, which the SEC staff may view as insufficient disclosure.

Clearly stating management and board areas of responsibility. Pursuant to Item 16K(b)(1), companies should explain the management's and the board's areas of cybersecurity risk management and oversight, and provide sufficient detail for a reasonable investor to understand each group's respective processes for managing and overseeing cybersecurity risk.

Recent Cybersecurity Enforcement Actions

On October 22, 2024, the SEC announced enforcement actions against several technology companies for making materially misleading disclosures regarding cybersecurity risks and intrusions. One company was also charged with disclosure controls violations. These charges are the result of the SEC's investigation of public companies potentially impacted by the SolarWinds' vulnerability. The enforcement penalties range from $990,000 to $4 million.

The alleged misleading disclosures fall into one of two categories: (i) The disclosures mentioned a cybersecurity incident but omitted material information; or (ii) the disclosures remained largely the same after the cybersecurity incident and did not reflect new and realized cybersecurity risks.

The enforcement actions reinforce that companies should:

- Carefully consider updating disclosures in the wake of cybersecurity incidents, particularly when a company's risk profile changes as a result of an incident.
- Maintain policies and procedures to facilitate prompt escalation of cybersecurity incidents to disclosure decision-makers.
- Understand the SEC's view of materiality and avoid minimizing cybersecurity incidents in disclosures.

Notably, two Republican SEC commissioners issued a strong dissenting statement to these actions. As described below, we anticipate that a new SEC administration will take a different approach to cyber-related enforcement actions.

Takeaways: Companies should revisit existing disclosure controls and procedures (DCP)[2] for SEC filings and assess whether current controls are sufficient to make timely materiality determinations and to capture and report cybersecurity-related information accurately and comprehensively.

SEC Staff Comment Letter Trends

The Disclosure Review Program in the SEC's Division of Corporation Finance has remained active over the past year. During the 12-month period ended June 30, 2024, the volume of SEC staff comment letters and the number of companies receiving comments were consistent with the prior year, but remained elevated compared to historical levels.[3]

Comment Trends

Non-GAAP and non-IFRS financial measures and management's discussion and analysis of nancial condition and results of operations (MD&A)[4] remained the most frequent areas generating SEC staff comments, and these topics are still the two most significant sources of staff comments by a wide margin. Segment reporting and revenue recognition ranked third and fourth, respectively, once again in the top four most frequent sources for comment. Goodwill and intangible assets replaced climate-related disclosures as the fifth most frequent topic generating SEC staff comment, with climate-related disclosures dropping out of the staff's top areas of comment, while business combinations became a frequent source of comment, ranking sixth overall.

[2] 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 Securities Exchange Act of 1934, as amended, Rules 13a-15(e) and 15d-15(e).

[3] See Ernst & Young's SEC Reporting Update "Highlights of Trends in 2024 SEC Staff Comment Letters" (Sept. 12, 2024)

[4] Item 5 of Form 20-F requires a discussion of the registrant's "Operating and Financial Review and Prospects," which is substantially similar to the MD&A requirements applicable to non-foreign private issuers. For ease of reference, we refer to the narrative disclosures required by Item 5 as "MD&A."

Recent Areas of Focus

Below is a summary of the SEC staff's noteworthy areas of focus:

Non-GAAP and non-IFRS financial measures. The SEC staff continues to focus on non-GAAP and non-IFRS financial measures and compliance with the staff's Compliance and Disclosure Interpretations (C&DIs) on non-GAAP financial measures, in certain cases resulting in requests to remove or substantially modify non-GAAP and non-IFRS financial measures. For example, SEC 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 in the staff's view, presented a misleading measure under C&DI Question 100.01.

Additionally, the SEC staff's comments have focused on non-GAAP adjustments related to frequent restructuring and acquisition-related costs, where the staff's comments have asked companies (i) to detail the facts and circumstances supporting an adjustment for what could be a recurring cost and (ii) to explain and quantify the components of these adjustments. Consistent with C&DI Question 102.10(a), SEC staff comments have also objected to companies presenting a full non-GAAP or non-IFRS income statement as a form of reconciliation because such presentation gives the non-GAAP or non-IFRS information undue prominence.

The SEC staff has also continued to issue comments to determine whether certain key performance indicators (KPIs) are in fact non-GAAP or 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 address the use of non-GAAP or non-IFRS measures in earnings releases and SEC filings, the SEC staff also reviews other materials, including company websites and 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.

MD&A. The SEC staff continues to raise questions about MD&A disclosures, most commonly about results of operations. The SEC staff's comments on results of operations have continued to request that companies explain MD&A disclosures with greater specificity, including identifying and quantifying the impact of each positive or negative factor that had a material effect on results of operations. The SEC staff also continued to highlight the presentation of KPIs and operating metrics, including how they are calculated and period-over-period comparisons. SEC staff comments regularly scrutinized KPIs discussed in earnings releases and investor presentations and questioned how these compare to the information disclosed in MD&A.

SEC staff comments also focused on (i) liquidity and capital resources and (ii) critical accounting estimates. Staff comments on liquidity and capital resources often requested enhanced disclosures of the drivers contributing to changes in cash flows and the trends and uncertainties related to meeting known or reasonably likely future cash requirements. Staff comments regarding critical accounting estimates frequently noted that companies' disclosures were too general, and requested that companies provide a more robust analysis, consistent with the requirements set forth in Item 5E. The staff often emphasized that critical accounting estimates disclosures should supplement, not duplicate, the disclosures in footnotes to financial statements.

Staff comments on MD&A reporting also addressed known trends or uncertainties, particularly those related to current or emerging trends in the macroeconomic environment such as inflation, interest rates, geopolitical conflicts and supply chain issues. Comments often requested additional disclosures to enhance an investor's understanding of the impact of these trends on the company and the company's response to those trends. As inflation and interest rates moderate and other trends emerge, companies will need to provide transparent, company-specific disclosures about the anticipated impact of such trends to help investors understand how and when companies may be affected by these changing macroeconomic factors. Companies should:

- Regularly reassess and update their MD&A disclosures to include current or emerging trends and uncertainties in the macroeconomic environment.
- Continue to consider CF Disclosure Guidance Topic No. 9 and No. 9A related to COVID-19 and supply chains as well as the SEC staff's May 2022 Sample Letter to Companies Regarding Disclosures Pertaining to Russia's Invasion of Ukraine and Related Supply Chain Issues, as much of the guidance in these materials could apply to other macroeconomic trends.

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 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 and in CF Disclosure Guidance: Topic No. 10.

In October 2024, the Department of the Treasury released the final rule imposing restrictions on U.S. outbound investment in Chinese companies, which has been referred to as a "reverse CFIUS" program. Effective on January 2, 2025, the program imposes additional diligence responsibilities, record-keeping and notification requirements, and restrictions on U.S. persons and their controlled foreign entities engaging in certain transactions with foreign persons in "countries of concern" (currently limited to China) that perform defined activities related to semiconductors and microelectronics, quantum information technologies or artificial intelligence (AI) (together, "sensitive sectors").

Depending on the extent of involvement in the sensitive sectors, China-based issuers should evaluate and consider making relevant disclosure in their Form 20-F filings on the impact of the reverse CFIUS program in relation to their business operating, financing viability and other risk factors.

Expected Areas of Focus in 2025

In 2025, we expect SEC staff comments to continue to focus on the reporting areas discussed above. Consistent with public statements from the current director of the SEC's Division of Corporation Finance, the SEC staff may also expand the scope of its comments to address artificial intelligence, cybersecurity and clawbacks.

As noted in the "Cybersecurity Disclosures" section above, the SEC staff has issued comments on the annual cybersecurity disclosures required by Item 16K of Form 20-F. While the SEC staff has only issued a few comments to date, we expect the volume of comments on cybersecurity to expand. We also expect that SEC staff comments on clawback disclosures may appear more frequently, including reminders to file a clawback policy and assessments of disclosures when a recovery analysis is triggered, in accordance with the final rules adopted by the SEC in October 2022. For more information regarding the SEC's focus on artificial intelligence, cybersecurity and clawbacks, see the "Consider Artificial Intelligence Disclosure," "Assess Trends in Cybersecurity Disclosures" and "Review Clawback Policies" sections of this guide.

In addition, the SEC staff may review and issue comments regarding companies' compliance with the SEC's recently adopted disclosure rules on insider trading policies and procedures. For additional considerations regarding these disclosure requirements, see the "Insider Trading Policies and Procedures Exhibit and Disclosures" section below.

Climate Change

The regulatory landscape for climate-related disclosures continues to evolve. The future of the SEC's climate disclosure rules adopted in March 2024[5] (SEC Climate Rules) remains uncertain given the pending litigation challenging the rules and the upcoming change in administration. In April 2024, the SEC voluntarily stayed the effectiveness of the SEC Climate Rules pending judicial review. The SEC made clear, however, that its 2010 climate guidance,[6] which provided the basis for the sample comment letter issued in September 2021 by the SEC's Division of Corporation Finance[7] and subsequent comment letters to companies, remains applicable.

In addition, a growing number of jurisdictions in the U.S. and abroad are requiring climate-related disclosures, and for many companies, some form of climate disclosure will become mandatory regardless of the future of the SEC Climate Rules. For example, foreign private issuers should assess whether it has any subsidiaries that "do business" in California and are subject to California's sweeping climate disclosure rules, which will phase in beginning with fiscal year 2025.[8] While the European Union's disclosure rules under the Corporate Sustainability Reporting Directive (CSRD) initially will apply only to EU-incorporated companies, for fiscal years starting on or after January 1, 2028, non-EU companies must report if they have a significant presence in the EU (defined by minimum EU revenues and asset thresholds).[9]

Preparing for Compliance

In this evolving landscape, companies should stay apprised of the applicability of various climate disclosure rules and proactively consider the necessary steps to comply with current and expected climate-related disclosure rules in the jurisdictions

[5] See our March 8, 2024, client alert "SEC Adopts New Rules for Climate-Related Disclosures." In April 2024, in response to multiple legal challenges, the SEC voluntarily stayed the effectiveness of the climate disclosure rules pending judicial review.

[6] See Commission Guidance Regarding Disclosure Related to Climate Change, Rel. Nos. 33-9106; 34-61469 (Feb. 2, 2010), 75 Fed. Reg. 6290 (Feb. 8, 2010).

[7] See Sample Letter to Companies Regarding Climate Change Disclosures, SEC Staff Guidance (Sept. 2021).

[8] See our December 20, 2024, client alert "California Seeks Public Input on Climate Reporting Requirements" and October 28, 2024, client alert "State of Play: California Amends Climate Disclosure Rules."

[9] See our October 9, 2023, client alert "Q&A: The EU Corporate Sustainability Reporting Directive – To Whom Does It Apply and What Should EU and Non-EU Companies Consider?"

in which they operate. Additionally, maintaining a practice of preparing for compliance with the expected climate rules aligns with broader investor and other stakeholder expectations for robust voluntary climate-related disclosures.

Climate-related disclosures included in SEC filings "filed" with the SEC are subject to potential liability under Section 18 of the Securities Exchange Act of 1934, as amended (Exchange Act) and Section 11 of the Securities Act of 1933, as amended (Securities Act) (if included in or incorporated by reference into a Securities Act registration statement). These provisions impose liability on issuers for making false or misleading statements in SEC filings with respect to any material fact relied on by investors. As companies add or expand climate-related disclosures in their SEC filings, they are likely to face increased potential liability from expanded disclosures.

Moreover, as discussed in detail in our client alert "The Informed Board, Summer 2023 – The EU's New ESG Disclosure Rules Could Spark Securities Litigation in the US," climate-related disclosures provided in response to other jurisdictions' regulatory requirements may be subject to the anti-fraud provisions of U.S. securities laws and potential scrutiny by U.S. investors looking for statements that could be the basis for a lawsuit.

Thus, companies should consider taking a proactive and methodical approach to climate-related DCP to minimize exposure to liability based on inaccurate or incomplete disclosures. At the same time, in light of the growing focus on, and demand for, climate-related disclosures and the uncertainty around the SEC Climate Rules, companies should consider an approach that balances risk tolerance, climate disclosure readiness and competition for compliance resources. Considerations for enhancing climate-related DCP include the following:

- **Internal oversight.** Companies should assess whether their current disclosure oversight structure is set up to manage climate-related disclosures, including whether the company's disclosure committee regularly reviews climate-related disclosures and includes the appropriate personnel. Alternatively, a company that has separate disclosure committees for SEC reporting and sustainability disclosures should consider whether there is sufficient coordination and communication, including overlapping members, between the two committees.
- **Materiality considerations.** Disclosures required under existing SEC rules, as well as under the SEC Climate Rules, are based on materiality determinations under the traditional materiality standard — *i.e.*, whether a reasonable investor would likely consider information important when deciding to buy, sell or vote securities. Companies should assess the impact of climate-related risks on their business as a whole and should consider designing a materiality assessment process that can capture and present for consideration all significant and applicable aspects of the company's climate-related risks and strategies for disclosure. Companies should develop and consistently apply criteria for assessing materiality, taking into account quantitative and qualitative factors as well as industry norms, regulatory guidance, and stakeholder expectations. This process should involve input from cross-functional teams, such as legal, finance, sustainability, and operations, to produce a comprehensive view of the company's climate-related risks and opportunities. Companies that are subject to multiple climate disclosure regimes also should be mindful of differing "materiality" standards under other disclosure frameworks. For example, the EU's CSRD incorporates a "double materiality" standard.[10]
- **Subcertification process.** Enhancing or adopting subcertification processes can help ensure that climate-related information is accurately captured and reported. Subcertifications involve designating personnel in the relevant departments to certify the accuracy and completeness of the information they provide in order to increase accountability and reduce the risk of errors or omissions.
- **External engagements and assurance.** Engaging external advisers with expertise in compiling climate-related data and preparing related disclosures can provide valuable insights and enhance DCP. A company's team of external advisers may include consultants, legal advisers and third-party attestation providers (which, under the SEC Climate Rules, may be the company's independent auditor for financial reporting purposes). A company that is required to retain an attestation provider under the CSRD or other regulatory mandates may want to consider whether that provider qualifies as independent under the SEC Climate Rules. In addition, companies should confer with their auditors when implementing controls to track climate-related impacts on the financial statements.
- **Board and committee oversight.** Thoughtful assignment of board and committee oversight responsibilities is necessary for tracking, assessing and reporting climate risk. While in some cases environmental, social and governance (ESG) oversight may fall within the purview of the board as a general matter, boards may consider delegating responsibility for more detailed review of climate-related disclosures to a board committee.
- **Coordinated public disclosures.** Stand-alone ESG or sustainability reports and other climate-related disclosures outside of SEC filings, including in response to state or other countries' disclosure requirements, should be consistent with SEC filings to avoid discrepancies. While companies may include certain disclosures in voluntary reporting that are not included in SEC

[10] Under the CSRD, companies must assess (i) how their business is impacted by sustainability-related factors (financial materiality) and (ii) how their activities impact society and the environment through emissions and employment creation (impact materiality).

filings, companies should make clear (i) why they are presenting such voluntary disclosures and (ii) that such voluntary disclosures are not material. Companies may choose to include such voluntary disclosures in their SEC filings with an explanation of why the information is provided (*e.g.*, if the information is not material but provides helpful context).

Consistency is essential to maintain stakeholder trust and avoid potential regulatory scrutiny. To help ensure consistent and accurate public disclosures across platforms for both required and voluntary disclosures, companies should consider:

- Regularly reviewing and reconciling public statements made in SEC filings, in other regulatory filings and through other media to confirm all climate-related information is accurate and aligned across disclosures.
- Analyzing appropriate differences between nonmaterial climate-related statements for noninvestor stakeholder audiences and reporting material climate-related risks and impacts for investors.
- Maintaining a calendar of climate-related disclosure activities, disclosures and deadlines, which can help build a cadence of internal processes and facilitate consistent disclosures over time.

Assembling and regularly communicating with cross-functional teams and external advisers to coordinate a comprehensive and harmonized approach.

Artificial Intelligence Disclosure

Evaluating Trends

The development, use and potential impact of artificial intelligence (AI) is a key focus for market participants, including investors and the SEC.[11] In an analysis of annual reports filed by S&P 500 companies for the fiscal year ended 2023, over 40% included disclosures about AI.[12] Also, more than 40% of S&P 500 companies cited "AI" during earnings calls in the second quarter of 2024.[13] Furthermore, many Fortune 100 companies included AI-related risk disclosures in their annual reports, with such disclosures falling broadly into one of the following categories: (1) cybersecurity risk; (2) regulatory risk; (3) ethical and reputational risk; (4) operational risk; and (5) competition risk.

In light of these trends, companies should evaluate the role of AI in their business and consider incorporating new or updated AI disclosures in Exchange Act reports, if applicable.

SEC Guidance

In June 2024, the SEC's Division of Corporation Finance announced that AI was a disclosure priority. The division will consider:

- How companies are defining "artificial intelligence" and how the technology could improve their business.
- Whether companies are providing tailored, rather than boilerplate, disclosures discussing the materiality to the companies' business, material risks, and impact on the business and financial results.
- Whether a company's business involves AI or if companies are merely using "buzz" words.
- Whether companies have a reasonable basis for their claims when discussing AI prospects.

More recently, in September 2024, SEC Chair Gensler stated that companies must ensure that their statements about AI capabilities and risks have a reasonable basis and are specific to the company, rather than relying on vague or generic language.

Disclosure Considerations

Currently, there are no specific SEC disclosure requirements related to AI. However, as with other factors that impact a company's business, disclosures related to AI may be required when responding to item requirements in periodic reports. For instance, companies may be required to address AI when describing the company's business, the impact of regulations on the company's business and the risk factors associated with an investment in the company.

- Given the SEC's focus on AI disclosures, companies that determine to include AI disclosures in their reports should confirm that those disclosures accurately detail the company's AI capabilities and the impact or potential impact of AI on the company's business.
- If AI development at a company is in early stages and the potential impact of AI is uncertain, the company should clearly describe the process and steps that may be required to realize the expected impact.
- Companies should also consider describing (i) whether they are developing their own AI capabilities or relying on third-party service providers and (ii) whether there are material risks to the company from its use of AI or from the development of AI by competitors or others in the market.

[11] See PwC's Global Investor Survey 2024 (Dec. 4, 2024).

[12] See Bloomberg Law, "AI Disclosures to SEC Jump as Agency Warns of Misleading Claims" (Feb. 8, 2024).

[13] See FactSet, "More Than 40% of S&P 500 Companies Cited 'AI' on Earnings Calls for Q2" (Sept. 13, 2024).

Updated SEC Filing Requirements

Changes in Beneficial Ownership Reporting Rules

Overview

On October 10, 2023, the SEC adopted amendments to its beneficial ownership rules. See our October 13, 2023, client alert "SEC Amends Beneficial Ownership Reporting Rules, Shortening Deadlines and Offering Guidance on 'Groups' and Cash-Settled Derivatives."

Pursuant to the amendments, Schedules 13D and 13G must now be filed on a more accelerated basis. The new beneficial ownership rules became effective beginning on February 5, 2024, and companies had until September 30, 2024, to begin complying with the new Schedule 13G accelerated filing deadlines. Under the old rules, except in certain situations, Schedule 13G filings were required to be amended within 45 days after the end of the calendar year for any changes to the previous disclosure. The amended rules require that all Schedule 13G filings be amended within 45 days after the end of the calendar quarter in which any material change occurred.

The first Schedule 13G amendments under the new rules were required to be filed by November 14, 2024. Filers should continue to assess whether any material change in the information previously reported has occurred during each quarter. The SEC declined to define what constitutes a material change for these purposes and instead pointed to the general concept of materiality (as defined in Exchange Act Rule 12b-2). The SEC signaled that any acquisitions or dispositions of 1% or more of the outstanding class of securities should be deemed material for Schedule 13G amendment purposes, based on the 1% threshold prescribed under Rule 13d-2(a) for Schedule 13D amendment purposes.

For initial filers, the amended rules require the filing of an initial Schedule 13G within 45 days after the end of the quarter in which a qualified institutional investor or exempt investor crosses the 5% threshold at quarter-end, or within five business days of crossing the threshold for passive investors.

Recent SEC Enforcement Actions

In September 2024, the SEC announced another enforcement sweep involving Section 13/16 beneficial ownership reporting. The SEC previously took broad-reaching actions in this area, including in 2014, 2015 and 2023.

As part of the 2024 sweep, the SEC settled charges against 23 entities and individuals for failures to timely report information about their holdings and transactions, including in multiple Section 16(a) reports (primarily Forms 4 and 5) and/or Schedule 13D filings required under the Exchange Act.[14] Two public companies were charged for contributing to filing failures by their officers and directors and failing to report the companies' insiders' filing delinquencies in their proxy statements. Although individual insiders are ultimately responsible for complying with the Section 16(a) disclosure requirements, many companies voluntarily take on the obligation to prepare and file Section 16 reports on behalf of their officers and directors. In its orders, the SEC noted that "issuers who voluntarily accept certain responsibilities and then act negligently in the performance of those tasks may be liable as a cause of Section 16(a) violations by insiders."

[14] Exchange Act Section 16 requirements, including reporting obligations under Section 16(a), do not apply to the insiders of FPIs. If a company loses its FPI status, however, the insiders of such company generally would become subject to Section 16 starting on the first day of the fiscal year following the determination date. A company's FPI status is determined annually as of the last business day of its most recently completed second fiscal quarter.

One entity was also charged for failing to timely file Form 13F reports, which are required to be filed by any institutional investment manager that exercises investment discretion over certain publicly traded securities with a fair market value of at least $100 million.

While beneficial ownership reporting investigations often result in charges against individuals and smaller companies that may not have robust disclosure controls, among the charged entities were a large technology company and leading global investment bank. The SEC's settlement order with the investment bank noted, among other things, that the bank and some of its affiliates failed to timely file multiple required Section 16 reports, with the SEC documenting at least 28 instances of violations. The order cited failures of the bank's systems and controls, misapplication of policy exceptions to the bank's restricted lists, failures to timely identify when the bank became a 10% beneficial owner (which would trigger a Form 3 filing and future Form 4 filing obligations), and internal delays in gathering or verifying information for filings.

Without admitting or denying the findings, the entities and individuals agreed to cease and desist from violations of the respective charged provisions and to pay civil penalties ranging from $10,000-$200,000 for the individuals and $40,000-$750,000 for the entities. The two public companies charged with contributing to insiders' reporting failures and not disclosing such delinquencies agreed to pay a civil penalty of $200,000 each.

Considerations

The SEC's announcement of the settled charges described above serves as a timely reminder for companies to ensure adequate systems and controls for beneficial ownership reporting obligations, especially given the new Schedule 13G accelerated filing deadlines.

- Ensuring compliance with obligations under Sections 13 and 16 is particularly important for companies that have undertaken commitments, whether formal or informal, to assist their insiders with required filings.
- Companies should also confirm that the relevant employees and directors understand their reporting obligations under Sections 13 and 16 (including Form 13F filings by certain institutional investment managers and Form 13H filings for certain large traders).

Recent statements from the SEC staff indicate that Section 13 and 16 matters will continue to be a priority in 2025. We expect that the staff will (i) use new technology to identify late Schedule 13D and Schedule 13G filings and (ii) comment more frequently on Schedule 13D filings where material deficiencies have been identified.

Insider Trading Policies and Procedures Exhibit and Disclosures

Beginning with the Form 20-F for the fiscal year ending December 31, 2024, 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.

Rule 10b5-1 Plans

To the extent companies permit the use of Rule 10b5-1 plans by directors, executive officers or other employees, their insider trading policies should be updated to ensure such plans comply with the requirements of Rule 10b5-1, as amended, including:

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

Companies also should consider requiring preclearance for all Rule 10b5-1 plan adoptions and modifications to help ensure that proposed plans comply with Rule 10b5-1. Although 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 for transactions that occurred under the terminated plan. Companies should therefore consider requiring advance notice to their legal departments prior to terminating a Rule 10b5-1 plan.

Blackout Periods

Because the announcement of a company's interim (quarterly or semi-annual) financial results almost always has the potential to materially impact the market for the company's securities, companies should consider implementing a blackout period during which persons subject to the blackout may not trade in the company's securities. In setting a blackout period, companies must consider both the appropriate time frame and scope of individuals to include. The blackout period should begin when the company's interim results become both sufficiently certain and visible internally. Based on insider trading policies filed to date by companies in the S&P 500 index, companies that report on a quarterly basis commonly start their quarterly blackout periods on or between the first and 15th day of the last month of the quarter, and commonly open the trading window after the first or second trading day following release of the company's earnings

Blackout periods typically apply to (i) directors, (ii) definitional executive officers, and (iii) designated employees who frequently have access to material nonpublic information about the company. However, applying blackout periods to all employees may be appropriate. This is common where there is broad access internally to financial information or the company has a small number of employees.

Shadow Trading

In April 2024, a jury in federal court found a former executive civilly liable for insider trading. In the first-of-its kind case, the SEC argued that the executive engaged in "shadow trading." More specifically, the SEC argued that the executive used material nonpublic information about the not-yet-public acquisition of his employer to trade in securities of another company with which he had no relationship, on the assumption that the acquisition of his employer would increase the stock price of the other company. In September 2024, a federal court upheld the jury's verdict. (Some members of the legal community anticipate that the former executive will appeal the case.)

In light of this shadow trading case, companies should consider addressing in their insider trading policies trading in other companies' securities on the basis of material nonpublic information obtained in the course of an individual's position with the company. In doing so, companies should consider whether such a prohibition should apply to all other companies or a narrower set, such as the company's business partners and competitors.

Treatment of Gifts

In connection with amending Rule 10b5-1, the SEC cited 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 to maximize the associated tax benefits. 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.

Accordingly, companies should consider including specific parameters on gifts in their insider trading policies. For example, companies can require advance clearance for gifts of securities by directors, executive officers and certain employees who are subject to quarterly blackout periods, since those individuals are generally more likely to be in possession of material nonpublic information. As a more conservative option, a company can treat gifts the same way it 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.

Edgar NEXT: Filer Access and Account Management Changes

On September 27, 2024, the SEC adopted rule and form amendments to improve the Electronic Data Gathering, Analysis and Retrieval (EDGAR) system's filer access and account management. The new system, called EDGAR Next, will impact all public companies and any other person who needs to make SEC filings (collectively, "Filers") and their filing agents. By way of example, impacted Filers will include any affiliate attempting to electronically file a Form 144 for a public resale effected via the Rule 144 safe harbor. All Filers need to take steps to confirm their existing EDGAR filing and account information in order to enroll when the process starts in March 2025.

Unlike the current system, where anyone with the CIK and CCC EDGAR codes of a Filer can make SEC filings on behalf of the Filer without further verification, only people who are specially designated in the new account system as of September 2025 will be allowed to make SEC filings in EDGAR Next. Therefore, each Filer must set up an account and designate who can make filings on their behalf. EDGAR Next requires all individuals responsible for making SEC filings or managing related accounts on behalf of Filers to obtain account credentials from Login.gov and complete a two-factor authentication to access EDGAR accounts and make filings. The two-factor authentication requires (i) a password and (ii) verification on the phone or an app.

Filers will need to authorize at least two individuals as account administrators to manage the Filer's EDGAR account (at least one account administrator for individuals and single-member companies). The account administrator is responsible for adding other administrators (up to 20) and removing other administrators. EDGAR Next additionally requires annual confirmation by an account administrator to ensure the accuracy of certain account-related information. The account administrator may delegate authority to make SEC filings on behalf of the Filer to another person or entity.

On March 24, 2025, the EDGAR Next system will go live, and existing Filers can start transitioning to the new system. Compliance with the amended Form ID is required to obtain new Filer credentials. On September 15, 2025, compliance with EDGAR Next is required.

While the deadline for existing Filers to enroll is December 19, 2025, such Filers will not be able to make any SEC filings until they enroll. After this date, Filers will be required to submit an amended Form ID in order to request access to their existing accounts. In addition, Filers not in compliance will not be able to file with EDGAR legacy codes. However, during the transition period from March 24 to September 15, 2025, Filers will be allowed to use either their traditional EDGAR or EDGAR Next accounts.

Existing Filers should confirm their EDGAR filing codes before March 24, 2025, to streamline the onboarding process. Filers should decide who or which account administrator will be responsible for managing accounts, making SEC filings and providing annual confirmations on behalf of the Filer. Individuals who will be responsible for managing accounts and making SEC filings on behalf of a Filer should obtain Login.gov credentials before March 24, 2025.

Other Matters of Interest

Clawback Policies

Background

As required by the Dodd-Frank Act, in October 2022, the SEC adopted final rules (Rule 10D-1 of the Exchange Act) that directed the stock exchanges to establish clawback listing standards. The rule called for listed companies to develop and implement a policy providing for (i) the recovery of erroneously awarded incentive-based compensation received by current or former executive officers, as defined under Rule 16a-1(f) under Section 16 of the Exchange Act, and (ii) related disclosure obligations, even if there was no misconduct or failure of oversight on the part of an individual executive officer.[15]

Now that a full year has passed since the December 1, 2023, deadline to comply with implementation of the Dodd-Frank required policies, companies should reflect on and revisit their processes to use best practices going forward.

Operational Matters for Dodd-Frank Clawback Policies

Short-Term Action Items

- **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 companies to file their clawback policies as exhibits to their annual reports on Form 20-F or 40-F, as applicable. Companies should consider whether to voluntarily file any stand-alone supplemental clawback policies that exceed the Dodd-Frank clawback rules' requirements.
- **Review the look-back period.** While the rules provide for the recovery of erroneously awarded incentive-based compensation during the three years prior to the date of the accounting restatement, for the upcoming year, such look-back period does not apply, and instead is only required to apply to incentive-based compensation received on or after October 2, 2023. Therefore, the look-back period for 2025 will be less than the three-year requirement. For newly public companies, the look-back period is the later of October 2, 2023, or the date the company listed its securities on Nasdaq or the NYSE.

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."[16] Before a potential accounting restatement arises, listed companies should ascertain which of their executive officer compensation arrangements qualify as incentive-based compensation.
- **Reflect on the rationale for and documentation of forms of executive compensation.** The scope of the "incentive-based compensation" definition in the SEC's clawback rules means 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, companies should be aware that if they are documenting the rationale for executive

[15] 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."

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

compensation as based on prior financial reporting measure performance (whether implicitly or explicitly) in compensation committee resolutions, their executive offer letters or otherwise, that rationale could bring compensation under the umbrella of incentive-based compensation that would have otherwise been excluded from clawback policies, and that could meaningfully increase the scope of recoverable compensation if a clawback policy is triggered.

- **Reinforce the importance of an open line of communication between the 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 collaborate to determine (i) whether, and the extent to which, the accounting restatement triggers application of the clawback policy and (ii) the process for compensation recovery, if applicable.

  Clawback policies are typically thought to fall primarily under the purview of the HR and legal functions, but accounting and finance functions play crucial roles in identifying whether an event has occurred that has triggered the application of the clawback policy and how much compensation, if any, to recover. These primary functions should be made aware that an accounting restatement could trigger application of the clawback policy and that they have the obligation to alert the other functions if an accounting restatement due to the listed company's material noncompliance with any financial reporting requirement under the securities laws has occurred. In short, companies should ensure that their accounting, finance, HR and legal functions are all aware of and understand the company's clawback policy requirements and the need for prompt coordination and communication between company functions 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 adviser(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 the fact 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 that triggers the company's clawback policy should consider engaging a third-party valuation expert to assist with evaluation and review.

- **Determine the means of recovering erroneously awarded incentive-based compensation.** Once erroneously awarded incentive-based compensation has been quantified, a company will need to assess how it intends to recover the amount, including the means and timing of recovery, as well as how the company plans to communicate any repayment obligation to its executive officers. 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.[17] While the Dodd-Frank clawback rules are currently expected to preempt conflicting state law, litigation in the coming years may confirm whether and when the Dodd-Frank clawback rules apply and could indicate which means of recovery may reduce 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 pre-tax basis. Therefore, if a company's clawback policy is triggered, the 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 advisers to determine how the officers' 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 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 eXtensible Business Reporting Language (XBRL) format:
  - 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).

[17] See California Labor Code § 221.

- 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, the company is 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 for whom, as of the end of the last completed fiscal year, erroneously awarded incentive-based compensation has been outstanding for 180 days or longer since the date the listed company determined the amount owed, the company should disclose the dollar amount of outstanding erroneously awarded incentive-based compensation due from each such individual.
- 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.

Checkboxes on the Cover Page of Annual Reports

Companies must determine whether the checkboxes (copied below) on the cover page of the annual report are applicable regarding (i) the correction of accounting errors and (ii) a clawback analysis. These disclosures on the cover page of the Form 20-F or 40-F must be tagged in XBRL format.

☐ If securities are registered pursuant to Section 12(b) of the Act, indicate by check mark whether the financial statements of the registrant included in the filing reflect the correction of an error to previously issued financial statements.

☐ Indicate by check mark whether any of those error corrections are restatements that required a recovery analysis of incentive-based compensation received by any of the registrant's executive officers during the relevant recovery period pursuant to §240.10D-1(b).

Box 1: Companies should perform a two-step process to determine whether to check Box 1:

1. Did the company correct any errors or make revisions to a previously issued financial statement or footnotes? The term "revision" encompasses (i) "Big R restatements," which correct a material error in the previously issued financial statement; (ii) "little r revisions or restatements," which correct an error that was immaterial to the previously issued financial statement (but recognizing the error correction in the current period, or leaving the error uncorrected, would materially misstate the current period); and (iii) any other changes.
2. Were such corrections or revisions due to accounting errors under Accounting Standards Codification (ASC) 250 or International Accounting Standard 8, as applicable?
   - Revisions due to the adoption of an accounting principle that applied to previous periods (*i.e.*, retrospective changes) are not considered accounting errors.
   - Out-of-period adjustments are also not in this category.
   - Correcting errors in the application of GAAP, IFRS or other mathematical errors are considered accounting errors.

Box 2: Do any of those error corrections involve restatements that require a company to determine whether it must recover incentive-based compensation under the company's clawback policy?

Clawbacks Beyond the Dodd-Frank Requirements — Considering Whether To Amend or Supplement the Clawback Policy.

Compensation committees (or boards of directors, if applicable) should consider at least annually whether to update the clawback policy in response to market and/or industry trends, proxy advisory firm guidance, other clawback rules and other factors that arise in the coming years as the Dodd-Frank clawback rules are implemented.

- Recent surveys have reported that a significant number of public companies have recoupment policies or provisions that exceed the Dodd-Frank requirements.[18] One survey of approximately 400 S&P 500 companies revealed that about 70% of company clawback policies disclosed before May 7, 2024, have at least one recoupment trigger besides accounting restatements.[19] Examples of the expanded triggers include: (i) breach of legal requirements or company policy, (ii) breach of fiduciary duty or fraud, (iii) misconduct with reputational or financial harm, (iv) administrative enforcement, (v) termination or criminal resolutions (*e.g.*, charges of fraud, embezzlement and theft) and (vi) inappropriate conduct.[20] A separate survey of large cap companies found that 66% of the respondents reported having recoupment provisions covering a broader

[18] See DragonGC's report "Compensation Clawbacks Report" (May 7, 2024), FW Cook's report "Clawback Policies: Beyond Compliance" (Sept. 13, 2024) and Meridian Compensation Partner's report "2024 Corporate Governance and Incentive Design Survey" (Sept. 26, 2024).

[19] See DragonGC's report "Compensation Clawbacks Report" (May 7, 2024).

[20] *Id.*

group of employees than required by Dodd-Frank, and 67% of the respondents reported having recoupment provisions covering discretionary cash and/or time-based equity awards.[21] A third survey noted that companies that have expanded recoupment policies typically provide for discretionary authority to recoup compensation where the recoupment is beyond the requirements of the Dodd-Frank Act.[22]

- Glass Lewis' United States 2025 Benchmark Policy Guidelines, published in November 2024, strongly recommend that companies maintain clawback policies that permit recovery in circumstances that extend beyond the Dodd-Frank clawback rules' requirements. Specifically, Glass Lewis stated that recovery policies should permit companies to recover variable incentive payments (whether time-based or performance-based) "when there is evidence of problematic decisions or actions, such as material misconduct, a material reputational failure, material risk management failure, or a material operational failure, the consequences of which have not already been reflected in incentive payments and where recovery is warranted" and regardless of whether the executive officer was terminated with or without cause.[23]
- Glass Lewis also expects robust disclosure about a company's decision not to pursue recovery under a clawback policy, and, if applicable, how the company has corrected the disconnect between executive pay outcomes and negative impacts of executives' actions on the company.[24] The absence of such enhanced disclosure could affect Glass Lewis' overall say-on-pay recommendation.[25]
- Similarly, in October 2024, Investor Shareholder Services released a new FAQ on Executive Compensation Policies. ISS noted that, for a listed company to be perceived as having a robust clawback policy, the policy "must extend beyond the minimum Dodd-Frank requirements and explicitly cover all time-vesting equity awards."[26]

While the aforementioned surveys and guidance from proxy advisory firms are generally applicable to U.S. domestic companies, FPIs should be aware of them but tailor any revisions to their clawback policies in response as appropriate depending on their facts and circumstances. We have observed that some FPIs already maintain clawback policies that permit recovery in circumstances that extend beyond the Dodd-Frank clawback rules' requirements, and expect that other FPIs will consider doing so. There is not a one-size-fits-all approach, and while it may be appropriate for some FPIs' clawback policies to extend beyond the minimum Dodd-Frank requirements, this determination should be made based on a FPI's particular facts and circumstances.

Resource Extraction and Conflict Minerals Form SD Disclosures

Companies should continue to confirm the applicability of the requirements for resource extraction and conflict minerals reporting on Form SD and, if applicable, prepare to provide the requisite disclosures. Key considerations regarding the resource extraction and conflict minerals requirements on Form SD are summarized below.

Resource Extraction Form SD Disclosures

As discussed in more detail in our August 27, 2024, client alert "New Resource Extraction Payment Disclosures Due September 26, 2024," in December 2020, the SEC adopted final rules requiring "resource extraction issuers" — which includes any company engaged in the commercial development of oil, natural gas or minerals — to annually report certain payments made to foreign governments or the U.S. federal government on Form SD. These requirements, which apply to foreign private issuers, had a two-year transition period, with initial Form SD filings required to be filed with the SEC for the first time in 2024.

The next Form SD filing for resource extraction issuers with a December 31 fiscal year-end is required to be filed with the SEC for fiscal year ending December 31, 2024, by September 27, 2025.[27] A resource extraction issuer with a non-calendar fiscal year-end is required to file its next Form SD with the SEC no later than 270 days following the end of the issuer's most recently completed fiscal year.

Conflict Minerals Form SD Disclosures

The next Form SD filing under the conflict minerals disclosure rules is required to be filed with the SEC no later than May 31, 2025. The conflict minerals disclosure rules and related guidance have remained at a practical standstill for the past few years following legal challenges to the rules and a remand to the SEC for further action. As a result, there have been no notable regulatory updates since the April 2017 no-action relief statement by

[21] See FW Cook's report "Clawback Policies: Beyond Compliance" (Sept. 13, 2024).

[22] See Meridian Compensation Partner's report "2024 Corporate Governance and Incentive Design Survey" (Sept. 26, 2024).

[23] See Glass Lewis' "2025 Benchmark Policy Guidelines – United States" (Nov. 14, 2024).

[24] See *id.*

[25] See *id.*

[26] See ISS's United States Executive Compensation Policies Frequently Asked Questions (updated Oct. 11, 2024).

[27] Because September 27, 2025, falls on a Saturday, the deadline is the next business day (*i.e.*, Monday, September 29, 2025).

the SEC's Division of Corporation Finance. In that statement, the division indicated it would not recommend enforcement action against companies for not complying with Item 1.01(c) of Form SD — the provision requiring companies to conduct due diligence to determine the source and custody of conflict minerals in their supply chains and to prepare a "conflict minerals report" describing their efforts and findings.[28]

Companies are still required to comply with the requirements of Items 1.01(a) and (b) of Form SD. This means companies that determine conflict minerals are necessary to the functionality or production of their products must make a good faith effort to determine the country of origin of those minerals and to briefly describe their efforts and findings in a Form SD filed with the SEC and made available on the company's website.[29]

US 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; 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. sanctions law. If a company is lawfully 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. A company should also consider whether it would be appropriate to disclose sanctions compliance-related risks more generally, even if it does not specifically conduct business in sanctioned countries or territories or with persons covered by existing sanctions, or risks that imposition of additional sanctions could impact the company's business in the future, in light of current geopolitical trends.

[28] See our April 11, 2017, client alert "SEC Staff Provides Relief From Conflict Minerals Rule."

[29] For additional information concerning the conflict minerals disclosure rules, see our September 5, 2012, client alert "SEC Adopts Conflict Minerals Rules"; our June 3, 2013, client alert "SEC Staff Issues Conflict Minerals & Resource Extraction Payments Disclosure Guidance"; our April 30, 2014, client alert "SEC Staff Issues Statement on Conflict Minerals Ruling"; and our May 2, 2024, client alert "Conflict Minerals Disclosures Due May 31, 2024."

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