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SEC Disclosure Issues and Developments for FPIs and Preparing Your 20-F Filing

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Agenda

- Areas of focus for SEC comments in anticipation of upcoming 20-Fs
 - Cybersecurity disclosures
 - Rule 10b5-1 disclosures
 - Climate Change disclosures
 - Human Capital Management disclosures
- Implementation of the new clawback policy requirement
- Discussion of the Holding Foreign Companies Accountable Act
- SEC's recent approach of removing accommodations
- Updates to risk factor disclosures
- Areas of likely SEC focus in the coming months

Cybersecurity Disclosure

- On July 26, 2023, the SEC issued a release adopting final rules aimed at standardizing and enhancing disclosure relating to cybersecurity incidents and risk management processes.
- The SEC had proposed rules on March 9, 2022.
- New Form 6-K Disclosure: Incidents
 - National Security and Public Safety Delay
- New Regulation S-K Disclosure: Process
 - Addressing Cyber Processes
 - Boards and Governance

Cybersecurity: Foreign Private Issuers

Final Rules affecting Foreign Private Issuers		
Amendment to General Instruction B of Form 6-K	Foreign private issuers (“FPIs”) must furnish on Form 6-K information on material cybersecurity incidents that they disclose or otherwise publicize in a foreign jurisdiction, to any stock exchange, or to security holders.	Disclose timely, in a manner consistent with the general purpose and use of Form 6-K.
Item 16J on Form 20-F	FPIs must describe: <ul style="list-style-type: none">• Board’s oversight of risks from cybersecurity threats;• Management’s role in assessing and managing material risks from cybersecurity threats.	Disclose in FPI’s annual report only (<i>i.e.</i> , Form 20-F).

Cybersecurity: Effective Date

- With respect to compliance with the incident disclosure requirements in Form 6–K, all registrants other than smaller reporting companies needed to have begun complying by December 18, 2023.
 - Smaller reporting companies are being given an additional 180 days from the non-smaller reporting company compliance date before they must begin complying, on June 15, 2024.
- With respect to Item 16K of Form 20–F, all registrants must provide such disclosures beginning with annual reports for fiscal years ending on or after December 15, 2023.
- With respect to compliance with the structured data requirements, all registrants must tag disclosures required under the Final Rules in Inline XBRL beginning one year after the initial compliance date for any issuer for the related disclosure requirement.
 - For Form 6–K all registrants must begin tagging responsive disclosure in Inline XBRL beginning on December 18, 2024.
 - For Item 16K of Form 20–F, all registrants must begin tagging responsive disclosure in Inline XBRL beginning with annual reports for fiscal years ending on or after December 15, 2024.

Insider Trading – Annual Disclosure

- Annual disclosure of internal insider trading policies and procedures designed to promote compliance by directors, officers and the issuer, with insider trading laws
 - If an issuer has not adopted such policies it would have to disclose why it has not done so
 - Insider trading policies themselves must be included as Exhibit 19
 - FPIs to make similar annual disclosures in Form 20-F
- Unlike the proposal, issuers are not required to describe their policies and procedures within the body of the periodic report. Instead they must disclose the insider trading policy itself.
- Posting to the website is not enough

Climate Change Disclosure

- Existing SEC rules and guidance
 - Principles-based approach
 - 2010 climate change guidance
 - Comment letters/September 2021 sample letter
- Coordinate disclosure in 2024 annual report, proxy statement and any sustainability report; consider:
 - Climate change risk and risk management
 - Plans and costs for climate change mitigation strategies in MD&A
 - Climate change goals and GHG emission reporting

Human Capital Management Disclosure

- Human Capital added as a line item to Regulation S-K (Item 101(c))
- Wide variation in disclosure, with some common themes:
 - Diversity, equity and inclusion (DEI)
 - Geographic location of employees
 - Recruitment, turnover, retention, training and engagement
 - Remote/hybrid work and COVID-19

Clawbacks

- General rule: Mandatory clawback in the event of a restatement of erroneously awarded compensation that was received by a covered executive officer.
 - No discretion on enforcement: Only three limited exceptions (cost of enforcement exceeds recovery, home country law and tax-qualified plan)
 - No reduction for taxes paid by the Executives.
 - No indemnification of Executives.
 - No fault required.

Clawbacks

- Key Concepts:
- “Covered Executive” means all of the Company’s current and former executive officers using the Section 16 definition (generally includes “president, principal financial officer, principal accounting officer (or if there is no such accounting officer, the controller), any vice-president of the company in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions [for the company]”).
- “Erroneously Awarded Compensation” means the amount of Incentive-Based Compensation received by a Covered Executive that exceeds the amount of Incentive-Based Compensation that otherwise would have been received had it been determined based on the restated financial statements.

Clawbacks

- “Incentive-Based Compensation” means all compensation (including cash bonuses or other cash incentive awards (including any deferred element thereof), and vested and unvested equity awards, including options, restricted stock and restricted stock units, performance stock unit awards and performance stock awards) from the Company or a subsidiary of the Company that is granted, earned, or vested based wholly or in part upon the attainment of a Financial Reporting Measure.
- “Financial Reporting Measures” are measures that are determined and presented in accordance with the accounting principles used in preparing the Company’s financial statements, and any measures that are derived wholly or in part from such measures, including stock price and total shareholder return.
- “Restatement” means an accounting restatement of the Company’s financial statements due to material noncompliance with any financial reporting requirement under the federal securities laws, including any required accounting restatement to correct an error in previously issued financial statements that is material to the previously issued financial statements, or that would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period.

Clawbacks

- Compliant clawback policy needs to be effective with respect to incentive-based compensation received on or after October 2, 2023 (policy can be adopted up to December 1, 2023).
- Consider having clawback policy permit offset of future compensation to satisfy clawback requirements (including compensation paid by subsidiary or affiliate). Also consider provision that permits suspension of payment of incentive-based compensation during period of uncertainty whether clawback may be required.
 - May make enforcement easier.
 - May have tax benefits for Executive (need to analyze at the time and be careful of 409A).
- Require covered executives to sign an acknowledgement letter (use future grants as consideration).
- Add a provision that makes clear that the terms of the clawback policy trump any other agreement between company and executive.

Clawbacks—Reporting Requirements

- Clawback policy must be filed as exhibit 97 to annual report on 20-F
- Clawback-related checkboxes needed on cover page of annual report
- NYSE companies must confirm their timely adoption of the clawback policy to NYSE no later than December 31, 2023
- If a clawback is triggered additional disclosures regarding the company's actions must be disclosed

SEC's Recent Approach of Removing FPI Accommodations

- Public companies have increasingly been the focus of new SEC rules
- In many cases, the SEC's approach varies from its historical practice of providing accommodations to FPIs that take account of different treatment of the FPI under its home country disclosure and governance practices
- Increasingly, the SEC has elected to treat FPIs in the same manner as U.S. companies and therefore has increased disclosure and general regulatory burdens on FPIs
- Examples include the new clawback policy requirement, the new Rule 10b5-1 plan rule, share repurchase disclosures, cybersecurity disclosures and climate-related disclosures

Holding Foreign Companies Accountable Act and China-based Companies

Three areas of disclosure focus by the SEC for China-based Companies:

1. HFCAA
2. PRC Government Involvement
3. Uyghur Forced Labor Prevention Act (UFLPA)

Holding Foreign Companies Accountable Act and China-based Companies (cont.)

Holding Foreign Companies Accountable Act

- PRC companies identified by the SEC (known as Commission-Identified Issuers (CIIs)) must comply with the submission and disclosure requirements under the HFCAA and Commission rules for each year in which they are identified.
- Required disclosures include, among other matters
 - the percentage of shares owned by foreign government entities
 - whether government entities in the foreign jurisdiction have a controlling financial interest with respect to the issuer.
 - identification of all Chinese Communist Party (CCP) officials who are on the board of the issuer or the operating entity for the issuer
 - whether the issuer's articles of incorporation (or any equivalent organizing document) contain any "charter" of the CCP

Holding Foreign Companies Accountable Act and China-based Companies (cont.)

PRC Government Involvement

- Disclosure about material risks related to the role of the government of the PRC in the operations of China-based Companies.
- Includes disclosures about any material impacts that intervention or control by the PRC in the operations of these companies has or may have on their business or the value of their securities.
- “control” is defined broadly by US federal securities law
 - Means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

Holding Foreign Companies Accountable Act and China-based Companies (cont.)

Disclosures related to UFLPA

- On December 23, 2021, the Uyghur Forced Labor Prevention Act (UFLPA) became law in the United States.
- Prohibits the import of goods from the Xinjiang Uyghur Autonomous Region of the PRC.
- SEC is looking for tailored disclosure about the material impacts of the provisions of UFLPA on registrant's business.
 - impacts may include material compliance risks or material supply chain disruptions that companies may face if conducting operations in, or relying on counterparties conducting operations in, the Xinjiang Uyghur Autonomous Region.

Updates to Risk Factor Disclosures

- Inflation
 - returning to normal in US from late 2023/rampant elsewhere esp. emerging markets
 - differential effects: sales, cost of goods sold, investment valuation
- Interest Rates
 - Plateaued and stabilizing in US
 - Global financial market risks
 - Hedging arrangements to mitigate
- Middle East War (since October 2023)
 - Similar to Ukraine since February 2021
 - Supply chain (sourcing, costs)
 - Business continuity, operations
 - Geopolitical tensions (expropriation, government contracts)

Resources

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