

Appendix A

1. The following Form 10-K 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) Update Item 6 in Part II to state “[Item 6. \[Reserved\]](#)” (instead of “Item 6. Selected Financial Data” from the prior Form 10-K) due to the SEC’s elimination of the disclosure requirement for selected financial data in 2021.¹
 - (ii) Add new “Item 9C” in Part II of the Form 10-K with the caption “Disclosure Regarding Foreign Jurisdictions that Prevent Inspections”.²
 - (iii) 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.³ Companies should coordinate this tagging with the financial printer.
 - (iv) For companies with mining operations⁴, consider whether expanded Regulation S-K 1300 requirements, which became mandatory for Form 10-Ks 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 10-K.⁵ In addition, companies with property that is *individually* material to their business must obtain a technical report summary⁶, which must be signed by a “qualified person” (as defined in Regulation S-K 1300) and filed as Exhibit 96.1 to the Form 10-K.⁷
2. **Considerations for Outstanding Registration Statements:** Consider how the filing of the Form 10-K may impact any outstanding registration statements. Specifically, if you have an outstanding registration statement on Form S-1, a post-effective amendment to the Form S-1 must be filed in order to incorporate the annual financial statements and other information from the Form 10-K into the Form S-1. You should also consider if you have become Form S-3 eligible, so that you can convert the Form S-1 into a Form S-3 and avoid future post-effective amendments for as long as you remain S-3 eligible. If you have an outstanding registration statement on Form S-3, ensure that you continue to meet the eligibility requirements for using the Form S-3 when filing your Form 10-K: (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 you still meet the requirements to use that registration statement; otherwise, you will need to re-file as a Form S-1. In addition, remember to update your auditor consent to include any newly filed registration statements and remove any registration statements that are no longer effective.

¹ For more information, see “[Considerations for the Form 10-K in 2022: Mandatory Compliance with SEC’s Rule Amendments to Items 301, 302 and 303](#)” in our prior memo.

² New Item 9C was added to the Form 10-K in 2021 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 10-Ks.

³ 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.

⁴ 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.

⁵ 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.

⁶ 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).

⁷ The technical report summary must be filed as Exhibit 96.1 to the Form 10-K the first time the company discloses mineral reserves or mineral resources in its Form 10-K. In addition, it must be filed as an exhibit in subsequent Form 10-Ks if: (i) there is a material change in the mineral reserves or mineral resources, as disclosed in the Form 10-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.

3. **D&O Questionnaires.** Ahead of your Form 10-K filing, review and update your D&O questionnaires, which provide back-up and support for the disclosures to be included in your Form 10-K and proxy statement. In particular:
- (i) Consider updates to state that a director nominee consents to being named in the proxy statements of both the company and of any dissident shareholder, in order to comply with the [new universal proxy rules](#);
 - (ii) If you are a Nasdaq-listed company subject to the board diversity requirements or otherwise plan to voluntarily disclose the diversity of your directors, include 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;
 - (iii) 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;
 - (iv) 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
 - (v) Consider building out (or adding) Iran-related activities questions to cover potentially problematic transactions with Russian entities.⁸

⁸ 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.