Client Alert | Public Company Advisory / Capital Markets

Reminders for Foreign Private Issuers for the 2018 Annual Reporting Season

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Executive Summary

This memorandum outlines certain considerations for foreign private issuers ("FPIs") in preparation for the 2018 annual reporting season. Part I of this memorandum discusses new developments and practical action items for the 2018 reporting season, and Part II includes a discussion of potential regulatory developments and pending rulemaking initiatives.

Part I. New Considerations and Action Items for the 2018 Reporting Season

Below are certain disclosure considerations and technical updates relevant to FPIs in connection with the upcoming annual report filing obligations.

Disclosure Considerations

New Revenue Recognition Accounting Standard

For FPIs that report using US GAAP, new revenue recognition accounting standard, ASU No. 2014-09[1], went into effect for fiscal years beginning after December 15, 2017. Companies transitioning to the new revenue recognition standard may use either a full retrospective method (i.e., applying it retrospectively to each prior period presented) or a modified retrospective method (i.e., applying it to contracts that are initiated after the effective date and contracts that have remaining obligations as of the effective date, without restating the prior period financials to reflect adoption of the new standard).

- *Transition Disclosures*—Staff Accounting Bulletin No. 74 ("SAB 74") requires that companies include robust transition disclosures in their annual reports to enable investors to understand the anticipated effects of the new standard. The SEC has emphasized the importance of these transition disclosures[2], indicating that it will focus on (i) disclosure of the impact that adoption of the new standard is expected to have on the company's

[1] Available here.

[2] See, for example, speeches by Wesley Bricker, Chief Accountant of the SEC, available here and here; and Sagar Teotia, Deputy Chief Accountant of the SEC, available here.

financial statements, or a statement that such impact is not known or reasonably estimable, and a qualitative description of the effect of the new policies and a comparison to the company's current accounting; (ii) disclosure of the status of the company's implementation process for the new standard and significant implementation matters yet to be addressed; and (iii) involvement of the audit committee in the process to ensure that its SAB 74 disclosures are timely identified and subject to effective internal control over financial reporting.

- *SEC Comments for Early Adopters*—Comment letters from the SEC's Division of Corporation Finance ("Corp Fin") on revenue recognition standard disclosures thus far indicate the following trends: (i) early adopters have been asked to clarify considerations made for operationalizing different aspects of the standards[3], (ii) the SEC has been requesting more robust SAB 74 disclosures for periods ending December 31, 2016 for companies using the full retrospective method; and (iii) several companies have disclosed incorrect effective dates for the standard. The emphasis of the comments was on the adequacy of disclosure and seeking to understand how the company made judgments in applying the new principles-based standard.

  The SEC stressed that it will monitor revenue-related disclosures carefully, and if companies have questions about the standard, Corp Fin is willing to work with them collaboratively to help resolve those issues.

PCAOB Auditing Standard 3101

In October 2017, the SEC unanimously approved[4] the Public Company Accounting Oversight Board's ("PCAOB") proposal to adopt a new auditing standard, AS 3101, The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion, and related amendments to other auditing standards (collectively, the "New Standard"). The New Standard will significantly revise the auditor's report by: (i) requiring disclosure of the communication of critical audit matters ("CAMs"), and (ii) implementing additional content requirements and formatting changes to improve the utility, organization and readability of auditor reports. A CAM is defined as any matter arising from the audit of the financial statements that was communicated or required to be communicated to the audit committee and that: (i) relates to accounts or disclosures that are material to the financial statements; and (ii) involved especially challenging, subjective, or complex auditor judgment. The New Standard includes guidance for auditors in determining whether a matter rises to the level of a CAM due to its involving especially challenging, subjective, or complex auditor judgment.

The changes other than communication of CAMs are effective for all audits relating to fiscal years ending on or after December 15, 2017. CAM requirements will be phased-in for large accelerated filers for audits relating to fiscal years ending on or after June 30, 2019, and for all other companies for audits relating to fiscal years ending on or after December 15, 2020. Auditors may voluntarily comply early. CAM requirements will not apply to audit reports of emerging growth companies ("EGCs"), certain brokers and dealers, investment companies other than business development companies and benefit plans, but will apply to audit reports of FPIs.

The New Standard will require an auditor's report to disclose any CAMs arising from the current period's audit, or to state that the auditor determined that there were no CAMs for that period. For any CAMs, the auditor must disclose in its report the principal considerations that led the auditor to determine that the matter is a CAM and how the CAM was addressed in the audit, and must refer to the relevant financial statement accounts or disclosures.

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3 The SEC focused its comments on the following areas: (i) accounting for sources of variable consideration, including refund liabilities and reassessment of variable consideration; (ii) accounting for rebates paid to customers; (iii) disclosing the nature of changes in contract balances, including how the timing of payments and satisfaction of performance obligations impact contract assets and liabilities; (iv) substantiating the method used to recognize revenue on over-time performance obligations; (v) determining that costs obtaining a contract are incremental, and thus eligible to be capitalized; (vi) determining of the appropriate amortization period for commissions costs, with consideration to contract renewals; and (vii) disclosing remaining unsatisfied performance obligations.

4 The SEC's order can be found here.

The PCAOB staff has released guidance, including an annotated example of the new auditor's report highlighting the key changes, followed by explanations[5], to aid auditors in complying with the new standard.

In preparation for compliance, given the complexity and sensitivity of the issues involved, companies should consider taking the following steps:

- *Begin working with auditors now*—Start a dialogue with auditors with respect to how they expect to approach the CAM requirements in the context of their particular company, what matters may merit this designation and what disclosures the auditors would anticipate making in their auditor's reports.
- *Establish CAM notification procedures*—Establish a process for receiving timely notification from the auditors of any intention to disclose a CAM and the information that the auditor intends to include in its report about the matter. Once the New Standard is implemented, ensure sufficient time is allocated for the audit committee, other executives and legal counsel to discuss and review the auditor's report.
- *Monitor Disclosures*—Disclosure of a CAM by the auditor in its report could result in disclosure of original information, which may compel the company to provide its own disclosure. Management should pay close attention to any differences between the CAM disclosures in the auditor's report and management's disclosures in its filed documents concerning the same matters. In addition, given that the new auditor's report discussion will reflect the auditor's perspective, which is inherently different from management's perspective, management may wish to revise or supplement its own disclosures on a matter in order to ensure that an accurate and complete picture is disclosed.
- *Consider Enhanced Disclosure*—Companies with long-tenured auditors may consider enhanced disclosure addressing the benefits of having a long-term relationship with their auditor, such as institutional knowledge and higher quality audits, as well as how the audit committee monitors auditor independence.

Audit Committee Disclosures

In 2015, the SEC issued a concept release[6] soliciting comments on possible revisions to existing disclosure requirements with respect to an audit committee's responsibilities for the oversight of independent auditors. There has been an increase in voluntary audit-related disclosures, which has helped establish the scope of audit committees' oversight role, and an overall trend towards more robust discussion of the role of the audit committee. According to an analysis by Ernst & Young LLP[7] of the 2017 proxy statements of 75 Fortune 100 companies that filed proxy statements each year from 2012 to 2017, voluntary audit-related disclosures continued to trend upward in a number of areas: 56% of companies disclosed factors considered by the audit committee when assessing the qualifications and work quality of the external auditor (up from 48% in 2016 and 17% in 2012); 73% stated that the audit committee believed that the choice of external auditor was in the best interests of the company and/or the shareholders (up from 72% in 2016 and 3% in 2012); 87% explicitly stated that the audit committee is responsible for the appointment, compensation and oversight of the external auditor (up from 81% in 2016 and 45% in 2012); and 43% provided information about the reasons for changes in fees paid to the external auditor (up from 31% in 2016 and 9% in 2012) (under current SEC rules, companies are required to disclose fees paid to the external auditor, but are not required to discuss the reasons for any changes in fees).

Although no further action has been taken by the SEC in connection with the 2015 concept release, given the continued investor interest in audit committee disclosures, companies should consider improvements to audit committee communications and expansion of current disclosures.

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[5] Available here. The guidance also notes that questions pertaining to AS 3101 and related amendments may be directed to the staff in the PCAOB's Office of the Chief Auditor via the standards' help line at (202) 591-4395 or may be submitted through a web form.

[6] The concept release can be found here.

[7] The Ernst & Young report can be found here. A review of S&P 500 companies' proxy statements conducted by The Center for Audit Quality (CAQ) and Audit Analytics revealed similar trends. That survey is available here.

Possible Updates to Risk Factor Disclosures

When reviewing risk factors for this reporting season, companies should consider:

- *Cybersecurity*—In light of recent cybersecurity breaches at several high-profile companies, as well as at the SEC itself, there is increasing recognition that cybersecurity poses both economic and security threats that can impact any company. SEC guidance[8] notes that material cybersecurity risks must be disclosed to avoid potential incomplete or misleading disclosures and companies should carefully analyze whether they need new, revised or expanded cybersecurity disclosure.

- *Climate Change and Sustainability*—These issues have been receiving increased attention, and risk factor disclosure could be necessary to address the impact of existing or pending legislation on a company's business, as well as the effects of increasing public consciousness and activism related to climate change and sustainability issues. Potential changes in climate regulation could also pose specific risks to certain companies.

- *Shareholder Activism*—As companies become increasingly aware of the prevalence of activism and the potential downside of being a target, shareholder activism is being included as a risk factor in some companies' periodic reports. In the first half of 2017, 65 companies included such a risk factor, representing more than a fivefold increase from 2014. This disclosure can take the form of a stand-alone risk factor describing how the company's business could be impacted by the actions of activist shareholders (such as by causing the company to incur substantial costs, including litigation, diverting management attention and resources, or creating uncertainty that impacts retention of employees or customers) or adding shareholder activism to a list of factors that could hinder investment or other business activities and impact a company's stock price.

- *Brexit*—While the full effect of the United Kingdom's withdrawal from the EU may not be seen for several years, approximately 600 companies have disclosed Brexit-related risk factors in their Forms 10-K and 20-F filed between September 1, 2016, and April 30, 2017. Brexit has been referenced in risk factors on currency exchange rate risks, cross-border trade and labor, international operations risks and global economic conditions, and risks related to political and regulatory uncertainty. As Brexit negotiations progress, impacted companies should continue evaluating whether Brexit poses a material risk to their business, what level of Brexit-related disclosure is appropriate and whether any prior Brexit risk factor disclosures require updates.

Presentation of Non-GAAP Financial Information

2016 guidance from Corp Fin[9] clarified the SEC's position on complying with key aspects of Regulation G and Item 10(e) of Regulation S-K relating to the use of non-GAAP financial information. Subject to limited exemptions[10], FPIs are required to comply with Regulation G with respect to any public announcements of

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8 The SEC's Disclosure Topic 2 is available here.

9 See Non-GAAP Financial Measures Compliance and Disclosure Interpretations (C&DIs), Questions 100.01–100.04, 102.01–102.03, 102.05, 102.07, 102.10, 102.11 and 103.02.

10 Item 10(e) permits FPIs to use a non-GAAP financial measure that it is otherwise prohibited under Item 10(e) if: (1) the non-GAAP financial measure relates to the GAAP used in the FPI's primary financial statements included in its filing with the SEC; (2) the non-GAAP financial measure is required or expressly permitted by the standard-setter that is responsible for establishing the GAAP used in such financial statements; and (3) the non-GAAP financial measure is included in the annual report prepared by the FPI for use in the home jurisdiction or for distribution to its security holders. Regulation G does not apply to a disclosure of a non-GAAP financial measure that is made by or on behalf of an FPI if the following conditions are satisfied: (1) the securities of the FPI are listed or quoted on a securities exchange or inter-dealer quotation system outside the US; (2) the non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with US GAAP; and (3) the disclosure is made by or on behalf of the FPI outside the US, or is included in a written communication that is released by or on behalf of the FPI outside the US. The exemption applies notwithstanding the existence of one or more of the following: (1) a written communication is released in the US, as well as outside the US, so long as the communication is released in the US contemporaneously with or after the release outside the US and is not otherwise targeted at persons located in the US; (2) foreign journalists, US journalists or other third parties have access to the information; (3) the information appears on one or more websites maintained by the FPI, so long as the websites, taken together, are not available exclusively to, or targeted at, persons located in the US; or (4)

material information that contain non-GAAP financial measures and are subject to the requirements of Item 10(e) of Regulation S-K with respect to any filings under the Securities Act of 1933 (Securities Act), such as registration statements on Form F-1 or F-3, and the Securities Exchange Act of 1934 (Exchange Act), such as annual reports on Form 20-F. Because reports of FPIs on a Form 6-K are generally "furnished" rather than "filed" with the SEC, unless a Form 6-K is expressly designated as being "filed" or is incorporated by reference into a Securities Act registration statement or an annual report on Form 20-F, Form 6-Ks are not subject to the Item 10(e) "equal prominence" requirements or the related SEC guidance thereon.

Since this guidance was released, the SEC has issued numerous comment letters on non-GAAP measures directed at companies with improper disclosure (656 in the first half of 2017, compared to 429 in the first half of 2016). Some of the most common comments focus on the undue prominence of non-GAAP information, including lack of comparable GAAP metrics, or presentation of the non-GAAP metric ahead of the comparable GAAP number. Although the pace of comments on these issues has been declining, companies should continue to closely monitor their non-GAAP financial disclosures to ensure they are compliant with the requirements.

XBRL Updates

- *XBRL Exhibits Now Required for IFRS Filers*—FPIs that prepare their financial statements in accordance with IFRS are now required, beginning with annual reports on Form 20-F filed in 2018 relating to fiscal years ending on or after December 15, 2017, to provide a version of their financial statements in interactive data format using eXtensible Business Reporting Language ("XBRL") in addition to providing financial statements in their traditional format. Previously, FPIs could voluntarily file financial data in XBRL format, although they were not required to comply with XBRL reporting, because the SEC had not specified a taxonomy specifically applicable to IFRS.

- *Inline XBRL*—The SEC has not yet issued final rules following its proposed rules that would require companies to provide their financial statements in the Inline XBRL format. Inline XBRL allows filings to be made that integrate XBRL data directly into HTML filings, rather than requiring a copy of the filing to be attached as a separate XBRL exhibit[11]. Currently, public reporting companies can voluntarily file their structured financial statement data in inline XBRL format.

EGC Check Boxes on Cover Pages of Forms[12]

Effective April 12, 2017, the SEC made a number of technical amendments to existing rules and certain Securities Act and Exchange Act forms such that the cover pages of certain forms are now required to include two check boxes to allow companies to indicate: (i) whether, at the time of the filing, the company is an EGC; and (ii) if so, whether it has elected not to use the extended transition period for an EGC to comply with any new or revised financial accounting standards.

Specialized Disclosure Rules

- *Repeal of Resource Extraction Rule*—In February 2017, Rule 13q-1 of the Exchange Act, which would have required companies, including FPIs[13], to publicly disclose payments to the US or foreign governments related to the commercial development of oil, natural gas or mineral resources, was repealed. The SEC is still required to promulgate rules mandating disclosure of payments to foreign governments; however, the Congressional Review Act expressly prohibits any rulemaking that is "substantially the same" as the disapproved rule without additional statutory authorization, which is unlikely to be forthcoming.

- *Conflict Minerals Disclosure Rules*—FPIs that file reports with the SEC under Section 13(a) or Section 15(d) of the Exchange Act must comply with the SEC's conflict minerals disclosure rules, which require a company

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following the disclosure or release of the information outside the US, the information is included in a submission by the FPI to the SEC made under cover of a Form 6-K.

[11] The SEC's order can be found here.

[12] The amendments can be found here. The filings subject to these technical amendments include Forms F-1, F-3 and F-4 under the Securities Act and Forms 20-F and 40-F under the Exchange Act.

[13] FPIs that rely on Exchange Act Rule 12g3-2(b) would not have been subject to the rule.

to disclose annually on Form SD whether it uses "conflict minerals" that originate from the designated countries which are "necessary to the functionality or production" of a product the company manufactures or contracts to be manufactured[14]. In April 2017 guidance, the Staff announced it would not recommend enforcement action if a company only includes disclosure in Form SD concerning the "reasonable country of origin inquiry" (under Items 1.01(a) and (b)) and does not disclose its due diligence on the source and chain of custody of conflict minerals or a Conflict Minerals Report and associated Independent Private Sector Audit (under Item 1.01(c))[15]. However, notwithstanding the Staff guidance, the requirements remain in place, and without more definitive and clear relief or additional guidance, reporting companies may choose to keep their reporting approach unchanged[16].

In November 2017, the House Financial Services Committee passed a bill[17] that would amend the Exchange Act to repeal Section 13(p), under which the SEC's conflict minerals disclosure rules and related requirements were adopted. However, this should not impact companies' current compliance plans, as even if the bill is passed, there is no guarantee it will be enacted into law.

- *Mining Disclosure Rules*—In June 2016, the SEC proposed rules that would revise the property disclosure requirements for mining registrants and the related guidance currently set out in Item 102 of Regulation S-K and Industry Guide 7[18]. FPIs that use Form 20-F to file their Exchange Act registration statements and annual reports, or that refer to Form 20-F when filing their Securities Act registration statements on Forms F-1 and F-4, are generally not subject to Regulation S-K. However, the proposed rules would amend Form 20-F to instruct registrants to refer to and, if required, provide the disclosure under the new subpart of Regulation S-K. The SEC has not yet considered final rules, and the proposing release does not address how much time issuers would have to comply with the new regime if it is adopted.

  In November 2017, the House Financial Services Committee passed a bill[19] that would repeal Section 1503 of the Dodd-Frank Act, which requires detailed disclosures about mine safety and health in quarterly and annual reports filed with the SEC[20]. However, this should not impact companies' current compliance plans, as even if the bill is passed, there is no guarantee it will be enacted into law.

Cybersecurity: Risk Management and Related Disclosures

Board Engagement; Cyber-Breach Response Plans; and Recent SEC Actions

As high-profile cyberattacks persist, the SEC continues to focus on the issue of cybersecurity. In September 2017, the SEC disclosed the 2016 hack of the SEC's EDGAR system and announced the creation of a Cyber Unit within the Enforcement Division, which will monitor cyber-related misconduct, the implementation of an internal cybersecurity risk profile and the creation of a cybersecurity working group to coordinate information sharing, risk monitoring and incident response efforts throughout the agency. The SEC's Office of Compliance Inspections and

14 The rules can be found here.

15 Item 1.01(c) requires that if the company knows, or reasonably believes, based on its RCOI, that any of its necessary conflict minerals originated in the Democratic Republic of Congo or an adjoining country and are not from recycled or scrap sources, the company must (i) exercise due diligence, including obtaining an IPSA, on the source and chain of custody of its conflict minerals, and describe the due diligence conducted in the Conflict Minerals Report attached as an exhibit to its Form SD, and (ii) describe its products that contain necessary conflict minerals, the facilities used to process the necessary conflict minerals, the country of origin of the necessary conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.

16 For additional information on the Staff guidance, see our prior release, available here.

17 Available here.

18 The proposal would rescind Industry Guide 7 and include the SEC's disclosure requirements in a new subpart of Regulation S-K. The proposed rules would require a company to provide disclosure for mining operations that are material to its business or financial condition. If a registrant's mining assets constitute 10% or more of its total assets, there would be a rebuttable presumption that its mining operations are material. Registrants with mining assets below the 10% threshold would be directed to consider whether there are other factors which would render its mining operations material. The proposed rules can be found here.

19 Available here.

20 For additional information on the mine safety reporting requirements, see our prior alert, available

Examinations issued a cybersecurity risk alert listing the elements that were included in the policies and procedures of companies that SEC staff believes had implemented robust controls[21] and in a November 2017 speech, Corp Fin director William Hinman indicated that the SEC intends to issue updated guidance focused on what internal processes and controls a company should have in place to evaluate a cybersecurity event; however, he did not indicate the timing of such guidance. In January 2017, the National Association of Corporate Directors released an updated edition of its "Director's Handbook on Cyber-Risk Oversight"[22].

Cybersecurity Disclosure Considerations

In 2015, the US Congress introduced a bill to require the SEC to issue rules mandating public company disclosure of the cybersecurity expertise or experience of each director, or what other cybersecurity considerations were evaluated in the nomination of directors. While no formal rulemaking initiatives have been undertaken, the SEC has been active in recent years in commenting on public company periodic reports regarding cybersecurity issues, including requiring companies to disclose whether they have experienced cyberattacks, requesting a separate discussion of risks posed by cyberattacks and seeking disclosure of expenditures for cybersecurity protection measures. Currently, disclosure related to cybersecurity should be guided by the SEC's 2011 Disclosure Guidance Topic No. 2[23], which made clear that cybersecurity disclosures may be required in risk factors, MD&A, business and legal proceedings sections and in the notes to the financial statements. Disclosures related to the role of the board in risk oversight are required in the proxy statements of US issuers, and consideration should be given to whether cybersecurity risk management should be separately addressed.

ISS and Glass Lewis Proxy Voting Guidelines

Proxy advisory firms, such as Institutional Shareholder Services, Inc. ("ISS") and Glass Lewis & Co. ("Glass Lewis"), can have a significant impact on the proxy voting process, since the voting recommendations of these firms often determine or influence shareholder votes. As a result, it is important for publicly traded companies to evaluate their corporate governance practices against the proxy voting policies and guidelines established by these firms. Both ISS and Glass Lewis provide country- or region-specific guidance[24] which companies should carefully review and consider as they prepare for their 2018 shareholder meetings.

Other Considerations

NYSE Rule Changes

- *Dividend Notification Requirements*—In August 2017, the SEC approved[25] an amendment to the NYSE Listed Company Manual (the "Listed Company Manual") requiring listed companies submitting dividends during or outside of market hours to provide the NYSE with ten minutes of advance notice before releasing the dividend information to the public. The advance notice requirement for announcements during market hours was effective immediately; however, the NYSE delayed implementation as it relates to announcements issued outside of market hours. The NYSE expects the new implementation date to be no later than February 1, 2018; listed companies will be given at least 30 days' notice of the implementation date.
- *Material News Issuances*—The SEC approved a rule change[26] to the Listed Company Manual requiring that a listed company not issue material news after the NYSE closes trading until the earlier of (i) publication of the company's official closing price on the Exchange, or (ii) five minutes after the NYSE's official closing time.

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21 These include: (i) maintenance of an inventory of data, information, and vendors, (ii) detailed cybersecurity-related instructions, (iii) maintenance of prescriptive schedules and processes for testing data integrity and vulnerabilities, (iv) established and enforced controls to access data and systems, (v) mandatory employee training and (vi) engaged senior management.

22 Available here.

23 Available here.

24 ISS guidelines are available here and Glass Lewis guidelines are available here.

25 The SEC's order can be found here.

26 The SEC's approval of the rule change can be found here.

Companies may still publicly disclose material information following a nonintentional disclosure to comply with Regulation FD.

Dealings with Sanctioned Countries

Corp Fin's Office of Global Security Risk continues to review annual reports on Form 20-F for transactions in or with countries and entities subject to sanctions implemented by the Office of Foreign Assets Control of the US Department of Justice. The SEC takes a broad interpretation of the requirement to disclose contacts with sanctioned countries and has requested that companies provide information regarding past, current and anticipated contacts with sanctioned countries, whether through subsidiaries, joint ventures or other direct or indirect arrangements, or other contacts with the governments of those countries or any entities that might be controlled by those governments. In particular, SEC comments have instructed FPIs to provide disclosure on any associated revenues, assets and liabilities derived from operations in countries designated as state sponsors of terrorism, as well as to include disclosure on the absence of such activity, if the issuer had included such disclosure for previous periods. FPIs may want to review their prior filings to prepare themselves for any inquiries in this area.

Part II. Future Rulemaking, Looking Ahead

Dodd-Frank Compensation-Clawback Rule[27]

In 2015, the SEC proposed rules that would require any company with securities listed on a national securities exchange to have a policy to "claw back" incentive-based compensation paid to current and former executives in the event of a financial restatement to correct a material error[28]. The proposal also specifies disclosure requirements relating to clawback policies and actual clawbacks. FPIs that list only debt or preferred securities would be subject to the clawback listing standards to the extent that they have securities listed on a national securities exchange or association[29].

The SEC has not issued a final rule; however, there has been a trend favoring the adoption of broader clawback policies that go beyond the scope of Sarbanes-Oxley requirements (including with respect to the group of covered executives), which trigger clawbacks only when there is fraud or misconduct in connection with a financial restatement. Companies that do have a broader clawback policy in place should consider enhancing related disclosures.

It is unclear whether pending Dodd-Frank rulemaking will eventually be implemented or whether portions of Dodd-Frank will be repealed by the "Financial CHOICE Act" or other legislation. It is not clear when, if at all, the Financial CHOICE Act will be considered by the Senate or what legislative changes it might undergo. The above discussion reflects the current state of pending Dodd-Frank-related disclosure requirements.

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[27] The proposed rule can be found here.

[28] Clawbacks of erroneously awarded incentive-based compensation would be required for the three fiscal years prior to a financial restatement and would be "no fault," meaning they would be triggered regardless of whether an executive was involved in any misconduct or was responsible for the restatement. SRCs, EGCs and companies that list only debt or preferred securities would be subject to the standards to the extent that they have securities listed on a national securities exchange or association. Incentive-based compensation is defined as any compensation (including stock options and other equity awards) that is granted, earned or vested based wholly or in part upon the attainment of any financial reporting measure.

[29] The proposed rule and rule amendments would not permit the exchanges to exempt FPIs from compliance with Section 10D's disclosure and recovery requirements in favor of following home country practice. It would, however, allow exchanges to permit FPIs to forgo recovery as impracticable if the recovery of erroneously awarded compensation pursuant to Section 10D would violate the home country's laws, so long as certain other conditions are met.

SEC Initiatives

Simplified Disclosure[30]

As part of its ongoing initiative to review and enhance disclosure effectiveness, the SEC proposed amendments to simplify the disclosure requirements of Regulation S-K, which may trickle down to FPIs either as a rule change or as a matter of best practice. These proposed changes include, for example, revising Item 102 to clarify that a description of property is required only to the extent that physical properties are material to the company's business, and revising Item 303(a) (MD&A) to require only a period-to-period comparison for the two most recent fiscal years presented in the financials, permitting a hyperlink to the prior year's annual report for the additional (third) year.

Enforcement Focus – Ending "Broken Windows"

At a securities conference in October 2017, Steven Peikin, co-director of the SEC's enforcement division, indicated that the SEC would end its "broken windows" strategy of pursuing many cases over even the smallest legal violations, and may also pull back from trying to make companies admit to wrongdoing as a condition of settling with the SEC. He also emphasized the benefits of cooperating with the SEC in an enforcement action.

SEC's Regulatory Agenda for 2018[31]

The SEC's regulatory agenda for 2018 focuses on, among other things: (i) disclosure of payments by resource extraction issuers, (ii) amendments to the XBRL rules to require the use of inline XBRL, (iii) update and simplification of certain disclosure requirements under Regulation S-K and Regulation S-X, and (iv) mining disclosure modernization. Notably, corporate board diversity and clawbacks, among other things, were removed from the prior year's agenda and reclassified as "long-term" initiatives.

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[30] For additional information, see our prior alert, available here.

[31] The SEC's rulemaking agenda can be found here.