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Public Company Update

Navigating the 2023 20-F Season: A Guide for Foreign Private Issuers

As we head into year-end, annual reporting season for foreign private issuers (“FPIs”) is just around the corner. FPIs are required to file an annual report on Form 20-F with the U.S. Securities and Exchange Commission (“SEC”) within four months after the end of their fiscal year (or until April 30, 2024).

Annual reports on Form 20-F provide FPIs an opportunity to communicate with investors, regulators, and other stakeholders. Therefore, it is important to prepare it carefully and accurately, and to comply with the applicable disclosure requirements and standards.

In this article, we will highlight some of the new or revised disclosure requirements that FPIs should be aware of, as well as some practical tips and reminders for the filing process.

New and Revised Disclosure Requirements for 2023 Form 20-F

Below we provide an overview of recent developments, trends and topics that are relevant to FPIs in preparing their 2023 Form 20-F:

Cybersecurity

In recent years, the SEC has prioritized the review of disclosures concerning cybersecurity risks. The new rules, adopted in July 2023, enhance and standardize disclosures regarding cybersecurity risk management, strategy, governance and incident-reporting.

Accordingly, a new item aptly named “Item 16K—Cybersecurity” has been added to Form 20-F, pursuant to which FPIs now need to provide disclosure regarding their (1) risk management and strategy related to cybersecurity risk and (2) governance related to cybersecurity risk-oversight.

In the latest regulatory update, FPI are now required to report significant cybersecurity incidents as part of their disclosures on Form 6-K. The incorporation of cybersecurity incidents into the spectrum of material information on Form 6-K does not, however, extend the original scope of the FPIs' disclosure obligations. With regards to compliance, FPIs are expected to adhere to the annual cybersecurity disclosure norms on

Form 20-F starting with the 2023 submission for calendar year companies. The specific incident disclosure mandates on Form 6-K became effective as of December 18, 2023.

In the realm of cybersecurity risk management and governance, the newly mandated disclosures are expected to come under intense scrutiny, particularly by private litigants and the SEC in cases of material cybersecurity incidents. Given this heightened focus, it is imperative for companies to ensure that their disclosures accurately reflect their actual processes. It is equally crucial for companies to be cautious in their portrayal, avoiding any exaggeration of their defensive measures, expertise, procedures, or preparedness to handle cybersecurity threats.

Governance

FPIs must provide (1) a description of their board of director's role in the oversight of risk stemming from cybersecurity threats, including whether the responsibility has been delegated to a committee or sub-committee, and (2) a description of management's role and expertise in handling material cybersecurity risks. The regulation includes a non-exhaustive list of items FPIs should include in their disclosures regarding management's role, namely a description of (1) management's reporting procedures to the board or committee, (2) the overall risk identification, monitoring, mitigation and remediation process and (3) the positions or committees within management responsible for managing cybersecurity threats and the relevant individuals' applicable experience.

Risk Management and Strategy

FPIs must disclose their processes for identifying, assessing and managing material risks from cybersecurity threats, including how their process is integrated into the issuer's overall risk management system, whether any third-parties are utilized and, if so, what processes are in place to oversee cybersecurity risk stemming from the use of a third-party provider.

Finally, FPIs must also describe the material affects or reasonably likely material affects prior cybersecurity incidents have had on the issuer, including its financial condition, business strategy and results of operations.

XBRL Tagging

Commencing with the 2024 20-F, FPIs must tag their 20-F cybersecurity disclosures in Inline XBRL.

Clawback Rule

The SEC has adopted a final rule that implements Section 954 of the Dodd-Frank Act, which requires all issuers listed on a national securities exchange, including FPIs, to adopt and comply with a written clawback policy that requires them to recover excess incentive compensation from executive officers in the event such compensation was awarded on the basis of financial statements that were later found to have had material misstatements.

Checkbox Disclosure

In this regard, the Form 20-F now includes two check boxes relating to compliance with the clawback rules. The first check box asks whether the Form 20-F contains financial statements reflecting a correction of an error to previously issued financial statements and the second check box asks whether any of the

corrections are restatements requiring a recovery analysis of incentive-based compensation pursuant to the clawback rules.

Narrative Disclosure

The new rule also requires FPIs to include in their annual reports on Form 20-F, narrative disclosure related to actions taken pursuant to the clawback policy if a recovery of compensation is triggered as a result of a restatement.

Generally, issuers will need to describe how they applied their policy, amounts of erroneously awarded compensation, any estimates utilized in the recovery analysis, outstanding amounts to be recovered, and any impracticability determinations.

Exhibit

In addition, FPIs must file their NYSE / Nasdaq compliant clawback policy as a new exhibit to their 2023 Form 20-F.

Disclosure Focus Areas

During their annual review, FPIs should evaluate the need for any revisions to their risk factor disclosure, disclaimers for forward-looking statements, other forward-looking disclosures, operating and financial review and prospects, or business section. For the fiscal year concluding on December 31, 2023, FPIs should also take into account relevant issues that have been highlighted by the SEC, and ensure that any required disclosure modifications are consistently applied across their Form 20-F.

Geopolitical Disclosures and Sanctions

Due to current geopolitical conditions, including the Israel-Hamas War, the ongoing Russia-Ukraine War and conflict between China and Taiwan, reporting companies may have disclosure obligations under the federal securities laws associated with the direct or indirect impact that such ongoing geopolitical events and the related international responses thereto have had or may have on their business.

In May 2022, the SEC issued a sample letter providing examples of the type of expected disclosures related to the impact of Russia's invasion of Ukraine. The letter recommended that companies disclose information regarding their direct or indirect exposure to the affected jurisdictions, including any reliance on goods or services sourced from those areas. It also advised companies to report on actual or potential disruptions in their supply chains or business relationships, as well as any connections to, or assets in, such jurisdictions. While the SEC has not issued similar letters for other ongoing geopolitical conflicts, reporting companies should analyze their risk exposure in a similar manner and include disclosures along similar lines as those outlined in the sample letter.

In addition, the SEC has increasingly focused on disclosures related to dealings in countries that are the subject of U.S. sanctions enforced by the Treasury Department's Office of Foreign Assets Control (OFAC). FPIs should continue to evaluate whether they are dealing directly or indirectly with a country, region, entity or individual subject to either comprehensive or targeted sanctions by OFAC.

Non-GAAP Financial Measures

As with prior years, the use of financial measures that do not conform either to U.S. GAAP or IFRS (“non-GAAP financial measures”) continues to be a main focus area for the SEC Staff in its review of Form 20-F annual reports.

The SEC has had particular focus on (i) non-GAAP financial measures that exclude items that could be considered normal, recurring expenses and (ii) compliance with the “equal or greater prominence” requirement.

In December 2022, the SEC published updated (“C&DI”), which provided guidance on the SEC’s analysis of what may be considered a normal operating expense. The C&DI explains that a broad expanse of factors must be assessed, including the nature and effect of the non-GAAP adjustment and how it relates to the company’s operations, revenue generating activities, business strategy, industry and regulatory environment.

In addition the updated C&DI provided a list of examples of non-GAAP financial measures that are impermissibly more prominent than the corresponding GAAP measure. Updated examples include (i) presenting a ratio calculated using a non-GAAP financial measure without presenting the ratio calculated using the most directly comparable GAAP measure with equal or greater prominence, and (ii) presenting charts, tables or graphs of non-GAAP financial measures without presenting corresponding charts, tables or graphs of the comparable GAAP measures with equal or greater prominence.

Effects of Current Financial and Capital Markets Conditions

Although inflationary pressures appear to have eased, the effect of sustained high interest rates and inflation on the financial and capital markets continues to be a relevant factor to be included in disclosures. FPIs are advised to review the adequacy of their disclosures, including in risk factors, in regard to the current capital and financial markets and related implications on the FPI’s ability to borrow funds or refinance existing indebtedness, as well as the potential impacts on the issuer’s ability to raise funds in the public or private markets. Quantitative and qualitative disclosures about market risk have also drawn comment lately in connection with disclosure regarding interest rate risk and liquidity, as such, if a company uses a sensitivity analysis, it should be described.

Human Capital

The SEC is expected to amend its disclosure rules to require FPIs to provide a description of their human capital resources, including any human capital measures or objectives that they focus on in managing their business. Although the scope and timing of the proposed rules is uncertain, it is expected that they will require comprehensive disclosures relating to human capital metrics and demographics, possibly including: (i) the number of employees and contractors, (ii) activities undertaken for attraction and retention of talent, (iii) development and training of employees, (iv) diversity and inclusion of employees, (v) the health and safety of employees, (vi) the compensation and benefits of employees, (vii) the engagement and satisfaction of employees, and (viii) any other human capital factors that are material to their business. In addition, FPIs should also evaluate effects stemming from long-term reliance on hybrid work arrangements, including impacts on productivity and profitability, as well as on operating expenses and overhead costs and / or risks related to return to office programs, including their impact on workforce retention and issues stemming from non-compliance.

FPIs should begin to prepare by developing controls and procedures in order to be able to provide and comply with these expected disclosures.

ESG

The SEC has not issued any specific rules on environmental, social, and governance (ESG) disclosure. Nonetheless, the SEC has indicated that it is actively monitoring and evaluating ESG disclosures. Accordingly, FPIs should carefully consider such types of disclosures. If and when doing so, reporting companies must be vigilant and ensure that their disclosures are consistent with information posted on their websites or provided to other stakeholders, in addition to it being accurate, reliable and balanced, such that it also addresses ESG-related risks. The new International Financial Reporting Standards sustainability and climate-related disclosure standards are a useful tool in matters related to ESG disclosures.

Climate-Related Disclosures

Although the SEC has not yet issued final rules on climate-related disclosures, climate change remains an area of focus in their review of Form 20-Fs. Until the final rules are adopted, companies should continue to follow the existing SEC guidance on climate disclosure, including the guidance provided in the September 2021 sample comment letter—which included expected disclosures in connection with climate-related or natural disaster-related risks and corresponding financial metrics, such as, increases in the cost of insurance coverage for entities with operations in high fire, hurricane or flood risk areas in the FPI's description of business, legal proceedings, risk factors, and operating and financial review and prospects.

Share Repurchase Rules

On May 3, 2023, the SEC adopted new enhanced disclosure requirements for issuers' repurchases of equity securities. The amendments require issuers to provide the following quantitative and qualitative information on a quarterly basis: (1) daily repurchase data in a tabular format; (2) checkbox disclosure indicating whether Section 16 officers and directors in issuer securities in the four business day period before or after the issuer's public announcement of a repurchase plan or program; (3) enhanced narrative disclosures related to an issuer's repurchase programs and practices; and (4) disclosure of an issuer's adoption or termination of a Rule 10b5-1 plan. FPIs were required to comply with the adopted rules beginning in 2024, nonetheless, on December 19, 2023, the U.S. Court of Appeals for the Fifth Circuit vacated the rule. The court's decision means that issuers, including FPIs, do not need to comply with the new share repurchase rules in their upcoming annual reports on Form 20-F.

Nasdaq Diversity Rules

In 2021, the SEC approved Nasdaq's proposed board diversity disclosure rule, requiring Nasdaq-listed companies to disclose their directors' voluntary self-identified gender and racial characteristics, and LGBTQ+ status. Listed FPIs must have, or explain why they do not have, at least one diverse director by December 31, 2023 and two diverse directors by December 31, 2025. In addition, FPIs must disclose in their Form 20-F the company's board diversity matrix. Nasdaq-listed FPIs may instead opt to post the information on the company's website, provided the company posts the disclosure concurrently with the filing of its Form 20-F and submits a URL link to the disclosure via email (drivingdiversity@nasdaq.com) or through the Nasdaq Listing Center, within one business day after such posting.

Crypto Assets

In December 2022, the SEC published a sample letter to address expected disclosures in light of recent developments in the crypto asset markets. In the sample letter, the SEC once again reminded reporting companies that they may have disclosure obligations under the federal securities laws in connection with their direct or indirect exposure to the various bankruptcies among crypto asset market participants and the impacts of the related widespread disruption on their business. As such, as these disruptive market events continue to develop and stabilize, FPIs should evaluate any relevant updates regarding their exposure to crypto assets, and include any business description, risk factor, or operating and financial review and prospects disclosures accordingly.

China-Specific Disclosures

In July 2023, the SEC published a sample letter to address expected disclosures in regard to China. In the sample letter, the SEC included three focus topics related to China-specific matters: (i) mandatory disclosure obligations under the Holding Foreign Companies Accountable Act, including specific requirements for Commission-Identified Issuers, (ii) China-based companies are expected to make more specific and prominent disclosure about material risks related to the role of the government of the People's Republic of China in their operations, and (iii) companies may need to make disclosures related to the material impacts of certain statutes, including the Uyghur Forced Labor Prevention Act. FPIs should evaluate any relevant updates regarding the China-specific reporting requirements.

Machine Learning Technologies (AI)

With the rise of the adoption and implementation of large language and other generative machine learning models in companies' businesses, the SEC is expected to continuously and increasingly focus on AI. Although no specific rule has been issued in such regard, FPIs should monitor the evolution and use of machine learning and generative AI in their business, including risks arising from insufficient human oversight of AI or a lack of controls and procedures monitoring the use of AI in day-to-day operations as well as from potential future competitive disadvantages related to a lack of investment in AI tools.

Additional SEC and Nasdaq Updates

Shortened Settlement Cycle

On February 15, 2023, the SEC adopted the final rule to shorten the standard settlement cycle for most broker-dealer transactions from two business days after the trade date (T+2) to one business day after the trade date (T+1). In addition to shortening the standard settlement cycle, the final rule will require broker-dealers to either enter into written agreements or establish, maintain, and enforce written policies and procedures reasonably designed to ensure the completion of allocations, confirmations, and affirmations as soon as technologically practicable and no later than the end of the trade date.

The SEC adopted a May 28, 2024 compliance date, which follows a federal holiday during which both markets and banks will be closed, providing market participants with a three-day weekend to facilitate the transition to a T+1 standard settlement cycle.

Waivers to Code of Conduct on Form 6-K for Nasdaq-listed FPIs

Commencing on September 20, 2023, Nasdaq-listed FPIs are required to disclose waivers to the code of conduct for directors or executive officers within four business days by either distributing a press release or disclosing it in a Form 6-K. Alternatively, an FPI that has previously stated in its most recently filed Form 20-F both its intention to disclose any amendments or waivers to its code of conduct on its website, may within four business days, disclose any such waivers by posting the information on its website. FPIs opting to disclose in this manner, must ensure the information remains posted to the website for at least 12 months and that such information is retained for at least another 5 years). NYSE-listed FPIs can continue to follow home country practice in connection with these matters.

SEC Filing Fees

Effective October 1, 2023, the filing fee that issuers must pay to register their securities with the SEC increased, from \$110.20 per million dollars to \$147.60 per million dollars. The SEC makes annual adjustments to the rates for fees and this most recent increase represents a steep increase compared to recent history, mostly driven by inflation. The annual rate changes take effect on the first day of each U.S. government fiscal year, i.e., October 1.

D&O 10b5-1 Trading Plans and Insider Trading Policies

Following the adoption of the final rules on Rule 10b5-1 trading arrangements and other securities transactions involving corporate insiders, FPIs will be required to disclose in Form 20-F whether the company has adopted (and if not, an explanation of why not) insider trading policies and procedures for directors, officers and employees, that are reasonably designed to promote compliance with insider trading laws, and to file its insider trading policy as an exhibit to the Form 20-F.

Although the final rules became effective on February 27, 2023, FPIs will be required to comply with the new disclosure requirements on Form 20-F in the first filing that covers the first full fiscal period that begins on or after April 1, 2023, which means the 2024 Form 20-F filed in 2025 for companies reporting on the calendar year.

Collapse of Potential Expansion of Section 16 to FPIs

For the past couple of years there has been legislative attempts to rescind the Section 16 exemption for FPIs. Commencing in 2022, the U.S. Senate introduced a bill intended to address purported trading abuses by insiders of certain FPIs, particularly Russian and Chinese issuers, by requiring such FPI insiders to comply with Section 16. The rationale of the bill being to provide transparency regarding insider sell-offs at FPIs and empower U.S. regulatory agencies to better identify, investigate and prosecute insider trading.

Compliance with Section 16 would require insiders to file reports with the SEC to disclose transactions in company securities and, subject to certain exemptions, create liability for “short-swing” profits liability on Insiders. The application of Section 16 to FPIs would have represented a major shift in how FPIs and their directors, officers and 10% shareholders are treated under U.S. securities laws and would have imposed a substantial new compliance burden on FPIs and their insiders, including becoming subject to SEC enforcement actions for failing to file required Section 16 reports.

The bill did not progress in 2022 and was re-introduced in 2023, re-emerging as part of U.S. Senate’s version of the National Defense Authorization Act for 2024 (the “NDAA”). Fortunately, the proposed

rescission of the Section 16 exemption was not included in the bill presented by the U.S. House of Representatives, being dropped in conference. As such, any such rescission appears to be dead for now.

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