



MAYER | BROWN

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

January 2025

Brian Hirshberg

Partner

+1 212 506 2176

bhirshberg@mayerbrown.com

Jason W. Parsont

Partner

+1 212 506 2496

jparsont@mayerbrown.com

Thomas Kollar

Partner

+852 2843 4260

thomaskollar@mayerbrown.com

Gilat Abraham Zaefen

Associate

+1 212 506 2605

gabraham@mayerbrown.com

Agenda

- Cybersecurity disclosure
- Climate Change disclosure
- Artificial Intelligence disclosure
- Risk factor disclosure
- Insider trading rules
- Beneficial Ownership rules
- Clawback updates
- Financial Reporting Updates
- China-Related Matters, including the Holding Foreign Companies Accountable Act
- Status of the SEC's approach to removing FPI accommodations
- Other Items:
 - D&O Questionnaires
 - EDGAR Next

Cybersecurity Disclosure

Cybersecurity Disclosures

- July 2023 rules aimed at standardizing and enhancing incident, governance and risk disclosures.
- First disclosures in annual reports for fiscal years ending on or after December 15, 2023.

Final Rule	What to disclose
Risk Management and Strategy	Describe processes , if any, to identify, assess and manage cybersecurity threats
Governance (Board)	Describe the Board's oversight of cybersecurity risk. Registrants need not disclose information about the frequency of board discussions on cybersecurity or information about any director expertise in the field.
Governance (Management)	Describe management's role in assessing and managing material risks from cybersecurity threats.
Incidents/Threat Assessment	Describe whether any risks from cybersecurity threats/incidents have materially affected or are reasonably likely to materially affect business strategy, results of operations, or financial condition.

Cybersecurity – Disclosure Trends

- October/December 2024: SEC announced settled actions against four companies impacted by the 2020 SolarWinds Orion software hack and one impacted by a Citrix Breach, predating the new rules. Lessons:
 - Do not **minimize** known cybersecurity incidents in public disclosures (e.g., describing hacker as having accessed a limited number of email messages, when it was known that 145 files were accessed)
 - Do not describe risks as **hypothetical** or discuss risks **generically** despite knowing of actual intrusions into a company’s data (e.g., saying attacks may compromise sensitive customer data when it was known that PII of 1.5 million individuals was compromised)
 - Such deficiencies call into question whether the company has **adequate disclosure controls** and procedures.
 - Half-truths are actionable – civil penalties ranged from approximately \$1-4 million.

Cybersecurity – Disclosure Trends Cont'd

- SEC Staff selectively reviewed cybersecurity disclosure as part of its annual review process. Comments included:
 - Requiring better explanation of how process for identifying risks has been **integrated** into overall risk management system (e.g., not enough to describe a “comprehensive and layered auditing approach”)
 - **Inconsistent statements** on the engagement of third parties (e.g., saying in one place none are used and in another that the Audit Committee relies on third party specialists).
 - **Inadequate disclosure** of relevant expertise of team assessing and managing material cybersecurity risks
- Inline XBRL tagging begins for fiscal years ending on or after December 15, 2024



Climate Change Disclosure Update

Climate Change Disclosure

- Status of the March 2024 final rules.
- Existing SEC rules and guidance
 - 2010 climate change guidance
 - Comment letters/September 2021 sample letter
- Coordinate disclosure in annual report and any sustainability report; carefully evaluate the accuracy and completeness of key company disclosures
- Consider:
 - Climate change risk and risk management, including “Greenwashing” allegations.
 - Plans and costs for climate change mitigation strategies in MD&A

Artificial Intelligence Disclosure

AI Disclosure

- Consider whether disclosure about how a company uses artificial intelligence is required and the related risks
- According to recent SEC Staff remarks, there has been a significant uptick in the last year in the number of companies discussing artificial intelligence in their annual reports
 - Disclosure mainly focused on risks related to AI
- SEC will focus on whether or not the company:
 - clearly defines what it means by artificial intelligence and how it may impact operations
 - provides tailored (not boilerplate) disclosures about material risks and the impact the technology is reasonably likely to have on its business and financial results
 - has a reasonable basis for its claims when discussing artificial intelligence prospects
 - Watch out for “AI-washing” – false or misleading disclosure around AI.

Risk Factors

Risk Factors

- Material factors that make investment in a company speculative or risky
- Tailored to the specific company—not boilerplate
- Take a fresh look at complete set of risk factors for annual report
 - Any updating needed?
 - Any new risk factors to add?
- Avoid describing risk only in hypothetical terms if a material event of that nature has occurred



Potential Risk Factors

- Artificial intelligence
- Exposure to commercial real estate
- Political/regulatory uncertainty (e.g., Tariff policy)
- Cybersecurity
- Climate change
- Continuing effects of Inflation and Interest Rate risk
- Continuing effects of international conflicts

Insider Trading Disclosures

Insider Trading – Annual Disclosure

- Issuers must disclose whether they have adopted insider trading policies and procedures for directors, officers and employees that are reasonably designed to promote compliance with insider trading laws.
- If issuer has not adopted such policies and procedures, it must explain why it has not done so
- Must file such policies and procedures as an exhibit to Form 20-F
- Posting to the website is not enough
- New this year: Disclosure must be provided in inline XBRL

Beneficial Ownership Table

Beneficial Ownership Table

- Issuers may rely upon Section 13(d) and 13(g) filings to disclose 5% holders
- Previously, Schedule 13G filers required to report **any change** to information previously reported
 - Amendments to report changes were due 45 days after year end
- Effective September 30, 2024, Schedule 13G filers only required to report **material changes** to information previously reported
 - Amendments to report material changes now due 45 days after quarter end.

Update on Clawbacks

Clawbacks

- Dodd-Frank compliant clawback policy needed to be effective with respect to incentive-based compensation received on or after October 2, 2023.
- Require covered executives to sign an acknowledgement letter (use future grants as consideration).
- Add a provision that makes clear that the terms of the clawback policy trump any other agreement between company and executive.
- Consider additional clawback provisions regarding bad behavior or fault provisions for executive officers.

Clawbacks—Reporting Requirements

- Clawback policy must be filed as exhibit 97 to annual report on Form 20-F or 40-F, as applicable
- Clawback-related checkboxes needed on cover page of annual report
- NYSE companies must confirm their timely adoption of the clawback policy to NYSE. Due date has passed.
- If a clawback is triggered additional disclosures regarding the company's actions must be disclosed.

Financial Reporting Issues

Financial Reporting Issues: MD&A Refresh

- SEC Continues to be focused on MD&A disclosure. Should reflect a view of the company through the eyes of management.
- Key areas of focus include:
 - Results of Operations
 - Known trends or uncertainties
 - Liquidity and Capital Resources
 - Critical Accounting Estimates
 - Segment Reporting
 - Metrics used to assess performance, including KPIs and Non-GAAP Financial Measures

Financial Reporting Issues: KPI Refresh

- Continuing focus on the misleading use of Key Performance Indicators (or KPIs)
- KPIs have been described by the SEC as the limited set of critical variables which present the “pulse of the business”.
- If the company uses a certain metric in the management of the business, the Staff will expect a discussion of that metric in line with SK 303
 - Requires disclosure of “such **other information** that the registrant believes to be necessary to an understanding of its financial condition, changes in financial conditions and results of operations.”

Financial Reporting Issues: KPI Refresh

- The SEC generally expects a KPI to be accompanied by the following disclosure:
 - A clear definition of the metric and how it is calculated;
 - A statement indicating the reasons why the metric provides useful information to investors; and
 - A statement indicating how management uses the metric in managing or monitoring the performance of the business.
- Also consider disclose ***estimates or assumptions underlying*** the metrics or its calculation

Financial Reporting Issues: KPI Refresh

- If a company ***changes the calculation*** method or presentation of a metric from one period to another or otherwise, it should consider disclosing, to the extent material:
 - The differences in the way the metric is calculated or presented compared to prior periods;
 - The reasons for the change;
 - The effects of the change on the amounts or other information being disclosed or previously reported; and
 - Other differences in methodology and results that would reasonably be expected to be relevant to an understanding of the company's performance or prospects.
- Depending on significance, it may be necessary to recast prior metrics to conform to the current presentation following a change in methodology.

Financial Reporting Issues – Non-GAAP Refresh

- Non-GAAP Financial Measures (***which include non-IFRS measures***) are a special category of KPIs subject to a higher level of regulation
- Two main components:
 - They are “financial” metrics as opposed to “operating” metrics; and
 - They adjust a comparable GAAP line item from the income statement, balance sheet or cash flow statement through inclusions or exclusions
- Make sure to form check against Reg G, SK 10(e) and the C&DIs to avoid comments.

Financial Reporting Issues – Non-GAAP Refresh

- The SEC has recently paid particular attention to the following:
 - **Misleading Revenue Recognition.** If a non-GAAP adjustment has the effect of changing the recognition and measurement principles required by GAAP, this could be considered misleading. See C&DI 100.04.
 - **Equal or Greater Prominence Failure.** C&DI 102.10(a) has a list of examples of what the Staff views as elevating the prominence of a non-GAAP metric over a GAAP metric that should be reviewed against your disclosure.
 - **Smoothing Non-Recurring Items.** When a non-recurring, infrequent or unusual charge or gain has not occurred in the prior two years and is unlikely to recur within two years. C&DIs 102.03, 100.03 and 100.01 provide helpful guidance.

China-Related Issues

Holding Foreign Companies Accountable Act and China-based Companies

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

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

In June 2024 the SEC Staff reiterated that the SEC would continue to focus on these topics and we would expect the new administration would not deviate from this course.

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

Holding Foreign Companies Accountable Act

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

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

PRC Government Involvement

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

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

Disclosures related to UFLPA

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



Status of the SEC's approach to removing FPI accommodations

SEC's Recent Approach of Removing FPI Accommodations

- FPIs have increasingly been the focus of new SEC rules
- In many cases, the SEC's approach varies from its historical practice of providing accommodations to FPIs that take account of different treatment of the FPI under its home country disclosure and governance practices
- Increasingly, the SEC has elected to treat FPIs in the same manner as U.S. companies and therefore has increased disclosure and general regulatory burdens on FPIs
- Examples include measures that are now law, such as the new cybersecurity disclosures, clawback policy requirement and cooling off period for D&Os relying on the 10b5-1 affirmative defense
- Other examples are stayed or unlikely to become law: the new share repurchase disclosures, climate disclosures and the Senate proposal to subject FPIs to Section 16.

Other Items

D&O Questionnaires

- Questions regarding director expertise in areas such as cybersecurity and AI
- Consider whether director independence questions should be updated to capture broad scope of relationships (e.g. close friendships)
- Request information on any margin loans or pledges of company securities

EDGAR NEXT

- EDGAR Next - intended to enhance the security of Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system and improve filers' access and account management capabilities.
- Timeline:
 - March 24, 2025 – Enrollment begins
 - September 15, 2025 – All filers will be required to use the EDGAR Next dashboard
 - December 19, 2025 – legacy EDGAR access codes will be deactivated
- Immediate Steps
 - Reach out to financial printer
 - Designate Authorized Account Administrators
 - Review beta testing environment

Additional Resources



See all our available resources [here](#).



OUR FREE WRITINGS & PERSPECTIVES BLOG PROVIDES NEWS AND VIEWS ON SECURITIES REGULATION AND CAPITAL FORMATION.

The blog provides up-to-the-minute information regarding securities law developments and commentary on developments relating to private placements, IPOs, and other securities topics.



SUBSCRIBE



Translating Securities with Mayer Brown

FOR EXPLANATIONS OF OVER 900 SECURITIES, DERIVATIVES, FINANCIAL SERVICES, AND CAPITAL MARKETS TERMS AND PHRASES.

writingonthewall.com



ACROSS —
— THE BOARD

Visit Across the Board, the new corporate governance blog at acrosstheboard.mayerbrown.com