

Key Considerations for the 2024 Annual Reporting Season: Your Upcoming Form 20-F and other FPI-Specific Considerations

January 26, 2024

This memorandum outlines key considerations from White & Case's Public Company Advisory Group for foreign private issuers ("FPIs") during the 2024 annual reporting season, divided into two sections: Form 20-F [Housekeeping Considerations](#) in Part I below, and [Disclosure Considerations](#) in Part II below.

Part I: Housekeeping Considerations

Our housekeeping reminders for preparing Annual Reports on Form 20-F are as follows:

- Remember to add the two new check box disclosures to the Form 20-F cover page and confirm whether or not to check these new boxes.** Starting [December 1, 2023](#), public companies are required to have in place a [clawback policy](#) that is compliant with stock exchange listing standards adopted pursuant to the [SEC's new clawback rules](#). As explained in [SEC C&DI 104.19](#), companies must now add two related check box disclosures to the cover page of their Form 20-Fs as follows:

New Check Box #1: 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. <input type="checkbox"/>

- **New Check Box #1: Considerations for Box Checking.** For New Check Box #1, companies need to confirm if their Form 20-F filing reflects the "correction of an error to previously issued financial statements." Three items of note for this analysis:
- (1) Exclude Adjustments Recorded in Current Period.** An "error" is defined in Accounting Standards Codification Topic 250, *Accounting Changes and Error Corrections*,¹ but the error only requires a company to check the box if it relates to "previously issued" financial statements—not financial statements for the current period.²
 - (2) Exclude Changes that Are Not "Error Corrections."** If a change to the financial statements does *not* represent an error correction under accounting standards (for example, the retrospective revision to reportable segment information, or the retrospective application of a change in accounting principle),³ then a company should not check this first box.

¹ See Footnote 72 of the [SEC adopting release](#) on the clawback rules.

² As the [SEC adopting release on the clawback rules notes](#), "sometimes the correction of an error is recorded instead in the current period financial statements – commonly referred to as an out-of-period adjustment – when the error is immaterial to the previously issued financial statements, and the correction of the error is also immaterial to the current period. We agree with that commenter that an out-of-period adjustment should not trigger a compensation recovery analysis under the final rules, because it is not an accounting restatement."

³ For a list of retrospective changes that do not represent an error correction, see pages 37 to 38 of the SEC adopting release on the clawback rules, and the text accompanying footnotes 112 through 116, available [here](#).

- (3) **Exclude Errors Only Affecting Interim Periods.** If an error *only* affects financial statements of interim periods (rather than annual periods), the Staff has indicated that it would not object to an issuer's decision *not to check the box*.⁴

New Check Box #2: 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).

- **New Check Box #2: Considerations for Box Checking.** For New Check Box #2, companies need to confirm if an error correction resulted in a financial restatement that “required a recovery analysis of incentive-based compensation received by any of the [company’s] executive officers during the relevant recovery period.” A “Big R” or “little r” restatement can trigger the checking of this new box, although we believe appropriate exceptions may occur, such as when a company does not award incentive-based compensation to executive officers or a company is otherwise not “required” under applicable rules to perform a recovery analysis of incentive-based compensation received by executive officers.⁵
2. **Review your exhibit list and remember to file your new clawback policy exhibit.** For your exhibit list, remember to (1) confirm inclusion of all required exhibits in accordance with Item 19 of Form 20-F, including exhibits filed since last year’s Form 20-F or Form 6-K required to be included in the Form 20-F and the newly required clawback policy under Instruction 97 to Item 19 of Form 20-F;⁶ (2) remove outdated exhibits no longer required to be filed, such as material contracts that have been fully performed; and (3) confirm permissible redactions and omissions in filed exhibits under Item 19 of Form 20-F (see our [2023 Annual Memo’s Housekeeping](#) Considerations for further information on these permissible redactions and omissions).
- **New clawback policy exhibit.** Since public companies are now required to have in place a clawback policy pursuant to stock exchange listing standards and SEC Rule 10D-1, remember to EDGARize and file this newly required clawback policy as Exhibit 97 to your Form 20-F. For the 20-F exhibit list, companies can use a description aligned with Instruction 97 to Item 19 of Form 20-F; *i.e.*, ***Policy relating to recovery of erroneously awarded compensation, as required by applicable listing standards adopted pursuant to 17 CFR 240.10D-1.*** In line with this description, the new clawback exhibit item only applies to the newly required clawback policy adopted pursuant to stock exchange and SEC rules, rather than any other type of clawback policy that a company voluntarily has in place (such as a discretionary clawback triggered by misconduct or reputational harm).
3. **Confirm your Filing Status for 2024.** As with every year, it is important to confirm your filing status in order to appropriately complete the checkboxes on your [Form 20-F](#) cover page. For an FPI, filing status will impact (i) to the extent applicable, whether it continues to qualify as an emerging growth company (“EGC”) (*i.e.*, until the first fiscal year where an issuer becomes a “large accelerated filer”), and (ii) whether it is subject to SOX 404(b) auditor attestation requirements (which apply once an issuer becomes an “accelerated filer” or a “large accelerated filer”).

Filing status does not affect the filing deadline. This year’s Form 20-F is due on **Tuesday, April 30, 2024**, for all calendar year-end FPIs, regardless of filing status. However, where a calendar year-end FPI has an effective shelf registration statement on Form F-1 or F-3 (*e.g.*, for resales by selling shareholders) and plans to allow uninterrupted sales of securities from its registration statement, SEC rules require that the company file its audited FYE 2023 financial statements by March 31, 2024, which may push up the Form 20-F deadline

⁴ The Center for Audit Quality posted this in its [highlights](#) from a meeting with SEC staff, in which it stated: “For example, assume a registrant presents (in an unaudited note to the financial statements for the fiscal year ended 20X3 in Form 10-K) the correction of material misstatements in its financial statements for the interim periods ended 03/31/X3, 06/30/X3, and 09/30/X3. The error only affected those interim periods. The annual periods presented in the 20X3 Form 10-K were not impacted by the errors...The staff indicated that in the above scenario, it would not object if the checkbox referred to above was not checked.”

⁵ For companies that have a “Big R” or “little r” restatement but do not check this box, we would recommend considering a brief explanation to disclose why checking the box was not applicable or appropriate under the facts and circumstances.

⁶ This includes the description of securities for securities registered under Section 12 of the Exchange Act. See Instruction 2(d) to Item 19 of Form 20-F.

to such earlier deadline. For more information, see “2. Considerations for Outstanding Registration Statements” in [Appendix A](#).

For companies that experienced stock price volatility in the recently completed fiscal year, re-assessing filing status is even more important. To confirm your filing status, keep in mind that:

- *Determining Public Float:* Public float is central to calculating your filing status and is computed as of the last business day of the company’s most recently completed second fiscal quarter (June 30, 2023, for calendar year-end companies) by *multiplying* (a) the number of shares of common stock or ordinary shares on that day *held by non-affiliates*⁷ by (b) the closing stock price on that day. As a result, confirming the identity and holdings of affiliates and subtracting out those shares is critical for an accurate calculation of “public float.”
- *Large Accelerated, Accelerated and Non-Accelerated Thresholds:* The public float thresholds for initial qualifications are set forth in Rule 12b-2 of the Exchange Act, but if your company previously qualified as a “large accelerated filer” or an “accelerated filer,” the thresholds to now move into accelerated or non-accelerated status are different and lower than those required for the initial qualification (e.g., less than \$560 million as opposed to \$700 million for accelerated filer status and less than \$60 million as opposed to \$75 million for non-accelerated filer status).⁸
- *Emerging Growth Company (EGC) Status Check:* If your company is an EGC, remember to annually assess whether you have ceased to qualify as an EGC based on: (1) having total annual gross revenues of \$1.235 billion or more; (2) the passage of time beyond the fifth anniversary of the first date common equity was sold pursuant to an effective registration statement; (3) the issuance of more than \$1 billion in non-convertible debt in the previous three years; or (4) becoming a large accelerated filer. See the definition of “emerging growth company” in Rule 12b-2.

4. **Remember to Add Items 16J and 16K.** Form 20-F now has two new items: (i) Item 16J, “Insider trading policies”; and (ii) Item 16K, “Cybersecurity.” The disclosure under Item 16K is required for all Form 20-Fs filed for fiscal years ending on or after December 15, 2023. For more information, see [“Part II: Disclosure Considerations—1. Cybersecurity.”](#)

The disclosure under Item 16J (which includes a statement of whether the issuer has adopted an insider trading policy, the reasons why, if not, and a requirement that the policy be filed as an exhibit to the Form 20-F) is **not** required for upcoming Form 20-Fs for calendar year-end companies. Instead, it is mandatory starting with the first Form 20-F that covers the first full fiscal period beginning on or after April 1, 2023 (*i.e.*, for calendar year-end companies, **Form 20-Fs filed in 2025 for fiscal year 2024** for calendar year-end companies).⁹ However, until this disclosure is required, we would still recommend including Item 16J in the table of contents and in the body of the filing, followed by “Not applicable.”

5. **Stock Repurchase Table Reminder.** The SEC’s new repurchase rules have now been vacated by a Fifth Circuit court decision.¹⁰ Therefore, these rules (which would have required quarterly “Form F-SR” disclosures beginning with the first full fiscal quarter beginning on or after April 1, 2024) are not in effect. However,

⁷ “Holdings” only includes shares of common stock or ordinary shares that are outstanding. Thus, “holdings” excludes shares of common stock or ordinary shares that have not yet been issued but are still considered “beneficially owned” under Rule 13d-3 insofar as they can be acquired within 60 days (e.g., shares underlying exercisable options). The term “affiliate” is defined under Rule 12b-2 of the Exchange Act as “a person that directly, or indirectly through one or more intermediaries, [controls](#), or is [controlled](#) by, or is under common control with, the person specified.” An individual or entity’s status as an “affiliate” is a fact-specific inquiry which must be determined by considering all relevant facts and circumstances; however, the SEC has indicated that status as an officer, director or 10% stockholder is one fact which must be taken into consideration in such inquiry. See American-Standard, SEC No-Action Letter (October 11, 1972).

⁸ See Rule 12b-2 of the Exchange Act for the definitions of “large accelerated filer” and “accelerated filer” and the SEC’s helpful guide for [determining filing status](#). Each issuer should run this calculation as facts and circumstances vary depending on prior qualifications. For example, if a company had previously been a large accelerated filer, the subsequent qualification thresholds to become an accelerated filer are less than \$560 million but \$60 million or more, or to become a non-accelerated filer, less than \$60 million, in each case, in public float. In addition, an FPI filing on Form 20-F may not qualify as a smaller reporting company.

⁹ In light of the increased focus on insider trading policies and the requirement to file the insider trading policy as an exhibit to the Form 20-F (starting with the Form 20-F filed in 2025 for calendar year-end companies), companies may want to take the opportunity this year to reassess their policies for the new 10b5-1 rule requirements as well as current market practice.

¹⁰ The Court’s opinion is available [here](#).

companies are reminded that, as in the past, they must still comply with Item 16E of Form 20-F to disclose, among other items, monthly information on their repurchases.¹¹

6. **Additional Housekeeping Items.** Companies are reminded to keep track of certain additional form check items in the Form 20-F, to consider the impact of their outstanding registration statements on their public filings and to review their form of D&O questionnaire for updates. [Appendix A](#) provides additional detail on all of these topics.

Part II: Disclosure Considerations

1. **Cybersecurity:** On July 26, 2023, the SEC adopted [mandatory cybersecurity disclosure requirements](#), which must be provided in a new section (Part III, Item 16K) of upcoming Form 20-Fs for calendar year-end companies. The new disclosure is required for all Form 20-Fs filed for fiscal years ending on or after December 15, 2023. Below, we discuss this new disclosure in more detail, including our guiding principles (in [Part A](#) below) and the specific disclosure requirements under Item 16K of Form 20-F (in [Part B](#) below).

A. Guiding Principles for Preparing New Cybersecurity Section of Annual Reports. In preparing this new disclosure, guiding principles to consider are the following:

- (1) **Take into Account Existing Cybersecurity Disclosures for Consistency.** It will be crucial for SEC and website disclosures to be consistent and provide coherent information for investors about a company's cybersecurity risk management processes. As such, companies should consider and review their existing cybersecurity disclosure for consistency across their:
 - o SEC filings, including in Risk Factors (Item 3.D), Business (Item 4) and MD&A (Item 5) sections of Form 20-Fs, including any descriptions of board oversight of cybersecurity risks.
 - o Sustainability reports posted on corporate websites, as well as any other relevant disclosures made on such websites, in press releases and at investor conferences.
- (2) **Establish controls and vetting processes to confirm accuracy.** The new cybersecurity disclosures in Form 20-Fs will need to be thoroughly vetted among responsible stakeholders internally to confirm accuracy and alignment with the company's own internal risk profile. The [SEC's recent enforcement action against SolarWinds](#) emphasizes the importance of aligning disclosures with a company's own internal documentation. For example, in the same month that SolarWinds disclosed only generic and hypothetical cybersecurity risk disclosures, the CISO wrote in an internal presentation that SolarWinds' "current state of security leaves us in a very vulnerable state for our critical assets."
- (3) **Collect and confirm disclosure sub-certifications.** Sub-certifications signed by responsible internal stakeholders should cover this new section of the 20-F to support the CEO and CFO's Sarbanes-Oxley certifications filed with the 20-F. In particular, the SolarWinds enforcement action highlights the importance of confirming that certifications are accurate when signed, as well as the involvement of the CISO in Disclosure Committee meetings.¹²

¹¹ For this purpose, keep in mind that the withholding of restricted stock (or the tendering of outstanding shares owned by an employee) to pay taxes due upon vesting must be disclosed under Item 16E of Form 20-F because the issuer is acquiring its own outstanding shares. However, if the equity at issue was never outstanding (for example, in the case of withholdings of restricted stock units, or forfeitures of restricted stock when vesting conditions have not yet been satisfied), then no such disclosure is required. See Regulation S-K Compliance and Disclosure Interpretations, Questions 149.01 and 149.02.

¹² For example, the [complaint](#) notes that SolarWinds failed to follow its own certification controls "including failing to use and document a list of controls in connection with certifications by Company officials" and while the CISO certified to the effectiveness of the Company's controls, he was unable to identify the relevant controls and instead "certified based on his general sense of the quality of those controls, while failing to identify the Company's extensive shortcomings in areas such as access controls" (see page 60 of the [complaint](#)). Further, despite being aware of issues and deficiencies, "[the CISO] signed sub-certifications relied on by senior executives, confirming that all material incidents had been disclosed to the executives responsible for the Company's securities filings" (see page 51 of the [complaint](#)).

B. Disclosure Requirements for New Cybersecurity Section of Annual Reports. For their new cybersecurity section in Form 20-Fs, companies should confirm compliance with the new line item requirements in Item 16K of Regulation S-K, as summarized below.

➤ **Risk Management and Strategy.** Under new Item 16K(b)(1), companies must:

Describe the registrant's processes, if any, for assessing, identifying and managing material risks¹³ from cybersecurity threats in sufficient detail for a reasonable investor to understand those processes. In providing such disclosure, a registrant should address, as applicable, the following non-exclusive list of disclosure items:

- (i) **Whether and how any such processes have been integrated into the registrant's overall risk management system or processes.**
- (ii) **Whether the registrant engages assessors, consultants, auditors, or other third parties in connection with any such processes.¹⁴**
- (iii) **Whether the registrant has processes to oversee and identify such risks from cybersecurity threats associated with its use of any third-party service provider.**

The SEC's purpose in adopting new disclosure items in Item 16K(b)(1) was to "allow investors to ascertain a registrant's cybersecurity practices, such as whether they have a risk assessment program in place, with sufficient detail for investors to understand the registrant's cybersecurity risk profile," while at the same time avoiding details that "could increase a company's vulnerability to cyberattack."¹⁵ In recent remarks, SEC Corporation Finance ("Corp Fin") Director Erik Gerding also noted that, unlike the proposed rule, these requirements focus more broadly on a company's cybersecurity processes, providing companies with a non-exclusive list of disclosure items and recognizing that companies will have "diverse approaches to cybersecurity, based on their particular circumstances."¹⁶

➤ **Cybersecurity Threat Disclosure.** Under new Item 16K(b)(2), companies must:

Describe 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 registrant, including its business strategy, results of operations, or financial condition and if so, how.

This new requirement in Item 16K(b)(2) was proposed in 2022 by the SEC to "equip investors to better comprehend the level of cybersecurity risk the company faces" and "assess the company's preparedness regarding such risk," but also aligns with the SEC's [2018 guidance](#), which encourages companies to address the impact of any prior cybersecurity incidents in their risk factors. We expect many companies to provide a cross-reference to existing risk factor disclosure on this point and to consider, as appropriate, any additional disclosure to address and clarify whether or not any cybersecurity incidents experienced to date have constituted a material cybersecurity incident. As the SEC noted, companies should likewise consider whether they need to revisit or refresh any previous disclosure made about

¹³ The SEC noted that it added a "materiality qualifier" here and that the types of risks that registrants may face include the following: "intellectual property theft; fraud; extortion; harm to employees or customers; violation of privacy laws and other litigation and legal risk; and reputational risk." See page 62 of SEC cybersecurity adopting release, available at: [Final Rule: Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure](#).

¹⁴ Per the SEC adopting release, the rationale for this requirement regarding assessors and consultants is that the SEC understands that many registrants rely on third-party service providers for some portion of their cybersecurity and believes it "important for investors to know a registrant's level of in-house versus outsourced cybersecurity capacity," but that registrants are not required to name the third parties. See pages 63 to 64 of SEC cybersecurity adopting release, available at: [Final Rule: Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure](#).

¹⁵ See page 61 of SEC cybersecurity adopting release, available at: [Final Rule: Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure](#).

¹⁶ See Erik Gerding, Director Division of Corporation Finance, December 14, 2023, speech, available [here](#); see also page 61 of SEC cybersecurity adopting release, available at: [Final Rule: Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure](#).

cybersecurity incidents as they prepare this disclosure, including during the process of investigating a cybersecurity incident.¹⁷

➤ **Governance Board Disclosure.** Under new Item 16K(c)(1), companies must:

Describe the board of directors' oversight of risks from cybersecurity threats.

If applicable, identify any board committee or subcommittee responsible for the oversight of risks from cybersecurity threats and describe the processes by which the board or such committee is informed about such risks.

For this requirement in Item 16K(c)(1), although the SEC opted not to adopt a proposal to require disclosure of the frequency of board and committee discussions, the SEC specifically noted in the adopting release that the disclosure may include discussion of frequency, including the board or board committee's reliance on "periodic (e.g., quarterly) presentations by the registrant's chief information security officer to inform its consideration of risks from cybersecurity threats."¹⁸ Notably, the SEC also removed its proposed requirement that companies disclose whether any directors have cybersecurity expertise, noting that "effective cybersecurity processes are designed and administered largely at the management level and that directors with broad-based skills in risk management and strategy often effectively oversee management's efforts without specific subject matter expertise as they do with other sophisticated technical matters."¹⁹

➤ **Governance Management Disclosure.** Under new Item 16K(c)(2), companies must:

Describe management's role in assessing and managing the registrant's material risks from cybersecurity threats. In providing such disclosure, a registrant should address, as applicable, the following non-exclusive list of disclosure items:

- (i) Whether and which management positions or committees are responsible for assessing and managing such risks, and the relevant expertise of such persons or members in such detail as necessary to fully describe the nature of the expertise. Relevant expertise may include, for example, prior work experience in cybersecurity; any relevant degrees or certifications; any knowledge, skills or other background in cybersecurity.**
- (ii) The processes by which such persons or committees are informed about and monitor the prevention, detection, mitigation, and remediation of cybersecurity incidents.**
- (iii) Whether such persons or committees report information about such risks to the board of directors or a committee or subcommittee of the board of directors.**

For this requirement in Item 16K(c)(2), the SEC noted that this list is a "non-exclusive list" that companies should consider when describing management's role in cybersecurity oversight, and that this disclosure would "typically encompass identification of whether a registrant has a chief information security officer [(CISO)] or someone in a comparable position." The detailed information required about the CISO's background (including the CISO's prior work experience, knowledge, skills and degrees or certifications held) is notable in that it goes beyond current disclosure requirements regarding other members of company management.

¹⁷ See footnote 229 of the SEC adopting release, available at: [Final Rule: Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure](#).

¹⁸ See page 69 of the SEC adopting release, available at: [Final Rule: Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure](#).

¹⁹ See page 85 of the SEC adopting release, available at: [Final Rule: Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure](#), and Erik Gerding, Director Division of Corporation Finance, December 14, 2023, speech, available [here](#).

2. **Review your XBRL Disclosures for Consistency:** In September 2023, Corp Fin Staff published a [Sample Comment Letter Regarding XBRL Disclosures](#), which highlights XBRL tagging issues and errors on which the SEC is focusing. The sample comments focus on inconsistent disclosures including:
- (i) outstanding shares reported on the cover page and balance sheet being tagged with materially different values; and
 - (ii) using different XBRL elements to tag the same line item from period to period, without including an analysis as to how the company concluded that the results reported necessitated the change in the element.

The SEC's sample comment letter also address custom tagging issues.²⁰ The Staff emphasized the importance of providing consistent and accurate information throughout a registrant's filings, and cautioned that companies may be asked to amend or revise their disclosures if they failed to comply with the EDGAR Filer Manual.²¹ Companies should therefore review the required XBRL data to confirm they are tagging information appropriately. This could include designating members of the financial reporting team to receive technical training on XBRL so they can review tagging for accuracy and consistency.

3. **Remember to Update Risk Factors.** Risk factor disclosure is a critical part of the Form 20-F, and there were many developments in 2023 that companies should consider as they draft their risk factors. These considerations include developments with respect to (1) cybersecurity, (2) artificial intelligence, (3) international geopolitics, (4) climate, and (5) internal controls. For a discussion of these developments and important tips for drafting risk factors, see our recent client alert [Key Considerations for Updating 2023 Annual Report Risk Factors](#).
4. **MD&A Considerations.** MD&A remained one of the top targets of SEC Staff comments, with the majority of this year's comments focused on disclosures about results of operations. Many comments related to a company's lack of sufficiently detailed disclosures about the reasons for material period-to-period changes in the financial statement line items. These included comments reminding companies that if two or more factors contributed to a material period-to-period change in a financial statement line item or subtotal, Item 5 of Form 20-F requires disclosure of the reasons for material changes, in quantitative and qualitative terms, for each factor, including where material changes within a line item offset one another.²² Comments have also asked about the effects of macroeconomic factors, such as inflation, interest rates and supply chain issues.²³ Companies should review their MD&A disclosures to confirm the reasons for material changes are disclosed with sufficient specificity to avoid these types of comments.
5. **Artificial Intelligence Considerations for your Annual Report.** New artificial intelligence ("AI") technologies present both significant opportunities and significant risks for companies. In addition to risk factor disclosure, companies should consider whether it is necessary or advisable to make disclosures about ways in which AI might impact their strategy, productivity, competition or product demand, which might be appropriately included in the Business section of their Form 20-F or trends sections of the MD&A. When discussing the potential impact

²⁰ The illustrative comments provided in the sample letter, which are not an exhaustive list, addressed the following topics: (i) compliance with Inline XBRL presentation requirements; (ii) outstanding shares reported on the cover page and balance sheet that are tagged with materially different values (*i.e.*, where one value is presented in a whole amount and the other value is presented in thousands); (iii) different XBRL elements used to tag the same reported line item on the income statement from period to period; and (vi) using a custom tag instead of an XBRL element consistent with current US GAAP in the income statement.

²¹ The manual is available [here](#).

²² For example: "Item 5 of Form 20-F requires a quantitative and qualitative description of the reasons underlying material changes, including where material changes within a line item off set one another, to the extent necessary for an understanding of the company's business as a whole. Item 5.A.1. also stipulates that when there are material changes from period to period in net sales or revenue, you must "describe the extent to which such changes are attributable to changes in prices or to changes in the volume...." Given that you reported a 15.7% increase in revenues for 2022 and a 34.4% increase in revenues for 2021, it appears these disclosures should be provided. However, if you believe the information would not be material, tell us how you have formulated your view and submit the underlying numerical analysis of these details for review."

²³ For example: "We note from your discussion of results of operations that general inflation was a cause of the increase in cost of sales in most regions and you specifically disclose a highly inflationary environment in Argentina. In future filings, please expand upon the principal factors contributing to your inflationary pressures, the actions planned or taken, if any, to mitigate the inflationary pressures, and quantify the resulting impact on your results of operations and financial condition."

of AI, it is important not to “AI” wash, or mislead investors as to your true artificial intelligence capabilities, which SEC Chair Gary Gensler cautioned companies against in a [statement in early December](#). For information on addressing AI in risk factors, see our recent client alert [Key Considerations for Updating 2023 Annual Report Risk Factors](#).

- 6. Mind the Non-GAAP/Non-IFRS.** The SEC Staff continues to focus on non-GAAP/non-IFRS financial measures in its comment letters, following the release of updated non-GAAP/non-IFRS C&DIs in December 2022²⁴ (for a summary of these recent updates, see our “Non-GAAP/Non-IFRS Compliance -- Five Key Reminders” in our [2023 Annual Memo](#)). It is important that companies review any non-GAAP disclosures against SEC requirements and guidance to ensure that non-GAAP measures are appropriately used and compliant with regulatory requirements.

In 2023, many of the Staff’s comment letters focused on compliance with its C&DIs. For example, the Staff asked registrants whether operating expenses are “normal” or “recurring” and, therefore, whether their exclusion from a non-GAAP/non-IFRS financial measure could be misleading based on C&DI [Question 100.01](#).²⁵ The Staff also commented on non-GAAP adjustments to revenue and expenses that could have the effect of changing the recognition and measurement principles required by GAAP, thereby rendering them “individually tailored” and potentially resulting in a misleading measure, based on C&DI [Question 100.04](#).²⁶

In addition, the Staff continues to focus on whether non-GAAP/non-IFRS financial measures comply with Item 10(e) of Regulation S-K, including whether certain performance metrics should have been identified as non-GAAP/non-IFRS measures and whether identified non-GAAP/non-IFRS measures are presented with the most directly comparable GAAP/IFRS financial measure at the appropriate prominence level. Item 10(e) specifically applies where FPIs include a non-GAAP/non-IFRS financial measure either in (i) a Form 20-F or (ii) a Form 6-K fully incorporated by reference into a registration statement or Form 20-F.

The scrutiny on non-GAAP/non-IFRS financial measures also came in the form of an SEC enforcement action in 2023. In March 2023, [the SEC issued a cease-and-desist order to DXC Technology Company](#) based on misleading non-GAAP disclosures in its periodic reports and earnings releases.²⁷ According to the SEC’s order, DXC materially increased its reported non-GAAP net income by misclassifying tens of millions of dollars of unrelated expenses as transaction-related costs and improperly excluded them from its non-GAAP net income, non-GAAP EPS, and other non-GAAP measures. In its order, the SEC specifically noted that the absence of a non-GAAP policy and specific disclosure controls and procedures resulted in subjective determinations made by employees about whether such misclassified expenses were related to an actual or contemplated transaction.

- 7. Restatements, Internal Controls and Disclosure Controls.** Restatements, internal control over financial reporting (“ICFR”) and disclosure controls and procedures (“DCPs”) are a recent focus of the SEC, including in recent comments made that challenge and question management of public companies regarding the following:

²⁴ Specifically, the SEC updated Non-GAAP Financial Measures C&DIs Questions 100.01, 100.04-100.06, and 102.10(a), (b) and (c), which can be found [here](#).

²⁵ For example: “We note you adjust certain non-GAAP financial measures for ‘Legal settlements and loss contingencies, net’ and ‘Non-cash revaluation of lease liabilities.’ It appears to us that legal settlements, loss contingencies and revaluation of lease liabilities are normal recurring operating costs necessary to operate your business. Please explain to us how you determined these adjustments comply with the guidance outlined in Question 100.01 of the Division of Corporation Finance’s Compliance & Disclosure Interpretations on Non-GAAP Financial Measures or tell us how you plan to revise your non-GAAP financial measures in future filings.”

²⁶ For example: “We note certain of your non-GAAP measures back out impairment of digital assets. Please explain why you believe that adjusting for impairment of digital assets provides useful information to investors given that you use your digital assets to, in part, fund your operations and also considering the recurring nature of this charge. Refer to Item 10(e)(1)(i)(C) of Regulation S-K. Please also tell us how you considered whether these measures substitute an individually tailored recognition and measurement method for those of GAAP which results in a misleading non-GAAP measure that violates Rule 100(b) of Regulation G. Please refer to Question 100.04 of the Compliance and Disclosure Interpretations on Non-GAAP Financial Measures for guidance.”

²⁷ The SEC’s cease-and-desist order is available [here](#).

- A company's materiality assessment following a company's disclosure of a "little r" restatement;²⁸
- The effectiveness of ICFR and DCPs when a company corrects a prior-period error;²⁹
- Management's judgment when it attributes a material error to a control deficiency but does not conclude that the deficiency is a material weakness;³⁰ and
- Disclosure stating that ICFR was ineffective (e.g., when a material weakness was identified) while simultaneously disclosing that DCPs were effective.³¹

In December 2023, SEC Chief Accountant Paul Munger issued a [statement](#) referencing the fact that the statement of cash flows has consistently been a leading source of "little r" restatements and emphasizing the importance of performing an "objective analysis from the perspective of a reasonable investor" when evaluating the materiality of both the financial statement and ICFR impacts of an error in the statement of cash flows.³² In light of the SEC's focus, companies should ensure they have adequate ICFR and DCPs in place and thoroughly evaluate their financial statement procedures, particularly with respect to their statement of cash flows.

8. Characterization of Legal Proceedings. It is important to avoid relying on boilerplate language such as "without merit" when characterizing legal proceedings in your SEC filings, particularly where there is at least some merit to the litigation. This is exemplified by the United States District Court for the District of Massachusetts decision in *City of Fort Lauderdale Police and Firefighters' Retirement System v. Pegasystems Inc.*,³³ in which the plaintiff shareholders filed a class action against Pegasystems after it was ordered to pay damages in a lawsuit regarding trade secret misappropriation. Plaintiffs alleged that Pegasystems made false statements and falsely reassured investors that the claims in the trade secret matter were "without merit," which the court found actionable, explaining that "a reasonable investor could justifiably have understood [the] message that [the trade secret] claims were 'without merit' as a denial of the facts underlying [the] claims—as opposed to a mere statement that Pega[systems] had legal defenses against those claims." While a company does not have to admit any wrongdoing in its disclosure, it may not "make misleading substantive declarations regarding its beliefs about the merits of the litigation." Rather than describing legal proceedings as "without merit," language such as "we intend to contest this matter vigorously" or "we have substantial defenses" (if justifiable) may be appropriate. Legal proceedings disclosures should be carefully evaluated to ensure that the merit of any claims is appropriately characterized.

9. Climate Change and Sustainability Disclosure. Climate change remains a particularly strong focus of both the SEC and investors. In March 2022, the [SEC proposed](#) extensive climate-related disclosure requirements that, if adopted, would require US public companies to dramatically expand the climate-related disclosures in their SEC filings. While these rules are pending (potential action has been [delayed until spring 2024](#)), companies

²⁸ For example, the SEC staff has questioned whether all qualitative and quantitative factors have been considered when a registrant concluded the error is not material to previously issued financial statements, pursuant to the guidance in Staff Accounting Bulletin (SAB) 99, Materiality, and ASC 250.

²⁹ The SEC staff may request additional information such as: a detailed description of the error, including who identified the error, when and how it was identified, and whether it was the result of a control deficiency; and a description of any control deficiency identified, including the registrant's evaluation of the severity of the deficiency and any remediation plans or the rationale for the registrant's conclusion that there was not a material weakness.

³⁰ For example: "With regard to your assessment of [ICFR], explain to us the specific nature and design of the control or controls that you believe had failed regarding this error, and describe in further detail your evaluation of the severity of the control deficiencies and how you considered whether it was reasonably possible that such control deficiencies would fail to prevent or detect a material misstatement. In this regard, it is unclear how you would be able to support a conclusion that it was not reasonably possible that the control deficiencies that led to the errors could not have resulted in a material misstatement in some future period, considering the scenarios where earnings were unusually low, and the error percentages were significantly higher, as you have shown for the second quarters of 2022 and 2021."

³¹ For example: "We note the disclosure that your disclosure controls and procedures were effective as of September 30, 2022. We also note your disclosure of your remediation plans for material weaknesses over internal controls. Please clarify and disclose the nature of any material weakness, its impact on your financial reporting and ICFR, and management's current plans, if any, or actions already undertaken, for remediating the material weakness. Additionally, please clarify how you can have effective disclosure controls and procedures if a material weakness does exist. We refer you to Item 308(a)(3) of Regulation S-X and 2007 interpretive guidance issued by the SEC in Release No. 34-55929. Please advise or revise."

³² See [The Statement of Cash Flows: Improving the Quality of Cash Flow Information Provided to Investors](#).

³³ No. CV 22-11220-WGY, 2023 WL 4706741 (D. Mass. July 24, 2023).

should continue to consider their existing climate-related disclosure in light of the SEC's [2010 climate change disclosure guidance](#).

Companies should also review their disclosures in light of the [SEC's sample comment letter](#) on climate disclosure, issued in September 2021, with which the Staff's recent comments on climate-related disclosures continue to align, including comments on:

- Indirect consequences of climate-related business trends, such as decreased demands for goods or services that produce significant greenhouse gas emissions³⁴
- The physical effects of climate change on operations and results
- Material expenditures for climate-related projects and compliance costs
- Whether information contained in sustainability reports is material and therefore required to be included in the Form 20-F.³⁵

In 2023, the Staff continued to issue multiple rounds of letters on climate-related disclosures, particularly if the company's initial response did not address each of the items in the initial comment letter. In several example comment letters, when a company asserted that the effects or costs of climate-related matters was not material, the Staff would ask the company to quantify the effects or costs and explain its analysis of materiality. As a result, climate-related comments had the highest average number of rounds of comments than any other comment type, and companies should carefully consider their disclosures in light of these types of comments. In addition, companies should confirm they have appropriate controls around climate disclosures to ensure that climate-related disclosures are properly supported and documented, and are consistent throughout all the company's publicly available disclosures.

10. Consider your Human Capital Management (HCM) Disclosures.³⁶ The HCM disclosures required in the Business section of domestic issuers' Form 10-Ks are not required for FPIs, and FPIs generally are not adopting such disclosures voluntarily. However, the SEC's plan to propose expanded rules around HCM disclosure for domestic issuers, coupled with institutional investor focus on the area, suggest this could also be a focus area for Form 20-F readers, so it is important for FPIs to consider any appropriate risk factor disclosure on this topic, depending on their investor base (subject to any limitations imposed by the laws of the jurisdiction under which the registrant is organized). Companies should assess what, if any, material issues their company faces with respect to human capital resources. This could include risks related to the ability to attract and retain skilled employees, employee health and safety issues, increases in labor costs and increased employee turnover.³⁷

As a benchmark, based on White & Case survey information of Fortune 50 companies' Form 10-K disclosure in recent years, companies have covered a broad range of topics in their HCM disclosure, including employee engagement, employee health and wellness, flexible work arrangements, pay equity and diversity, equity and inclusion ("DEI"). Although there have been substantial differences between companies' disclosures in terms of the length of their disclosure and the range of topics covered, there is a trend towards companies increasing their HCM-related disclosures, including, in some cases, an increase in quantitative information.

To the extent they will include these disclosures, companies should consider which human capital measures or objectives the board and senior management focused on during fiscal 2023, and how these should be discussed in the company's disclosure. Companies should also consider whether recent developments in their

³⁴ For example: "To the extent material, discuss the indirect consequences of climate-related regulation or business trends, such as the following: decreased demand for goods or services that produce significant greenhouse gas emission or are related to carbon-based energy sources; increased demand for goods that result in lower emissions than competing products; increased competition to develop innovative new products that result in lower emissions; increased demand for generation and transmission of energy from alternative energy sources; and any anticipated reputational risks resulting from operations or products that produce material greenhouse gas emissions."

³⁵ For example: "We note that you provided more expansive disclosure in your corporate social responsibility report (CSR report) than you provided in your SEC filings. Please advise us what consideration you gave to providing the same type of climate-related disclosure in your SEC filings as you provided in your CSR report."

³⁶ For more information, see our alert, "[SEC Adopts Amendments to Modernize Disclosures and Adds Human Capital Resources as a Disclosure Topic: Key Action Items and Considerations for US Public Companies.](#)"

³⁷ SRCs are not technically required to provide HCM disclosures, but some may do so for investor relations purposes.

operations and industry warrant updates to their HCM disclosures, such as in light of labor inflation or cost-cutting measures in light of macroeconomic pressures.³⁸

³⁸ Additional HCM-related disclosure rules may be forthcoming for domestic issuers (likely not FPIs), as these remain on the SEC's Reg Flex Agenda for spring 2024 (available at: [Agency Rule List - Fall 2023 \(reginfo.gov\)](#)). At a meeting in September 2023, the SEC's Investor Advisory Committee approved subcommittee recommendations to expand required HCM disclosures to include more prescriptive disclosure requirements, such as headcount of full-time versus part-time and contingent workers, turnover metrics or comparable workforce stability measures, the total cost of the workforce broken down into components of compensation, and demographic data of workforce diversity across gender, race/ethnicity, age, disability and/or other categories.

Appendix A

1. The following Form 20-F form check items are not new this year, but were recently added in the past two years and should therefore be confirmed for your upcoming filing:
- (i) Confirm that Item 3.A states “[Item 3.A \[Reserved\]](#)” (instead of “Item 3.A Selected Financial Data” as may have been included in prior Form 20-Fs) due to the SEC’s elimination of the disclosure requirement for selected financial data in 2021.³⁹
 - (ii) Confirm “Item 10J: Annual Report to Security Holders.” Item 10J was added to Form 20-F in 2022. While the SEC has not released formal guidance on how to respond to Item 10J, including whether it needs to be included in Form 20-F, we believe that issuers should address it as follows:
 - If an issuer is not required under home country law to furnish, or does not otherwise furnish, to its security holders an annual report separate from the Form 20-F, then the issuer should write: “Not applicable.”
 - If an issuer is required under home country law to furnish, or otherwise furnishes, to its security holders an annual report separate from the Form 20-F, then it should write: “If we are required to provide an annual report to security holders in response to the requirements of Form 6-K, we will submit the annual report to security holders in electronic format in accordance with the EDGAR Filer Manual.”
 - (iii) Confirm the inclusion of “Item 16I” of the Form 20-F with the caption “Disclosure Regarding Foreign Jurisdictions that Prevent Inspections.” New Item 16I was added to the Form 20-F in 2022 pursuant to the Holding Foreign Companies Accountable Act (HFCAA) (as explained in our prior alert) in order to identify any issuers that retain auditors that the PCAOB is unable to inspect completely. Given the SEC’s recent statement that “the PCAOB has been able to fulfill its oversight responsibilities as it relates to audit firms in China and Hong Kong,” this year, companies should not have any disclosure (beyond “Not applicable” or “None”) under this item in their upcoming Form 20-Fs.
 - (iv) As in the past, tag in inline XBRL the independent auditor’s: (i) name; (ii) location (*i.e.*, city and state, province or country); and (iii) PCAOB ID number.⁴⁰ Companies should coordinate this tagging with the financial printer.
 - (v) For companies with mining operations,⁴¹ consider whether expanded Regulation S-K 1300 requirements, which became mandatory for Form 20-Fs filed in 2022 for the fiscal year ended December 31, 2021, apply. If a company’s current mining operations, *in the aggregate*, are material to its business, Regulation S-K 1300 disclosures would be required in its Form 20-F.⁴² In addition, companies with property that is *individually* material to their business must obtain a technical report

³⁹ For more information, see “[Key Considerations for the 2022 Annual Reporting Season: Form 20-F and Other FPI-Specific Considerations: in 2022: Mandatory Compliance with SEC’s Amendments to Part I of Form 20-F, Item 3.A and Item 5Items 301, 302 and 303](#)” in our prior memo.

⁴⁰ This requirement is a result of the SEC’s December 2021 amendments implementing the HFCAA for all auditors that provide their opinions related to financial statements, in accordance with [Section 6.5.54 of the EDGAR Filing Manual](#). Practices vary as to the location of this tagging in annual reports, but a commonly used option is to tag the auditor’s name and PCAOB ID number in the Index to the Financial Statements and the auditor’s location at the end of the audit report.

⁴¹ The SEC’s comment letter practices indicate that this inquiry should be conducted both by companies that sell mineral extractions *and* vertically integrated companies that do not sell their mineral extractions but whose mining operations supply raw materials.

⁴² These disclosures include: (i) summary property disclosure on overall mining operations, mineral resources and mineral reserves; (ii) individual property disclosure for any property that is individually material to their business; and (iii) a description of the internal controls that the company uses in its exploration and mineral resource and reserve estimation efforts, including quality control/quality assurance programs, verification of analytical procedures, and a discussion of comprehensive risk inherent in the estimation.

summary,⁴³ which must be signed by a “qualified person” (as defined in Regulation S-K 1300) and filed as Exhibit 96.1 to the Form 20-F.⁴⁴

See [Appendix B](#) for a summary of the Nasdaq diversity disclosure requirement, along with other key investor and proxy advisory firm policies on board diversity.

It is also important to keep track of the number of boards on which each of your directors sits, bearing in mind key investor and proxy advisory firm policies on overboarding, which tend to be country/region-specific.

See [Appendix C](#) for a discussion of over-boarding policies.

2. **Considerations for Outstanding Registration Statements:** Consider how the filing of the Form 20-F may impact any outstanding registration statements.

- All Effective Registration Statements:** Remember to update your auditor consent attached as an exhibit to the Form 20-F to include any newly filed registration statements and remove any registration statements that are no longer effective.
- Effective Shelf Form F-1s:**
 - **Post-Effective Amendment and Timing of Form 20-F:** You must file a post-effective amendment to the Form F-1 in order to incorporate the audited annual financial statements and other information from the Form 20-F into the Form F-1. If you plan to allow uninterrupted sales (*e.g.*, by selling stockholders) off of that Form F-1, you must file and have the SEC declare effective this post-effective amendment by the end of the third month after your fiscal year end (for calendar-year-end FPIs, March 31, 2024). For the sake of efficiency, you may want to consider filing your Form 20-F before this three-month deadline (for calendar-year-end FPIs, March 31, 2024) and then immediately preparing and filing a post-effective amendment on Form F-1, all with enough time to ensure the SEC declares the post-amendment effective by the three-month deadline.
 - **Potential Form F-3 Eligibility:** You should also consider if you have become Form F-3 eligible, so that you can convert the Form F-1 into a Form F-3 and avoid future post-effective amendments for as long as you remain F-3 eligible.
- Effective Shelf Form F-3s:**
 - **Timing of Form 20-F:** You are not required to file a post-effective amendment with audited annual financial statements and can instead update the registration statement merely by filing the Form 20-F. However, if you plan to allow uninterrupted sales off of that Form F-3, you must file your audited annual financial statements by the last day of the third month after your fiscal year end (March 31, 2024, for calendar-year-end FPIs). You should consider filing the Form 20-F by the three-month deadline, ahead of the normal 120-day deadline for filing an annual report on Form 20-F, or, if your Form 20-F is not ready by such date, filing by such deadline a current report on Form 6-K with the audited financial statements (incorporated by reference into the Form F-3).
 - **Form F-3 Eligibility:** You should also ensure that you continue to meet the eligibility requirements for using the Form F-3 when filing your Form 20-F: (i) if you previously filed as a well-known seasoned issuer (WKSI), confirm that you are still a WKSI in order to use that registration statement (otherwise, it will need to be re-filed (if eligible) as a non-WKSI shelf); or (ii) if you previously filed a non-WKSI shelf registration statement, confirm that

⁴³ The technical report summary must describe the information reviewed and conclusions reached by the qualified person about the company's mineral resources and/or reserves on each material property (or, optionally, exploration results).

⁴⁴ The technical report summary must be filed as Exhibit 96.1 to the Form 20-F the first time the company discloses mineral reserves or mineral resources in its Form 20-F. In addition, it must be filed as an exhibit in subsequent Form 20-Fs under either of the following circumstances: (i) there is a material change in the mineral reserves or mineral resources, as disclosed in the Form 20-F, from the last technical report summary filed for the property; or (ii) the company has previously filed a technical report summary supporting the disclosure of exploration results and there is a material change in the exploration results from the last technical report summary filed for the property.

you still meet the requirements to use that registration statement. Otherwise, you will need to re-file as a Form F-1.

While it does not affect the Form 20-F, all FPIs with outstanding registration statements should also bear in mind the requirement to file a Form 6-K by the date that is nine months after the end of their fiscal year, including six-months consolidated interim financial statements (which may be unaudited), containing explanatory notes.⁴⁵ This Form 6-K should be incorporated by reference into any effective Form F-3s and would trigger a prospectus supplement for any effective Form F-1.

3. **D&O Questionnaires.** Ahead of your Form 20-F filing, review and update your D&O questionnaires, which provide backup and support for the disclosures to be included in your Form 20-F. In particular:
- (i) If you are a Nasdaq-listed company subject to the board diversity requirements or otherwise plan to voluntarily disclose the diversity of your directors, remember to include, as in the past, a question to elicit information on your directors' diversity characteristics that covers the potential diversity categories that you may want to disclose (under Nasdaq and/or investor policies) and to obtain their consent to disclose this information;
 - (ii) Consider adding a question to elicit information from directors on their expertise with respect to ESG, human capital, cybersecurity and/or AI in light of both SEC and investor focus on board qualifications in these areas;
 - (iii) Consider adding or refining questions on outside directorships or officerships to identify any potential antitrust concerns, given Department of Justice [focus on potential violations of Section 8 of the Clayton Act](#); and
 - (iv) Consider building out (or adding) Iran-related activities questions to cover potentially problematic transactions with Russian entities.⁴⁶

⁴⁵ This is based on the following requirement from Item 8.A.5 of Form 20-F, as follows: "The interim financial statements should include a balance sheet, statement of comprehensive income (either in a single continuous financial statement or in two separate but consecutive financial statements; or a statement of net income if there was no other comprehensive income), cash flow statement, and a statement showing either (i) changes in equity other than those arising from capital transactions with owners and distributions to owners, or (ii) all changes in equity (including a subtotal of all non-owner items recognized directly in equity). Each of these statements may be in condensed form as long as it contains the major line items from the latest audited financial statements and includes the major components of assets, liabilities and equity (in the case of the balance sheet); income and expenses (in the case of the statement of comprehensive income) and the major subtotals of cash flows (in the case of the cash flow statement). The interim financial statements should include comparative statements for the same period in the prior financial year, except that the requirement for comparative balance sheet information may be satisfied by presenting the year end balance sheet. If not included in the primary financial statements, a note should be provided analyzing the changes in each caption of shareholders' equity presented in the balance sheet. The interim financial statements should include selected note disclosures that will provide an explanation of events and changes that are significant to an understanding of the changes in financial position and performance of the enterprise since the last annual reporting date. If, at the date of the document, the company has published interim financial information that covers a more current period than those otherwise required by this standard, the more current interim financial information must be included in the document. Companies are encouraged, but not required, to have any interim financial statements in the document reviewed by an independent auditor. If such a review has been performed and is referred to in the document, a copy of the auditor's interim review report must be provided in the document."

⁴⁶ Since February 2022, the US has imposed sweeping sanctions on Russia, bringing a number of high-net-worth individuals and companies with substantial investments in the US within scope of the of the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA). Companies should undertake diligence to determine whether any sanctioned individuals or entities may be involved in their activities to assess compliance and potential disclosure requirements, as the ITRA requires Form 10-K and Form 10-Q disclosure if the company (or any affiliate) knowingly engaged in certain sanctionable activities.

Appendix B

Board Diversity Policies

Gender and Racial/Ethnic Diversity Policies of Proxy Advisory Firms:

FPIs in US Tax Havens

ISS's updated policy for FPIs in US tax havens in the Russell 3000 or S&P 1500 indices requires at least one female director (see Americas policies [here](#)).

Israeli FPIs

- **ISS:** ISS does not have specific policies on gender and racial/ethnic diversity for Israeli companies. See [here](#) for its policies for Israeli companies.
- **Glass Lewis:**
 - *Gender Diversity:* Glass Lewis defaults to US requirements, and as such, will generally recommend voting against the nominating committee chair of a board that has fewer than two female directors, except for boards of six or fewer total directors. See [here](#) for Glass Lewis's policies on Israeli companies.
 - *Racial/Ethnic Diversity:* Glass Lewis encourages ethnic/racial diversity, and specifically notes the relatively low percentage of Israeli Arabs serving on boards but will not make a voting recommendation on it except in a contested election. Glass Lewis states that it "believes that the composition of a board should be representative of a company's workforce, the jurisdictions in which it principally conducts its business activities, and its other key stakeholders" and that Israeli FPIs "should consider including diversity of ethnicity and/or national origin as attributes in their composition profiles, whether defined targets for diversity of ethnicity and national origin should be set, and the manner and extent to which the ethnic and national backgrounds of directors and board nominees is publicly disclosed."

FPIs in Other Countries

- ISS and Glass Lewis policies on board diversity are region and/or country specific. For the currently applicable policies, see [ISS's current voting policies](#) and [Glass Lewis's current voting policies](#).

Diversity Policies of Institutional Investors and Nasdaq:

- **BlackRock:** BlackRock maintains region/country-specific market guidelines. BlackRock notes that, "to ensure there is appropriate diversity of perspectives, we look to boards to be representative of the company's key stakeholders, with an approach to diversity that is aligned with any market-level standards or initiatives designed to support diversity (particularly gender and ethnic diversity) among board members." BlackRock also notes its "general view" that, subject to market-specific standards, it is looking for "all boards to be taking steps towards at least 30 percent of their members being comprised of the under-represented gender (which should be read in conjunction with applicable country-specific guidelines)." BlackRock asks companies, consistent with local law, "to provide sufficient information on each director/candidate and in aggregate so that shareholders can understand how diversity (covering professional characteristics, such as a director's industry experience, specialist areas of expertise, and geographic location; as well as demographic characteristics such as gender, ethnicity, and age) has been accounted for within the proposed board composition. These disclosures should cover how diversity has been accounted for in the appointment of members to key leadership roles, such as board chair, senior/lead independent director and committee chairs."⁴⁷ Below are the market standards for specific countries:
 - *FPIs in Israel:* While BlackRock is looking for companies in this region to make progress towards having greater female representation at board level in line with its general guidelines, BlackRock is

⁴⁷ See [BlackRock Investment Stewardship Proxy voting guidelines for European, Middle Eastern, and African securities](#).

- likely to take voting action if the board has failed to appoint at least directors from the underrepresented gender. See BlackRock's Israel-specific voting guidelines [here](#).
- *FPIs in Other Countries*: See BlackRock's region-specific voting guidelines [here](#).
 - **State Street**: State Street's published guidelines state that it expects boards of companies in all markets and indices to have at least one female board member. It may waive the policy if a company engages with State Street and provides a specific, timebound plan for adding at least one woman to the board. State Street also expects companies in the Russell 3000, TSX, FTSE 350, STOXX 600 and ASX 300 indices to have boards comprised of at least 30 percent women directors. State Street may waive the policy if a company engages with SSGA and provides a specific, time-bound plan for reaching 30 percent representation of women directors. If a company fails to meet any of these expectations outlined above, State Street may vote against the Chair of the Nominating Committee or the board leader in the absence of a Nominating Committee, if necessary. Additionally, if a company fails to meet this expectation for three consecutive years, State Street may vote against all incumbent members of the Nominating Committee, or those persons deemed responsible for the nomination process. See State Street's [Guidance on Expanding Board Gender Diversity](#).
 - **Nasdaq's Diversity Disclosure Rule**: Starting December 31, 2023, Nasdaq's listing rule requires most Nasdaq-listed companies to have, or explain why they do not have, at least one diverse director, and in 2025, to have, or explain why they do not have, at least two diverse directors. For FPIs, this includes one director who self-identifies as female and one who self-identifies as one or more of the following: female; LGBTQ+; or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the Company's principal executive offices. In addition, beginning in 2022, the listing rules required all Nasdaq-listed companies to publicly disclose board diversity data using a standardized disclosure matrix template. A company may include this in its annual meeting proxy statement furnished on Form 6-K, in its Form 20-F or on its website. The most logical place appears to be the annual proxy statement on Form 6-K, especially if relevant to investors, or otherwise, the website. Specific requirements, including the posting of a Nasdaq notice, must be satisfied if the company places its matrix on the website.⁴⁸ Nasdaq rules specify that, starting in 2023, the matrix disclosure should include both the current and prior year statistics; however, Nasdaq has issued an FAQ that functionally removes this requirement by allowing only one year if the prior year remains publicly available (*i.e.*, in a proxy statement, Form 20-F or on the company's website).

Below are two alternatives for presenting the board diversity matrix. A company should not include additional categories within the matrix or include a different format other than one of these two alternatives. However, a company may supplement its disclosure by providing additional information related to its directors below the matrix (*e.g.*, directors with disabilities, directors with veteran status, Middle Eastern directors,⁴⁹ etc.), in a narrative that accompanies the matrix or in a separate graphic.

⁴⁸ If posting the matrix on its website, a company must: (i) label the disclosure and decide where to post it on the company website. The disclosure should be clearly labeled as "Board Diversity Matrix" on the company's website. It can be posted anywhere on the website, but Nasdaq recommends posting it on the Investor Relations web page or other web page where governance documents are posted; and (ii) inform Nasdaq of posting. Within one business day after posting, companies must complete Section 10 (Board Diversity Disclosure) of the Company Event Form on the Nasdaq listing center, which requires the company to provide the disclosure date and URL location of its matrix. For additional information, see Nasdaq's [Website Disclosure of Board Diversity Matrix Info Sheet](#).

⁴⁹ Certain companies may want to include additional ethnic or racial categories below or otherwise outside of the matrix to display this diversity to proxy advisers. In cases where it applies US, rather than regional, voting standards to FPIs, ISS considers racial and ethnic diversity to be broader than Nasdaq.

Alternative 1

Board Diversity Matrix (As of [DATE])

Total Number of Directors	#			
	Female	Male	Non-Binary	Did Not Disclose Gender
Part I: Gender Identity				
Directors	#	#	#	#
Part II: Demographic Background				
African American or Black	#	#	#	#
Alaskan Native or Native American	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+			#	
Did Not Disclose Demographic Background			#	

Alternative 2

Board Diversity Matrix (As of [DATE])

Country of Principal Executive Offices	[Insert Country Name]			
Foreign Private Issuer	Yes/No			
Disclosure Prohibited under Home Country Law	Yes/No			
Total Number of Directors	#			
	Female	Male	Non-Binary	Did Not Disclose Gender
Part I: Gender Identity				
Directors	#	#	#	#
Part II: Demographic Background				
Underrepresented Individual in Home Country Jurisdiction			#	
LGBTQ+			#	
Did Not Disclose Demographic Background			#	

Appendix C

Director Overboarding Policies

While most stakeholders support limits on the number of outside directorships a director can hold, the overboarding policies of proxy advisory firms and institutional investors are generally country or region-specific and therefore companies are advised to carefully consider the specific policies of the relevant firms when considering whether their directors may be considered “overboarded.” See the country-specific policies of [ISS](#) and [Glass Lewis](#). In addition, the general policies of major institutional investors are discussed below:

- **BlackRock:** “As the role of director is increasingly demanding, directors must be able to commit an appropriate amount of time to board and committee matters. Given the nature of the role, it is important a director has flexibility for unforeseen events, and therefore only takes on the maximum number of non-executive mandates that provides this flexibility. BlackRock is especially concerned that where a full-time executive has a non-executive director role or roles at unrelated companies, there may be a risk that the ability to contribute in either role could be compromised in the event of unforeseen circumstances. Companies should disclose board and committees’ attendance to enable shareholders to monitor directors’ availability. However, in BlackRock’s experience, the test of an over-committed director is not just their attendance record but also includes an assessment of a director’s ability to provide appropriate time to meet all responsibilities when one of the companies starts facing exceptional circumstances.”

For companies in EMEA, “BlackRock will ordinarily consider there to be a significant risk that a board candidate has insufficient capacity, and therefore consider voting against his/her (re)election, where the candidate would (if elected) be: (i) serving as a non-executive director (but not the board chair) on **more than four** public company boards; (ii) serving as a non-executive board chair and as a non-executive director (but not the board chair) on **more than two** other public company boards; (iii) serving as a non-executive board chair on **two** public company boards and as a non-executive director on **one or more** other public company boards; or (iv) serving as a non-executive director (but not the board chair) on more than one public company board while also serving as an executive officer at a public company. In case of an executive officer, we would vote against his/her (re)election only to boards where he/she serves as a non-executive director.”⁵⁰

- **State Street:** State Street implements the following voting guidelines, in addition to its existing guidelines regarding director time commitment:⁵¹ State Street may take voting action against directors who hold excessive commitments according to either of the following conditions: (i) named executive officers (NEOs) who sit on **more than two** public company boards; (ii) non-executive board chairs or lead independent directors who sit on **more than three** public company boards; or (iii) director nominees who sit on **more than four** public company boards.⁵² State Street may consider waiving its policy and voting in support of a director (other than an NEO) if the company discloses its director commitment policy in a publicly available manner (e.g., corporate governance guidelines, proxy statement, company website). This policy or associated disclosure must include: (i) a numerical limit on public company board seats a director can serve on (this limit cannot exceed State Street’s policy by more than one seat); (ii) consideration of public company board leadership positions (e.g., committee chair); (iii) affirmation that all directors are currently compliant with the company policy; and (iv) description of an annual policy review process undertaken by the Nominating Committee to evaluate outside director time commitments.⁵³
- **Vanguard:** “Directors’ responsibilities are complex and time-consuming. As a result, a director may be considered ‘overboarded’ when the number of director positions they have accepted makes it challenging to dedicate the requisite time and attention to effectively fulfill their responsibilities at each company. While no two boards are identical and time commitments may vary, the funds believe the limitations below are

⁵⁰ See [BlackRock Responsible Investment Guidelines EMEA](#).

⁵¹ For example, see State Street’s [proxy voting guidelines for European companies](#) and its [proxy voting guidelines for US and Canadian companies](#).

⁵² Service on mutual fund boards and UK investment trusts is not considered when evaluating directors for excessive commitments.

⁵³ See [SSGA’s Managing Through a Historic Transition: The Board’s Oversight of Director Time Commitments](#).

appropriate absent compelling evidence to the contrary. The funds will take into account the scope of external commitments when evaluating a director's capacity on a case-by-case basis. A fund will generally vote against: (i) any director who holds an executive role of any public company and serves on **two or more additional outside** public company boards; and (ii) any director who serves on **more than four** public company boards. In certain instances, will consider voting for a director who would otherwise be considered overboarded if: (i) the director has committed to stepping down from a/the directorship(s) necessary to fall within the thresholds listed above by the following year's annual general meeting; (ii) the director becomes overboarded as a result of becoming an interim executive officer or has become an executive officer within the last 12 months; and/or (iii) the company provides specific, verifiable information confirming that (a) the director devotes significantly less than an average amount of time to one or more of the boards on which they sit and (b) that the reduced workload is appropriate based on the nature of the company's board (e.g., the company's business model or governance structure) and the relevant director continues to fulfill their obligations to that company, irrespective of their diminished hours of service."

Israeli FPIs

- **ISS:** Under extraordinary circumstances, will vote against individual directors, members of a committee, or the entire board, due to "[e]gregious actions related to a director's service on other boards that raise substantial doubt about his or her ability to effectively oversee management and serve the best interests of shareholders at any company."
- **Glass Lewis:** Generally recommend against a director who: (i) serves as an executive officer of a public company while serving on **more than one additional** public company board, (ii) serves as an executive chair/vice chair of a public company while serving on **more than two additional** external public company boards; and (iii) any other director who serves on **more than five** public company boards. However, Glass Lewis also takes the following into consideration:
 - When determining whether a director's service on an excessive number of boards may limit the ability of the director to devote sufficient time to board duties, may consider relevant factors, such as the size and location of the other companies where the director serves on the board, the director's board roles at the companies in question, whether the director serves on the board of any large privately-held companies, the director's tenure on the boards in question, and the director's attendance record at all companies and the director's attendance record at all companies.
 - May not recommend that shareholders vote against overcommitted directors at the companies where they serve an executive function.
 - Will generally refrain from recommending against a director who serves on an excessive number of boards within a consolidated group of companies or a director that represents a firm whose sole purpose is to manage a portfolio of investments which include the company.
 - May refrain from recommending against the director if the company provides a sufficiently compelling explanation regarding his or her significant position on the board, specialized knowledge of the company's industry, strategic role (such as adding expertise in regional markets or other countries), etc.⁵⁴

⁵⁴ See [Glass Lewis's Israel Voting Guidelines](#).

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