

SEC Disclosures Issues and Developments for Foreign Private Issuers

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Agenda

- MD&A and financial statement considerations
- Key performance indicators and non-GAAP measures
- Areas of focus for SEC comments in anticipation of upcoming 20-Fs and 40-Fs, including climate change and cybersecurity matters
- SEC and PCAOB implementation of the Holding Foreign Companies Accountable Act
- Areas of likely SEC-focus in the coming months

MD&A and Financial Statement Considerations

MD&A Requirements

- Purpose of the MD&A is to provide investors with management's explanation of factors that have materially affected the issuer's historical financial condition and results of operations and an assessment of known trends and uncertainties that management anticipates will have a material effect in the future
- If applicable, a foreign private issuer should refer to the reconciliation to U.S. GAAP and discuss any aspects of U.S. GAAP not covered in the reconciliation that it believes are necessary to understanding the financial statements as a whole

Recent Amendments to MD&A

- The SEC recently adopted changes to Form 20-F in order to:
 1. Eliminate duplicative disclosures, and
 2. Modernize and enhance MD&A disclosures for the benefit of investors, while simplifying compliance efforts for registrants
- Compliance date for most foreign private issuers will be this year's upcoming Form 20-F filing

Results of Operations

- Companies must disclose known events or trends that are reasonably likely to cause a material change in the relationship between costs and revenues, such as known or reasonably likely future increases in:
 - Costs of labor or materials
 - Price increases
 - Inventory adjustments
- Companies must disclose the reasons underlying material changes in net sales or revenues
- If line item changes are material, disclose the underlying reasons for these material changes in quantitative and qualitative terms
- Elimination of specific disclosure with respect to the impact of inflation and changing prices
 - Companies are still required to discuss these matters if they are part of a known trend or uncertainty that has had, or is reasonably likely to have, a material impact on net sales or revenue
 - This allows companies to focus on material disclosure that is tailored to their business, facts and circumstances

Off-Balance Sheet Arrangements

- Companies should consider off-balance sheet arrangements within the broader context of their MD&A
- Companies should discuss commitments and obligations arising from arrangements with unconsolidated entities or persons that have, or are reasonably likely to have, a material current or future effect on their:
 - Financial condition,
 - Changes in financial condition,
 - Revenues or expenses,
 - Results of operations,
 - Liquidity,
 - Cash requirements, or
 - Capital resources.

Critical Accounting Estimates

- If line item changes are material, disclose the underlying reasons for these material changes in quantitative and qualitative terms
- Disclosure of critical accounting estimates explicitly required
 - Qualitative and quantitative information necessary to understand
 - The estimation uncertainty
 - Impact the critical accounting estimate has or is reasonably likely to have on financial condition or results of operations

Financial Statement Requirements

- Annual audited and interim unaudited financial statements in a registration statement may be prepared using either U.S. GAAP, IASB IFRS, or local GAAP
 - Audited financial statements must be accompanied by an audit report
- Items that frequently require discussion and quantification as a result of the reconciliation requirements include stock compensation, impairments, deferred or capitalized costs, foreign currency translation, derivatives, consolidation, retirement obligations, research and development, tax expenses or deferrals and revenue recognition

Periods for Rule 3-05 Financial Statements

PERIODS TO BE PRESENTED	
Significance Level	Required Financial Periods
If all significance tests less than 20%	No Rule 3-05 Financial Statements required
If any significance test greater than 20% but none exceed 40%	One year of audited financial statements; unaudited financial statements for most recent interim period (but no corresponding prior year interim period)
If any significance test greater than 40%	Two years of audited financial statements and unaudited financial statements for most recent, and corresponding prior year, interim period

Practical Considerations

Financial disclosures *re* acquired businesses

The Amended Rules:

- Ease burdens and costs involved in preparation of financial statements
 - Maximum of two (*instead of three*) years of audited annual financials
 - Corresponding prior year interim period required only at more than 40% significance
 - Increased significance threshold for dispositions from 10% to 20%
 - Permit abbreviated financials for acquisitions of a component of an entity
 - Allow omission of target financials once business included in registrant's post-acquisition financial statements for nine months or one year
 - Eliminated required three years of audited annual financials if real estate operation acquired from a related party

Practical Considerations

Financial disclosures *re* acquired businesses (*cont'd*)

The Amended Rules:

- Assist registrants make more meaningful significance determinations
 - Using aggregate worldwide market value for investment test corrects fair value vs. book value mismatch in investment test under Old Rule
 - Adding revenue component to income test prevents anomalous results, especially for registrants with net loss or low net income
- Introduce new obligations and challenges for registrants
 - Management's Adjustments, while optional, require management to present reasonably estimable synergies and dis-synergies of the acquisition and to have a reasonable basis for each adjustment
 - Requires management to state that pro formas reflect all Management's Adjustments that are, in their opinion, necessary to a fair statement of pro formas
 - Registrants will need to get used to presenting pro formas under Amended Rules, including presentation of "Transaction Accounting Adjustments," "Autonomous Entity Adjustments" and related explanatory notes

Practical Considerations

Financial disclosures *re* acquired businesses (cont'd)

A few practical reminders and tips for reporting companies:

- Assess how Amended Rules impact your disclosures
 - Public companies that engage or are considering engaging, in acquisitions or dispositions should involve their accounting departments and counsel
- Pay attention to the SEC's reminder that financial disclosures must be complete and not misleading:
 - *"In adopting these changes, we note that regardless of the number of years presented, if trends depicted in Rule 3-05 Financial Statements are not indicative or are otherwise incomplete, 17 CFR 210.4-01(a) ('Rule 4-01(a)') requires that a registrant provide 'such further material information as is necessary to make the required statements, in light of the circumstances under which they are made, not misleading.'"*
- Remember that Rule 3-13 waiver requests are available and can be utilized by registrants

Key Performance Indicators and Non-GAAP Measures

Key Performance Indicators

- On January 30, 2020, the SEC provided guidance regarding the disclosure of key performance indicators (“KPIs”) and metrics used in the MD&A section.
 - Similar to earlier concerns raised by the SEC with respect to the use of non-GAAP financial measures.
- The SEC’s Division of Enforcement has taken action in recent years against companies relating to the use of misleading key performance metrics.
- Item 303(a) of Regulation S-K requires discussion of “such other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations.” In addition, Instruction 1 to Item 303(a) requires discussion of “statistical data that the registrant believes will enhance a reader's understanding of its financial condition, changes in financial condition, and results of operations.”
- Guidance reminds each registrant that uses metrics in its MD&A that, under existing requirements, it “need[s] to include such further material information, if any, as may be necessary in order to make the presentation of the metric, in light of the circumstances under which it is presented, not misleading.”

Key Performance Indicators *(cont'd)*

- SEC generally expects that a metric be accompanied by the following disclosure:
 - A clear definition of the metric and how it is calculated;
 - A statement indicating the reasons why the metric provides useful information to investors; and
 - A statement indicating how management uses the metric in managing or monitoring the performance of the business.
- If a company changes the calculation method or presentation of a metric from one period to another or otherwise, it should consider disclosing, to the extent material:
 - The differences in the way the metric is calculated or presented compared to prior periods;
 - The reasons for the change;
 - The effects of the change on the amounts or other information being disclosed or previously reported; and
 - Other differences in methodology and results that would reasonably be expected to be relevant to an understanding of the company's performance or prospects.
- Depending on significance, it may be necessary to recast prior metrics to conform to the current presentation following a change in methodology.

COVID-19 Trends

- Since the onset of the COVID-19 pandemic, the SEC Staff has issued many comments on registrants' accounting and disclosures related to COVID-19
- Registrant's disclosure should include the impact of the COVID-19 impact in the MD&A section
- Do not just provide general statements about uncertainties created by the pandemic; instead provide disclosure tailored to the registrant's particular facts and circumstances
- Registrants that want to adjust GAAP results as a result of the effects of the COVID-19 pandemic should limit non-GAAP adjustments to those that are clearly related to the pandemic

COVID-19 Trends *(cont'd)*

Example SEC Comment

We note that the majority of your sales are in domestic markets and your most significant customer operates primarily in [Location X]. Given the continued rise in COVID-19 cases throughout the United States, including [Location X], please ensure that your MD&A disclosures in your upcoming Form 10-Q for the period ended June 30, 2020, address the matters described in CF Disclosure Guidance: Topic 9A. Please similarly revise your risk factor and financial statement disclosures as appropriate.

COVID-related Non-GAAP Measures

- When you take a defined GAAP measure and either exclude items that are components or include items that aren't components, the result is a non-GAAP financial measure.
- In late March 2020, SEC Staff at the Division of Corporation Finance issued CF Disclosure Guidance: Topic No. 9, *Coronavirus (COVID-19)* ("Topic 9 Guidance"), in which they frowned upon companies giving way to any pandemic-driven pressure to "present ... non-GAAP financial measures or metrics for the sole purpose of presenting a more favorable view of the company."
- Instead, the SEC Staff encouraged companies to share "why management finds the measure or metric useful and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations."

New Requirements This Year

New Annual Report Disclosure Requirements

- SEC amended Forms 10-K, 20-F, and 40-F to include new Items 9C, 16I, and B(18), which implement the HFCAA
 - Disclosure Regarding Foreign Jurisdictions that Prevent Inspections
 - PCAOB has identified registered public accounting firms headquartered in mainland China and Hong Kong
 - SEC will use annual reports covering FY 2021 to identify registrants
- Data tagging requirements
 - Apply to everyone filing an annual report that uses Inline XBRL
 - Name of auditor, location of audit report issuance, and PCAOB ID number
 - Location of information not specified

Nasdaq Board Diversity Standards

- New rules require Nasdaq-listed companies to have, or to explain why they do not have, at least two diverse directors, including:
 1. At least one director who self-identifies as female (regardless of designation at birth) and
 2. At least one director who self-identifies as either an underrepresented minority or as LGBTQ+
- Foreign issuers (including foreign private issuers) may satisfy the board-composition requirement by having two directors who self-identify as female
- The new rules also require Nasdaq-listed companies to annually disclose diversity information in a standardized board diversity matrix

Areas of Focus for SEC Comments



SEC Staff Disclosure Areas of Focus

- COVID-19
- Climate Change
- LIBOR Cessation
- Cybersecurity
- China-based Issuers

SEC Staff Comments: COVID-19

- At the beginning of the pandemic, many companies addressed their risk factor disclosures by including a generic pandemic-related risk. As time has passed, the expectation is that an issuer will update specific, tailored risks

Sample SEC comment

We note your disclosure that the extent to which your operations may be impacted by the COVID-19 pandemic will depend largely on future developments, which are highly uncertain and cannot be accurately predicted, including new information that may emerge concerning the severity of the outbreak and actions by government authorities to contain the outbreak or treat its impact. Please amend your risk-factor disclosure to provide more detailed risks related to the COVID-19 pandemic, tailored to your specific facts and circumstances. For guidance, see CF Disclosure Guidance: Topic No. 9 (25 March 2020)

- Review existing risk factors, and consider whether these should be revised to address events that already have come to pass, and to address new risks that have been identified as the pandemic has become more prolonged and its effects more wide-reaching
- COVID-19 risks may have evolved over time requiring modification, especially as a result of vaccines, vaccine hesitancy, variants and break-through infections

SEC Staff Comments: Climate Change

- Division of Corporation Finance Sample Letter

Sample SEC Comment

Disclose the material effects of transition risks related to climate change that may affect your business, financial condition, and results of operations, such as policy and regulatory changes that could impose operational and compliance burdens, market trends that may alter business opportunities, credit risks, or technological changes.

- Re-read the 2010 Commission Guidance Regarding Disclosure Related to Climate Change and consider whether revised or enhanced disclosure is required
- Evaluate disclosure controls and procedures with respect to climate change

SEC Enforcement

- Climate and ESG Task Force
 - “The initial focus will be to identify any material gaps or misstatements in issuers’ disclosure of climate risks under existing rules.”
- Cyber Unit
 - “The Cyber Unit will focus the Enforcement Division’s substantial cyber-related expertise on targeting cyber-related misconduct...”

SEC Enforcement *(cont.)*

- Pearson plc, a London-based educational publishing and services company, learned of a cyber breach in March 2019
- The company's July 2019 semi-annual report on Form 6-K filed with the SEC contained the same risk factor disclosure as the prior report, describing a hypothetical risk of a data breach:
 - "Risk of a data privacy incident or other failure to comply with data privacy regulations and standards and/or a weakness in information security, including a failure to prevent or detect a malicious attack on our systems, could result in a major data privacy or confidentiality breach causing damage to the customer experience and our reputational damage, a breach of regulations and financial loss."
- SEC found that the company made misleading statements and omissions about the data breach

SEC Guidance

- 2010 Commission Guidance Regarding Disclosure Related to Climate Change
 - Specific risks faced as a result of climate change legislation or regulation
 - Business trends: legal, technological, political and scientific developments regarding climate change
 - Indirect risk from climate change impact on a registrant’s reputation
- 2018 Commission Statement and Guidance on Public Company Cybersecurity Disclosures
 - Provides a list of issues to consider when drafting cybersecurity risk factor disclosure
 - “In meeting their disclosure obligations, companies may need to disclose previous or ongoing cybersecurity incidents or other past events in order to place discussions of these risks in the appropriate context.”

SEC Staff Comments to China-Based Companies

- SEC Staff recently published a sample comment letter to China-based companies
- “For China-based registrants with ongoing periodic reporting obligations or that are engaged in capital raising transactions via takedowns from an effective shelf registration statement, the Division expects your prospectus supplements or incorporated periodic or current reports, and future periodic reports, to disclose the information and risks discussed [in the sample comment letter].”

Sample SEC Comment

Provide a description of how cash is transferred through your organization and disclose your intentions to distribute earnings or settle amounts owed under the VIE agreements. State whether any transfers, dividends, or distributions have been made to date between the holding company, its subsidiaries, and consolidated VIEs, or to investors, and quantify the amounts where applicable. Provide cross-references to the condensed consolidating schedule and the consolidated financial statements.

SEC and PCAOB Implementation of the Holding Foreign Companies Accountable Act

Setting the Stage

- On December 18, 2020, President Trump signed the Holding Foreign Companies Accountable Act (the “HFCAA”) into law.
- Prohibits foreign issuers from listing and trading their securities on any U.S. securities exchange (*e.g.*, NYSE or Nasdaq) or over-the-counter if authorities in the foreign issuer’s home jurisdictions prohibit the Public Company Accounting Oversight Board (the “PCAOB”) from inspecting the issuer’s registered public accounting firm.
- Aimed at U.S.-listed Chinese companies
- Puts U.S.-listed Chinese companies in a difficult position
- Compliance may be impossible
- Chinese regulations impose limitations on the inspection of public accounting firms based in China and Hong Kong by foreign regulators, including the PCAOB

HFCAA: Disclosure and PCAOB Inspection

- HFCAA triggered if issuer retains a registered public accounting firm that has a branch or office that:
 - (i) is located in a foreign jurisdiction, and
 - (ii) the PCAOB is unable to inspect or investigate completely because of a position taken by an authority in the foreign jurisdiction
- Also requires issuers to submit to the SEC documentation showing that the issuer is not owned or controlled by a governmental entity
- Issuers identified by the SEC must be audited by an accounting firm that the PCAOB can inspect or investigate
- Failure to allow PCAOB inspection for three consecutive years, SEC prohibits trading on a national securities exchange or through any other method regulated by the SEC, including over-the-counter trading
- Trading prohibition can be removed:
 - Issuer certifies it has retained a registered public accounting firm that the PCAOB has inspected to the satisfaction of the SEC
- Failure to comply again = trading suspended for a minimum of 5 years

HFCAA: Additional Disclosure Requirements

- In any year when an issuer uses a PCAOB-Identified Firm to prepare its audit report, the issuer must disclose in its annual report:
 - That a non-PCAOB inspected accounting firm prepared its audit report;
 - Percentage of shares of the issuer owned by governmental entities;
 - Whether governmental entities in the foreign jurisdiction of the accounting firm have a controlling financial interest in the issuer;
 - Name of each official of the Chinese Communist Party who is a member of the board of directors of the issuer; and
 - Whether the constitutive documents of the issuer contain any charter of the Chinese Communist Party, including the text of any such charter.

Implementation by the SEC and PCAOB

- Interim final rulemaking for the disclosure requirement adopted by the SEC on March 18, 2021
- PCAOB adopted a framework to make its determinations regarding its ability to inspect or investigate audit firms as required by the HFCAA, on September 22, 2021
- On December 2, 2021, the SEC adopted amendments to finalize the interim final rules, at the same time unexpectedly adopting final rules to implement the HFCAA's trading prohibition without the anticipated notice and comment process
- PCAOB published its first report on December 16, 2021, identifying registered public accounting firms in mainland China and Hong Kong as PCAOB-Identified Firms

Some Options for U.S.-Listed Chinese Companies

- Up to three years before non-compliance would compel a delisting
- Could be reduced to two years if pending legislation is passed and signed into law
- Options available to a U.S.-listed Chinese issuer:
 - Going private
 - Voluntarily delisting and deregistering (“going dark”)
 - Secondary listing outside of the United States, such as Hong Kong

Expected Areas of SEC Focus

SEC Developments Relating to ESG Disclosures

- Division of Corporation Finance Climate Change Comment Letters
- Enforcement Climate and ESG Task Force
- Rulemaking on the Horizon
 - Disclosure relating to climate risk
 - Disclosure relating to human capital management, including workforce diversity
 - Disclosure relating to corporate board diversity

Other SEC Rulemakings

- Rule 10b5-1 and Insider Trading
- Share Repurchase Disclosure Modernization
- Cybersecurity Risk Governance

Disclosure Controls and Procedures: Rules

- Exchange Act Rules 13a-15 and 15d-15 require a company's principal executive officer and principal financial officer to make certifications regarding the maintenance and effectiveness of disclosure controls and procedures. The rules define "disclosure controls and procedures" as controls and procedures designed to ensure that information required to be disclosed by the company in its Exchange Act reports is **(1)** "recorded, processed, summarized and reported, within the time periods specified in the Commission's rules and forms," **and (2)** "accumulated and communicated to the company's management ... as appropriate to allow timely decisions regarding required disclosure."

Disclosure Controls and Procedures: SEC Guidance

- “When KPIs and metrics are material to an investment or voting decision, the company should consider whether it has effective controls and procedures in place to process information related to the disclosure of such items to ensure consistency as well as accuracy.”
 - Commission Guidance on Management’s Discussion and Analysis of Financial Condition and Results of Operation, Release Nos. 33-10751; 34-88094; FR-87 (Feb. 25, 2020).
- A company’s disclosure controls and procedures should not be limited to disclosure specifically required, but should also ensure timely collection and evaluation of “information potentially subject to [required] disclosure,” “information that is relevant to an assessment of the need to disclose developments and risks that pertain to the [company’s] businesses,” and “information that must be evaluated in the context of the disclosure requirement of Exchange Act Rule 12b-20.”
 - Certification of Disclosure in Companies’ Quarterly and Annual Reports, Release No. 33-8124 (Aug. 28, 2002).

Disclosure Controls and Procedures: Practice Tips

- Policy
 - Even if the policy is drafted comprehensively to focus on process, substance should be given consideration, as well.
 - Remember that DCP apply to metrics, KPI, and non-GAAP
- Establish a disclosure committee with a clearly defined role
- Build out a timetable to filing and stick to it
- Be prepared for situations where something may be considered material in hindsight

Disclosure Controls and Procedures: SEC Enforcement

- Pearson settlement also found the company had inadequate disclosure controls and procedures.
- SEC order emphasizes that although protecting customer data was critical to Pearson's business, and that Pearson had identified the risk for unauthorized access to this data as significant, Pearson failed to "maintain disclosure controls and procedures designed to analyze or assess such incidents for potential disclosure in the company's filings."

Internal Controls over Financial Reporting

- Sarbanes-Oxley Act of 2002 Section 404
- 404(a) Rules Required -- The Commission shall prescribe rules requiring each annual report required by section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) to contain an internal control report, which shall —
 - (1) state the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and
 - (2) contain an assessment, as of the end of the most recent fiscal year of the issuer, of the effectiveness of the internal control structure and procedures of the issuer for financial reporting.
- 404(b) Internal Control Evaluation and Reporting -- With respect to the internal control assessment required by subsection (a), each registered public accounting firm that prepares or issues the audit report for the issuer shall attest to, and report on, the assessment made by the management of the issuer. An attestation made under this subsection shall be made in accordance with standards for attestation engagements issued or adopted by the Board. Any such attestation shall not be the subject of a separate engagement.

Internal Controls over Financial Reporting *(cont.)*

- Andeavor LLC entered into a Rule 10b5-1 plan to repurchase shares while the CEO had plans to discuss a potential merger with another company
- SEC found trading while in possession of MNPI, but no charges of insider trading
- SEC order found that the company failed “to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurance that stock buyback transactions were executed in accordance with management’s authorization.”
 - “abbreviated and informal process”

Supplemental Materials

Read more:

- [SEC Proposes New Rules on Share Repurchase Disclosure](#)
- [SEC Adopts Interim Final Rules To Implement the Holding Foreign Companies Accountable Act](#)
- [SEC Approves Nasdaq Board Diversity Rule](#)
- [SEC Issues MD&A Guidance](#)



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Supplemental Materials

SEC Reporting Issues for Foreign Private Issuers

SEC Reporting Issues for Foreign Private Issuers (Portfolio 5507)

Click [here](#) to learn more

- This Portfolio discusses the securities laws applicable to foreign private issuers that access the U.S. capital markets and the integrated disclosure system. The most recent edition includes updates related to foreign private issuers, SEC amendments, and requirements for financial instruments that are guaranteed and for guarantor financial information.

Description

For the best part of the 20th century and into the 21st century, the U.S. equities market has been the deepest, broadest, and largest equities market in the world. It is only natural to expect that an increasing number of foreign enterprises would seek to raise capital in the United States. In fact, it has become commonplace for foreign private issuers to execute public offerings in the United States. SEC reporting requirements for foreign private issuers have been influenced by the need to harmonize traditionally strong and precise U.S. disclosure standards with those of other increasingly significant, and now mature, foreign capital markets.

Bloomberg Tax & Accounting Portfolio 5507-4th, SEC Reporting Issues for Foreign Private Issuers, serves as a practical resource for both practitioners and their clients (foreign private issuers). The Portfolio is divided into two principal sections: “Regulatory Framework Applicable to Foreign Private Issuers” and “Preparing Annual Report on Form 20-F: A Guide.”

The first section discusses the securities laws applicable to foreign private issuers that access the U.S. capital markets and the integrated disclosure system applicable to foreign private issuers. Foreign private issuers that choose to access the U.S. capital markets may offer their securities in a private placement exempt from the registration requirements imposed by the U.S. securities laws. Alternatively, foreign private issuers may conduct a public offering in the United States by registering an offering of their securities pursuant to the Securities Act of 1933, as amended, and also register their securities for listing or trading on a U.S. securities exchange pursuant to the Securities Exchange Act of 1934, as amended. For foreign private issuers that have become U.S. reporting companies, Form 20-F is the principal form for regular reporting.

The second section of the Portfolio provides a detailed description of Form 20-F, with a focus on areas that have been revised or that are frequently the subject of SEC comments. This section also provides insight on the kind and quality of disclosure expected by the SEC. The discussion emphasizes financial disclosure, such as Operating and Financial Review and Prospects (which is very similar to Management’s Discussion and Analysis) and various accounting hot buttons. In addition, the analysis focuses on both ease of use for foreign private issuers with limited U.S. securities law experience and the detailed description that will be critical for U.S. securities lawyers and bankers who may not regularly work with foreign private issuer clients.

This Portfolio may be cited as Bloomberg Tax & Accounting Portfolio 5507-4th, Pinedo, SEC Reporting Issues for Foreign Private Issuers.



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