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THE UNIQUE IMPACT OF RECENT SEC RULES ON FOREIGN PRIVATE ISSUERS

Foreign private issuers should be aware that new SEC rules can have a special impact on them, and that the SEC may be rethinking its traditional approach for such issuers.

By Paul M. Dudek *

For the past two years, the US Securities and Exchange Commission ("SEC") has been pursuing an ambitious rule-writing agenda, proposing and adopting numerous new regulations in areas ranging from the settlement cycle for securities transactions (T+1), to the outsourcing of services by registered investment advisers, to updating the SEC's regulations under the Privacy Act. Public companies in particular have increasingly been the focus of new SEC mandates, with a large number of these rule-writing matters being directed at companies that are reporting to the SEC under the Securities Exchange Act of 1934 ("Exchange Act") and are listed on the New York Stock Exchange or Nasdaq Stock Market.

These companies include a large number of foreign private issuers[1] ("FPIs") which are listed on US stock exchanges and report to the SEC. FPIs have been uniquely affected by the new rules, and they also appear likely to be impacted by various rule-making initiatives that the SEC has proposed but not yet adopted. In many cases under these new rules, the SEC's approach varies starkly from the SEC's historical practice of providing accommodations to FPIs that take account of home country disclosure and governance practices.[2]

This article highlights how the SEC's adopted and proposed rules impact those FPIs that are listed on US stock exchanges. While the SEC has adopted or proposed accommodations for FPIs in some of its recent rule writings, in many cases it has elected to treat FPIs in the same manner as US companies in its black letter regulations. This effort towards "equal treatment" in practice frequently results in unequal or higher burdens on FPIs, or otherwise impacts them differently than the

[1] An FPI is an entity (other than a foreign government) incorporated or organized under the laws of a foreign jurisdiction unless: (1) more than 50% of its outstanding voting securities are directly or indirectly owned of record by US residents and (2) any of the following applies: (i) the majority of its executive officers or directors are US citizens or residents; (ii) more than 50% of its assets are located in the United States; or (iii) its business is administered principally in the United States. Rule 405 under the Securities Act of 1933 ("Securities Act") and Exchange Act Rule 3b-4(c). A recent SEC release

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estimates over 850 FPIs are registered with the SEC. Rel. No. 33-11126 (2022).

[2] These are discussed in "Current SEC Initiatives Impacting Foreign Private Issuers," by the author, 51 Rev. of Securities & Commodities Reg'n 179 (Sept 5, 2018).

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FORTHCOMING

- ***U.S. DEPARTMENT OF JUSTICE'S REVISED COMPLIANCE GUIDANCE: DOJ TACKLES CLAWBACKS AND EPHEMERAL MESSAGING***

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same regulation as applied to US issuers. This article looks at five significant rules that the SEC has adopted or proposed since May 2021, with a particular focus on the impact of the rules on FPIs that are listed on US stock exchanges: the final rules on clawback policies,[3] Rule 10b5-1 plans,[4] share repurchase disclosures[5] and cybersecurity disclosures,[6] and the proposed rules on climate-related disclosures.[7]

FINAL RULE ON CLAWBACK POLICIES

In October 2022, the SEC adopted Rule 10D-1 under the Exchange Act as required by Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"). This rule requires US stock exchanges to adopt listing standards relating to the recovery of certain incentive compensation. These new stock exchange listing standards will take effect on October 2, 2023, and require listed issuers (including FPIs) to comply with them by December 1, 2023.

Broadly speaking, the new SEC rule requires US stock exchanges to adopt standards under which a listed issuer must (1) adopt a "clawback" policy for the recovery of so-called erroneously awarded incentive compensation, (2) enforce its clawback policy if previously issued financial statements are restated due to an accounting error, and (3) provide required disclosures relating to such enforcement. The policy must provide for the recovery (*i.e.*, clawback) of "excess" incentive-based compensation received by any employee (including former employees) who served as an executive officer of the company during the three most recently completed fiscal years preceding the date on which preparing a restatement of financial statements is required. The amount of compensation to be recovered is the amount in excess of what would have been paid based on the restated results.

FPIs are subject to the clawback rule equally with US issuers but may face a number of issues US issuers do not encounter in implementing the rule.

General applicability of the rule. When the SEC first proposed the clawback rule in 2015, it proposed that the listing standards would apply broadly to all companies listed on US stock exchanges with few exceptions, noting that Section 954 refers to "any security" of an issuer. In its proposing release, the SEC observed that commenters had raised questions on whether the rule should apply to FPIs and solicited comment on whether certain categories of issuers or securities should be exempted from the rule, but did not specifically request comment relating to FPIs.

Even so, a number of commenters expressed concern regarding the rule's application to FPIs, noting potential conflicts between the SEC's clawback rule and home country laws, stock exchange requirements, or corporate governance arrangements. Notably, FPIs are entirely exempt from and may follow home country law instead of the SEC's other compensation-related rules, such as the disclosures that US companies provide with respect to executive compensation, and the governance requirements relating to such compensation, such as the say-on-pay shareholder vote. In addition, notwithstanding similar legislation in which Congress directed the SEC to draft rules applicable to all listed companies, the SEC has in the past crafted accommodations for FPIs. Such accommodations have included those relating to audit committees for listed companies as required by Section 301 of the Sarbanes-Oxley Act of 2002[8] ("Sarbanes-Oxley Act"), and to

[3] Listing Standards for Recovery of Erroneously Awarded Compensation, Rel. No. 33-11126 (2022).

[4] Insider Trading Arrangements and Related Disclosures, Rel. No. 33-11138 (2022).

[5] Share Repurchase Disclosure Modernization, Rel. No. 34-97424 (2023).

[6] Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, Rel. No. 33-11216 (2023).

[7] The Enhancement and Standardization of Climate-Related Disclosures for Investors, Rel. No. 33-11061 (2022).

[8] Standards relating to Listed Company Audit Committees, Rel. No. 33-8220 (2003).

compensation committees for listed companies as required by Section 952 of the Dodd-Frank Act.[9]

Nonetheless, in its release adopting the clawback rule, the SEC expressed the view that Section 954 was intended to encourage reliable financial reporting by all listed issuers and provided no exemptions for FPIs. In addition, perhaps in light of the broad discretion that stock exchanges have to waive governance-related listing standards for FPIs, the SEC expressly denied stock exchanges the ability to grant exemptions from the clawback rule.

Employees covered. Under Section 954, the clawback policy must apply to any individual who serves as an "executive officer" of the company if they received incentive-based compensation. The statute does not provide a specific definition for those officers who would be subject to the policy, giving the SEC latitude in having clawback policies applied broadly or narrowly.

The SEC elected to have the rule apply broadly, modeling the definition of "executive officer" for purposes of the clawback rule on the definition of "officer" under Section 16 of the Exchange Act. This definition is more expansive than the general definition of "executive officer" in Rule 3b-7 under the Exchange Act, which includes an issuer's president, any vice-president in charge of a principal business unit, division, or function (such as sales, administration, or finance), any other officer who performs a policy-making function or any other person who performs similar policy-making functions for the issuer.

In the adopting release, the SEC noted that it wanted clawback policies to apply not only to those corporate officers who have policy-making functions but also to those who play an important role in preparing financial statements. As a result, the SEC established a definition of executive officer that includes a company's principal financial officer and principal accounting officer (or if there is no such accounting officer, the controller). This definition is consistent with the definition of "officer" under Exchange Act Rule 16a-1(f).

As a result, in developing a clawback policy, FPIs will have the additional burden of developing procedures and controls that identify those positions to which the policy will apply.[10] US issuers are well accustomed to identifying their corporate officers for purposes of the rules under Section 16. FPIs, on the other hand, generally have had no reason to identify their officers for this purpose. The title "executive officer" is common in US business circles and a specific term of art under Rule 3b-7. The title is not necessarily typical outside the United States, as evidenced by the fact that Form 20-F largely avoids the term and refers instead to "senior management," i.e., those members of the company's administrative, supervisory, or management bodies.

Enhanced controls. The SEC's clawback rule may impel FPIs to act more like US companies with respect to how they approach their financial reporting for their interim fiscal periods during the year. The regulatory landscape for US companies contains several elements that focus on interim period financial reporting: (1) Item 4.02 of Form 8-K; (2) required quarterly review by independent auditors under Rule 10-01 of Regulation S-X; and (3) quarterly certifications under Sections 302 and 906 of the Sarbanes-Oxley Act. In light of the clawback rule, even though FPIs are not subject to quarterly filing of financial statements with the SEC, they may want to consider implementing enhanced controls and procedures around their financial reporting process more akin to those implemented by US companies. These enhanced controls, which could include any or all of the above elements, would impose new burdens and costs on FPIs.

Under Rule 10D-1, the triggering event for a company to implement its clawback policy is when the company is required to restate its financial statements to correct an error that either (1) "is material to the previously issued financial statements" or (2) "would result in a material misstatement if the error were corrected in or left uncorrected in the current period."[11] The triggering date is the earlier of the date (1) the company's board of directors, or a committee thereof, or authorized officer(s), concludes or reasonably should have concluded that the company is required to restate its financial statements and (2) a court or competent regulatory body directs the company to restate its financial statements.

[9] Listing Standards for Compensation Committees, Rel No. 33-9330 (2012).

[10] For US issuers, the officers subject to the clawback policy will be evident since they will be the ones who also file reports

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under Section 16. Since this information will not be readily apparent for FPIs, the SEC Staff may insist on additional disclosures to identify such officers.

[11] The adopting release refers to these as "Big R" and "little r" restatements, respectively.

Significantly, a "Big R" restatement requires a US company to file a Form 8-K that provides the disclosures required under Item 4.02 and to promptly amend its Exchange Act reports to restate the previously issued financial statements. As a result, when management at a US company becomes concerned with an indication of a potential error in its prior financial statements, it will have in place controls and procedures to generally evaluate whether any such error (if one exists) constitutes a "Big R" restatement that will require a Form 8-K filing, a "little r" restatement that will not, or an out-of-period adjustment that does not constitute either. FPIs, unlike US issuers, may not have these pre-existing controls in place to support implementing their clawback policies.

In addition, US companies are subject to the review that their independent auditors conduct in connection with filing a Quarterly Report on Form 10-Q, as required by Rule 10-01(d) of Regulation S-X. Also, the principal executive officer and principal financial officer of a US company must provide with each Form 10-K and 10-Q filing their certifications, as required by Sections 302 and 906 of the Sarbanes-Oxley Act, under which the officers personally attest that the financial information is accurate and reliable, and that adequate internal controls are in place. These certifications likewise support a process through which US companies continually scrutinize their financial information, which seeks to prevent the need for or reduce the magnitude of any restatements in the first place, and the more timely recognition that an accounting error needs to be addressed.

FPIs are not required to file a Form 8-K if financial statements need to be restated. Neither are FPIs subject to a requirement to file quarterly financial statements and if they do prepare and publish quarterly financial statements, such financial statements are furnished to the SEC on a Form 6-K, which does not require the Rule 10-01(d) review or the certifications required under Sections 302 and 906.[12] As a result, FPIs may find that they have extra work to do around designing and implementing procedures for their clawback policy.

Disclosure. The SEC adopted extensive disclosure requirements with respect to how listed companies implement their clawback policies in practice. Specifically, all companies are required to indicate, via check boxes on the cover page of their SEC annual report, whether the financial statements in the report reflect the correction of an error to the prior financial statements and whether the errors required application of the clawback policy. Disclosure is also required that provides information about the restatement and the clawback analysis, including the name of any officer and the amount due from any officer as a result of the restatement.

While individualized compensation disclosure for executive officers is typical for US companies, SEC rules have long permitted FPIs to provide streamlined compensation disclosure. Under Item 6.B.1 of Form 20-F, individualized compensation disclosure is not required unless such information is otherwise provided, either voluntarily or in accordance with home country requirements. Given that flexibility, many FPIs do not provide individual compensation information.[13] However, under amendments adopted to Form 20-F in connection with the clawback rule, FPIs will be required to disclose clawback amounts on an individual basis even when the basic underlying compensation information has not been disclosed. FPIs may believe that they need to provide additional information on an individualized basis to provide appropriate context for information relating to a clawback.

Impracticability of recovery based on conflict with home country law. Under Rule 10D-1, recovery of incentive compensation is required on a no-fault basis, irrespective of whether any misconduct occurred and without any consideration of whether a particular executive officer was responsible for the erroneous financial statements. As noted above, at the proposal stage, commenters raised concerns that the SEC's clawback rules could be inconsistent with home country laws for some FPIs, and possibly would require some FPIs to violate local law in order to implement the required compensation clawback. A clawback triggered without any individual misconduct or culpability could be unenforceable under home country labor law or regulation, or under general principles of fairness and equity under a non-US legal system.

Although these arguments did not persuade the SEC to wholly exempt FPIs, the SEC included a limited

[12] Both major US stock exchanges require FPIs to publish semi-annual financial information. NYSE Listed Company Manual Section 203.00 and Nasdaq Stock Market Rule 5250(c)(2). Regulation S-X and Sections 302 and 906 do not apply to this information.

[13] Consistent with its traditional approach, in 2006, the SEC amended Form 20-F to clarify that FPIs are not required to file as exhibits employment agreements for individuals unless otherwise publicly disclosed. Executive Compensation and Related Person Disclosure, Rel No. 33-8732A (2006).

impracticability accommodation to alleviate some of the implementation challenges FPIs may face. Under the narrow accommodation, a company is not required to recover relevant incentive compensation if doing so would violate a law of the company's home country that was adopted before November 28, 2022.[14] To take advantage of this exception, a company must provide its US stock exchange with an opinion of home country counsel that recovery would violate home country law.

This foreign law exception is limited to laws of the FPI's country of incorporation. It does not extend to the domicile of the executive officer in question, or any other country or local jurisdiction whose laws may apply to the executive officer, or home country laws that are enacted in the future. The SEC stated that these situations could be covered by a separate narrow exception if a company reasonably determines that the expense paid to a third party to recover the compensation would exceed the amount of the compensation to be recovered, making any recovery impractical. This exception requires that the company first make a reasonable attempt to recover the compensation, document its efforts to do so, and provide that documentation to the listing exchange.

Impracticability of recovery based on US tax matters. Commenters on the proposal noted that under US tax law, benefits under certain tax-qualified retirement plans could not be assigned or alienated and that requiring recovery of amounts deferred under such plans could cause such plans to violate the plan qualification requirements under US tax law. In response to these concerns, the SEC adopted a narrow exception to the recovery requirement if recovery would likely cause such a plan that was broadly available to company employees to fail to meet applicable qualification requirements.

No corresponding exception is available if a clawback would adversely impact an employee benefit plan under non-US tax law. It could be that the SEC desired to keep the exceptions under black letter rules narrow, rather than craft an exception that would be generally available if certain conditions were met. The adopting release does not discuss foreign tax laws, much less invite applications for exemptions based on foreign tax laws. However, the SEC could perhaps be persuaded to grant an appropriately narrow exception based on non-US tax laws, perhaps in an appropriate situation that was analogous to the treatment of US tax-qualified benefit plans.

Stock price and TSR-related compensation. Compensation is subject to being clawed-back if it is granted, earned, or vested based on attaining a financial reporting measure. Under the rule adopted by the SEC, such a measure includes a company's stock price and total shareholder return ("TSR") as well as traditional financial statements and related measures. The SEC justified including share price as a relevant metric because of its view that improper accounting can affect share prices and in turn could result in excess compensation to executive officers.

The SEC noted the potential costs, uncertainty, and subjectivity of evaluating the impact of a financial statement error on stock price or TSR. In light of these factors, companies can use reasonable estimates when determining the impact of such an error on share price or TSR. Such estimates may be more complex for FPIs, especially if their shares are traded on a non-US stock exchange in a currency other than the US dollar. In such cases, companies should be able to take into account foreign currency exchange rates that may have also impacted share prices. In addition, the price of shares for FPIs may be subject to a wider range of economic, social, and political factors that companies should also be able to consider in evaluating whether a financial statement error impacted the company's share price or TSR.

Compensation governance arrangements. Previously, SEC rules have had little impact on compensation decision-making for US-listed FPIs. Under the new clawback rule, FPIs will need to understand how the rule could impact compensation decisions and have a governance process in place to carry out the recovery process if there is a financial restatement. While US companies will likely have an independent compensation committee to handle recovery matters under a clawback policy, FPIs are exempt from SEC and US stock exchange requirements for such a committee. FPIs will thus face an additional hurdle in developing a governance structure to implement the clawback rule.

FINAL RULE ON RULE 10B5-1 PLANS

Rule 10b5-1 under the Exchange Act provides an affirmative defense from insider trading liability for corporate insiders and issuers effecting transactions in the issuer's securities pursuant to trading plans entered into in good faith and while not in possession of material nonpublic information. A Rule 10b5-1 trading plan

[14] This was the publication date of the adopting release in the Federal Register.

often calls for periodic purchases or sales[15] pursuant to timing or metrics established when the plan is entered into. FPIs, their directors and officers, and other insiders have found these plans useful.

Previously, corporate insiders and issuers needed to meet few conditions to implement a Rule 10b5-1 plan. On December 14, 2022, in response to claims that Rule 10b5-1 plans facilitated improper share transactions by corporate insiders, the SEC adopted amendments to the rule that impose a number of new conditions on the ability to claim the affirmative defense. These conditions include cooling-off periods, a limitation on overlapping plans, disclosure of option grants and insider trading policies, and certifications by those entering into a plan. While the amendments adopted by the SEC are generally the same for FPIs as for US issuers, there are some key differences.

Identification of Officers. Rule 10b5-1 plans may be used by any individual or entity that may, by virtue of their affiliation with an issuer, learn of material nonpublic information: directors, senior officers, mid-level managers and employees, and significant shareholders. The amendments impose a cooling-off period (discussed below) for Rule 10b5-1 plans entered into by directors and "officers," as defined under Rule 16a-1(f). As discussed above with respect to clawbacks, FPIs will need to implement new processes to identify those individuals who are considered officers under Section 16, an analysis that FPIs did not previously need to undertake.

Measurement of the Cooling-Off Period. The SEC amended Rule 10b5-1 to provide for a cooling-off period under which directors and officers must wait a period of time before share transactions can be effected under a new or modified plan.[16] A cooling-off period was intended to address concerns that insiders could misuse plans by adopting a plan and then quickly have shares traded under the plan while aware of material nonpublic information.

For FPIs, the cooling-off period is the later of:

- 90 days after adopting or modifying the plan and
- the earlier of (1) two business days after the furnishing of financial results on a Form 6-K or Form 20-F for the fiscal quarter in which the plan was adopted or (2) 120 days after adopting the plan.[17]

FPIs announce their financial results in a variety of formats, some of which track closely to a Form 10-Q in form and substance, and some of which do not. For example, some FPIs may publish summary financial results, especially for the first and third fiscal quarters.[18] Under the amendments to Rule 10b5-1, FPIs should be able to continue their existing practices with respect to publishing financial results and have the cooling-off period for directors and officers start running when a Form 6-K is furnished with an earnings release.[19]

Disclosures of insider trading policies and trading by insiders. FPIs and US issuers are all subject to a new requirement to disclose in their annual reports whether they have adopted policies and procedures for directors, officers, and employees that are reasonably designed to promote compliance with insider trading laws, or if not, to explain why they have not done so. If a company has adopted such a policy, it must be filed as an exhibit.

The SEC chose not to subject FPIs to new detailed quarterly disclosures that US companies must now provide under Form 10-K or 10-Q with respect to any trading plans adopted or terminated by any director or officer during the previous fiscal quarter. Such disclosures include detailed information naming the director or officer and the amount of shares to be sold or purchased under the plan.

Option grant disclosures. Concurrent with the amendments to Rule 10b5-1, the SEC also imposed new disclosure requirements on US companies that are designed to highlight the practice of "spring-loaded" or "bullet-dodging" grants of options to officers that are made shortly before the filing of material information on Form 10-K, Form 10-Q, or Form 8-K. These disclosures will likely appear in proxy and information statements that US companies file under Exchange Act Section

[15] Issuers do not sell securities under Rule 10b5-1 plans.

[16] Issuers are not subject to any cooling-off period, and non-insiders (i.e., persons who are not the issuer, directors, or officers) must observe a 30-day cooling-off period.

[17] For US issuers, the measurement of the cooling-off period is equivalent, except the two-business day period is measured from the filing of a Form 10-K or 10-Q report.

[18] For example, European issuers are not required to publish financial results for the first and third fiscal quarters. Transparency Directive (2004/109/EC) as amended by Directive 2013/50/EU.

[19] By contrast, an earnings release filed by a US issuer under Item 2.02 of Form 8-K does not trigger the beginning of the two-day period.

14(a) as part of the executive compensation disclosures provided by US companies under Item 402 of Regulation S-K.[20] Inasmuch as these disclosures were framed as compensation-related, and as FPIs are exempt from the numerous line-item compensation disclosures provided by US companies, the SEC did not impose a similar requirement on FPIs with respect to option grants.

Gifts of securities. When the SEC adopted amendments to Rule 10b5-1, it also modified the reporting of gifts of securities under Form 4. Since FPIs are not subject to Section 16 under the Exchange Act, this change does not impact their directors, officers, and major shareholders.

FINAL RULE ON SHARE REPURCHASE DISCLOSURES

On May 3, 2023, the SEC adopted rules that will require public companies to provide new and expanded disclosures about the repurchase of their shares. In a significant departure from the current regulatory framework, all FPIs may be required to make quarterly filings with the SEC.

Quarterly Form F-SR filings. Up until this most recent rule writing, FPIs had no specific quarterly SEC filing obligations under the Exchange Act. Now, at variance from this long-standing approach, FPIs that repurchase their shares during a fiscal quarter must file a Form F-SR within 45 days after the end of the quarter. The Form F-SR must contain:

- tabular disclosure of daily repurchase activity covering nine categories of information, including the average price paid per share; the total number of shares purchased (including the number of shares purchased as part of a publicly announced plan or on the open market); number of shares purchased that were intended to qualify under the Rule 10b-18 safe harbor or satisfy the Rule 10b5-1 affirmative defense; and the maximum number of shares that may yet be purchased under a publicly announced plan; and

- check box disclosure indicating whether directors or senior management purchased or sold shares that are the subject of a publicly announced repurchase program within four business days before or after the program was announced or increased.[21]

The text of the new rule and Form F-SR are unclear on whether an FPI is nonetheless required to file a Form F-SR that discloses the lack of any purchase activity if it did not repurchase shares in a fiscal quarter.[22] One indication that the SEC does not expect FPIs to file Form F-SR if they did not repurchase shares in the prior fiscal quarter is the SEC's Paperwork Reduction Act analysis relating to the new rules, which estimates that only 300 FPIs out of over 700 Form 20-F filers would provide disclosure under Form F-SR. However, that analysis may be distinguishing between providing substantive disclosure on share repurchases and filing the form with no substantive disclosures about repurchases.

Monitoring personal share transactions by insiders. As noted above, FPIs will be required to disclose via a check box whether directors or senior management effected transactions in shares within four business days of certain announcements relating to a repurchase program. In order to respond to this requirement, FPIs will need to be aware of purchases and sales by these corporate insiders. While US companies are subject to a similar new check box disclosure requirement on Form 10-K and 10-Q, US companies likely already have adopted a robust tracking regime for insider transactions to monitor compliance with Section 16 obligations. FPIs have never been required to track share transactions by their insiders on a real-time basis. This is another significant way in which the SEC's approach to Form F-SR differs markedly from its traditional approach to FPI disclosures, especially with respect to personal information relating to directors and senior management. To comply with the new requirement, FPIs may need to institute new controls and procedures to gather and verify this information.

Under Form F-SR, disclosure is required for share purchases made by or on behalf of the issuer or any "affiliated purchaser" defined under Exchange Act Rule 10b-18(a)(3). This is the same scope of coverage as that under current Item 16E of Form 20-F. FPIs will now be required to obtain this information on a quarterly basis rather than on an annual basis.

[20] If a US company is not subject to the proxy rules, the disclosures would appear in its Form 10-K.

[21] US companies will provide substantially the same disclosures on Form 10-K and Form 10-Q, although the check box disclosure will relate to directors and officers who are subject to Section 16.

[22] New Exchange Act Rule 13a-21 states that every FPI "must file" a Form F-SR disclosing specified information.

Annual disclosures. In addition, FPIs that file on Form 20-F must provide annual narrative disclosure about the objectives or rationales for their share repurchases, the process or criteria used to determine the amount of the repurchases, and any policies or procedures relating to purchases and sales by their directors or senior management during a repurchase program.

Other disclosures. For US companies, quarterly disclosure will be required in Forms 10-Ks and 10-Qs about the adoption, termination, and the material terms of companies' Rule 10b5-1 trading plans (excluding pricing information). FPIs are not subject to this additional disclosure requirement.

Compliance dates. FPIs will be required to file Form F-SR within 45 days after the end of the first full fiscal quarter that begins on or after April 1, 2024, i.e., by August 14, 2024, for companies with a December 31 fiscal year end; that first filing would disclose share repurchases between April 1 and June 30, 2024. FPIs will be required to provide the Form 20-F narrative disclosure in the first Form 20-F after the first Form F-SR has been filed, i.e., the Form 20-F for the year ended December 31, 2024, that is filed in 2025. Although these dates are many months away, FPIs may have much to do to get ready for this new quarterly filing obligation.

FINAL RULE ON CYBERSECURITY DISCLOSURES

On July 23, 2023, the SEC adopted new rules requiring all companies, including most FPIs, to provide disclosure regarding cybersecurity risk management, strategy, and governance in annual reports on Form 20-F and Form 10-K. Specifically, companies must disclose in their annual reports: (1) their processes for assessing, identifying, and managing material risks from cybersecurity threats; (2) whether any risks from current or previous cybersecurity threats have materially affected or are reasonably likely to materially affect them; and (3) the board of directors' oversight of risks from cybersecurity threats and management's role and expertise in assessing and managing material risks from cybersecurity threats. Upcoming annual reports on Form 20-F to be filed in 2024 (for fiscal years ending on or after December 15, 2023) will be required to include the new disclosures.

Notably for FPIs, the SEC did not amend Form 20-F to require annual updating regarding previously disclosed cybersecurity incidents, as initially proposed. In addition, while US issuers will now be required to file a Form 8-K disclosing the occurrence of a material cybersecurity incident within four business days of determining that one has occurred, the SEC did not impose a similar mandatory disclosure requirement for FPIs. The SEC did amend Form 6-K to add a material cybersecurity incident to the categories of items that should be disclosed in a Form 6-K report. In the adopting release, the SEC noted that in order for a material cybersecurity incident to trigger a Form 6-K filing, the standard Form 6-K criteria would continue to apply: the relevant information must be made or required to be made public under home country laws, is filed or required to be filed under stock exchange rules, or is otherwise distributed to security holders. In this respect, the SEC maintained the traditional approach to current disclosures for FPIs, unlike that taken with respect to share repurchases. The amendment to Form 6-K will be effective on December 18, 2023.

PROPOSED RULE ON CLIMATE-RELATED DISCLOSURES

The SEC's proposal to require public companies to provide climate-related disclosures is the agency's most far-reaching corporate disclosure initiative in over 20 years. Published on March 21, 2022, the proposed rules would require all companies, including FPIs, filing reports under the Exchange Act or registering an initial public offering under the Securities Act to provide far-ranging climate-related information in their SEC reports and prospectuses.

Broadly speaking, the proposed rules would require significant, detailed narrative disclosures in the body of annual reports, prospectuses and registration statements, new disclosures in the notes to audited year-end financial statements, and, for certain companies, a new attestation by an independent outside expert relating to additional quantitative disclosures on greenhouse gas emissions. The proposals are modeled in part on the recommendations of the Task Force on Climate-related Financial Disclosures ("TCFD") and the standards promulgated by the Greenhouse Gas Protocol.

If adopted, the impact of the rules on FPIs would differ in some respects than for US issuers. For example, many FPIs are already providing climate-related information under TCFD standards, either voluntarily or in accordance with home country or non-US stock exchange requirements. In the proposing release, while the SEC stated that its rules are modeled in part on TCFD standards, the SEC's proposal differs in several respects from such standards. For example, the SEC's proposal would call for new mandated climate-related financial statement metrics and related disclosure in a note to consolidated financial statements. This would include disclosures regarding the financial impact

of both physical climate-related events. This, for example, includes severe weather and natural risks, and transition climate-related activities (e.g., research and development of new technologies, purchase of assets, infrastructure, or products related to enhancing the efficiency of energy use or the use of other resources) on any relevant line items to a company's financial statements during the fiscal years presented. These financial statement metrics would be subject to audit by a company's independent audit firm and come within the scope of internal control over financial reporting.

These additional financial statement disclosures would need to be included whether an FPI prepares its financial statements under US generally accepted accounting principles or International Financial Reporting Standards as issued by the International Accounting Standards Board ("IASB IFRS"). By requiring FPIs that prepare financial statements under IASB IFRS to provide additional disclosures, the SEC would be cutting back on its previous full acceptance of IASB IFRS in regard to issuer financial statements.[23]

The SEC recognized that many FPIs may be subject to a disclosure regime that elicits climate-related disclosures. The SEC therefore requested comment on whether FPIs that are subject to a substantially similar climate-related disclosure regime should be permitted to report under that alternative reporting regime instead of the SEC's rules. In general, the SEC has not accepted disclosure standards developed by other regulators.[24] This possibility that the SEC could permit FPIs to comply with an alternative reporting regime for climate-related disclosures could alleviate the burden on FPIs of preparing disclosures that cover similar matters but which are notably different from the SEC's proposals.

In the proposing release, the SEC asked commenters to address how an alternative disclosure regime would be identified: should companies, governments, industry groups, or climate-related organizations be permitted to file applications for the SEC to determine that a non-US disclosure regime is substantially similar to the SEC's requirements? Should there be minimum standards for such regimes, not only with respect to the substantive disclosure requirements but also governance? Should the SEC require mutual recognition for US companies under a non-US regime as a condition for accepting such a regime for FPIs? These questions are particularly relevant now that the European Union adopted the EU Corporate Sustainability Reporting Directive in January 2023. This directive, once implemented through EU Member State legislation, will require EU entities, and as currently written various US entities, to provide in annual reports climate-risk disclosures that are even more extensive than those contemplated under the SEC's proposal.

There have been many developments with respect to climate-related disclosures since the SEC's proposal. Most significantly perhaps, in June 2023 the International Sustainability Standards Board finalized its inaugural standards – IFRS S1 *General Requirements for Disclosure of Sustainaibility-related Financial Information* and IFRS S2 *Climate-related Disclosures*, and a month later the International Organization of Securities Commissions ("IOSCO") endorsed those standards.[25] In its endorsement message, IOSCO called on its 130 member jurisdictions (which includes the United States) to consider ways to adopt or apply these standards.

CANADIAN MJDS FILERS

In 1991, the SEC adopted the multijurisdictional disclosure system ("MJDS") for large Canadian companies that are listing or offering their securities in Canada and the United States.[26] Under the MJDS, eligible Canadian companies can file with the SEC prospectuses, annual reports, and other disclosure materials prepared under Canadian standards. Instead of filing an annual report on Form 20-F, MJDS companies file a Form 40-F, which consists largely of Canadian disclosure documents. Since the MJDS was adopted, the SEC has largely adhered to the mutual recognition approach that underlies the arrangement, imposing on MJDS filers additional obligations only when required

[23] Acceptance from Foreign Private Issuers of Financial Statements Prepared in accordance with International Financial Reporting Standards without Reconciliation to US GAAP, Rel. No. 33-8879 (2007).

[24] A noteworthy recent exception to this general stance can be found in the SEC's recently adopted rules requiring disclosures of payments made by resource extraction companies to host governments. Disclosure of Payments by Resource Extraction Issuers, Rel. No. 34-90679 (2020). Adopted in December 2020, these rules permit FPIs that are subject to EU, UK, Norwegian, or Canadian rules to provide disclosures in accordance with those rules instead of those adopted by the SEC.

[25] IOSCO press release IOSCO/MR/19/2023 (July 25, 2023).

[26] Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers, Rel. No. 33-6902 (1991).

by Congress.[27] With respect to the five rule writings discussed above, the SEC has treated MJDS companies in different ways.

Clawback policy. Perhaps reflecting that this rule was mandated by Congress, the SEC chose to subject MJDS filers to the new clawback rules to the same extent as other FPIs. The SEC amended Form 40-F to add the two restatement-related check boxes, to require disclosures of how the filing company implemented its clawback policy, and to have the clawback policy filed as an exhibit.

Rule 10b5-1 plans. Although Canadian MJDS companies and their insiders may claim the affirmative defense under Rule 10b5-1 in the same manner as other companies, the adopting release does not mention MJDS filers. Inconsistent with other FPIs, filing a Form 40-F annual report does not trigger the two-business day period related to the cooling-off period. Absent clarification from the SEC, MJDS filers may feel they need to furnish their Canadian annual reports and financial statements on a Form 6-K in order to come fully within the four corners of the affirmative defense.

Share repurchases. MJDS filers appear to be required to file Form F-SR on the same quarterly basis as other FPIs.[28] However, the SEC did not amend Form 40-F to require the annual narrative disclosures with respect to objectives or rationales for repurchases, and other matters.

Cybersecurity. The SEC did not amend Form 40-F to require the annual governance disclosures relating to cybersecurity matters; the Form 6-K changes will apply to MJDS filers.

Climate-related disclosures proposal. The SEC did not propose specific amendments to Form 40-F that would require MJDS filers to provide similar disclosures as US companies on Form 10-K and FPIs on Form 20-F. The SEC did request comment on whether MJDS filers should be required to comply with its climate-related disclosure requirements and alternatively, whether MJDS filers should be permitted to comply with related Canadian requirements if certain conditions are met, or if additional disclosures are provided.

[27] For example, the Sarbanes-Oxley Act and the SEC's rules thereunder imposed several new requirements on all SEC filers, including MJDS companies.

[28] Under new Exchange Act Rule 13a-21, every FPI that does not file reports on Forms 10-K and 10-Q is required to file Form F-SR.

READING TEA LEAVES FOR FPIS

Several SEC Commissioners addressed the SEC's traditional approach to FPIs in public statements relating to the SEC's consideration of the new share repurchase disclosures. In voting against the rules package, Commissioner Hester Peirce noted that the SEC could have adhered to the historical treatment of FPIs and deferred to home country disclosure standards for their disclosures.[29] Commissioner Peirce believed that the share repurchase information on a daily basis was immaterial for all issuers, and wondered "if this immaterial information warrants quarterly reporting [from FPIs], will we stop making sensible accommodations to FPIs in other areas as well?"

Commissioner Mark Uyeda, who also voted against the rules package, took particular issue with requiring FPIs to file share repurchase data on a quarterly basis, and pondered whether "these amendments may be remembered as the beginning of the end for the Commission's approach to foreign private issuers."[30] Commissioner Uyeda said he believed the SEC was sacrificing principles of mutual recognition and comity to impose its views on the rest of the world. Voting in favor of the rules package, Commissioner Jamie Lizárraga said he believed that absent compelling reasons, FPIs should not be treated differently than US issuers, advocating a level playing field for all companies that raise capital in the United States.[31]

SEC Chair Gary Gensler did not address FPIs in his published remarks but noted in oral comments that Commissioner Uyeda had spurred a good conversation within the SEC about the treatment of FPIs under the SEC's rules.[32] Whether the SEC takes up a larger project on the SEC filings by FPIs remains to be seen. ■

[29] Statement of Commissioner Hester M. Peirce, "No Repurchase Left Behind: Dissenting Statement on Share Repurchase Modernization Rule," *available at* https://www.sec.gov/news/statement/peirce-statement-share-repurchase-disclosure-modernization-050323.

[30] Statement of Commissioner Mark T. Uyeda, "Statement on the Final Rule: Share Repurchase Modernization," *available at* https://www.sec.gov/news/statement/uyeda-statement-share-repurchase-disclosure-modernization-050323.

[31] Statement of Commissioner Jamie Lizárraga, "Modernizing Share Repurchase Disclosures," *available at* https://www.sec.gov/news/statement/lizarraga-statement-share-repurchase-disclosure-modernization-050323.

[32] Webcast of SEC open meeting on May 3, 2023, *available at* https://www.youtube.com/watch?v=juIz8Q0wEPQ.

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