

Preparing An Annual Report on Form 20-F – Guide for 2022

December 13, 2021

This alert memorandum summarizes considerations that will affect the preparation of the annual report of a foreign private issuer on Form 20-F for the year ended December 31, 2021.

During 2021, there were only limited changes to Form 20-F and the applicable rules. However, extensive changes adopted in previous years have become mandatory during the course of 2021, after being optional for an initial period. Part I of this memorandum reviews all these changes.

In Part II, we review Form 20-F disclosure topics that are attracting particular attention in SEC public statements and recent comment letters. Part III addresses rule changes in other areas that could have a bearing on the annual report on Form 20-F.

Please see additional details and references to sources in the endnotes.

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I. Recent Changes to Form 20-F

Form 20-F is the form used for an annual report (“Annual Report”) of a foreign private issuer (“FPI”) filed with the U.S. Securities and Exchange Commission (the “SEC”). In recent years, the SEC has amended Form 20-F and related disclosure requirements on several occasions. These amendments had varying transition provisions, and issuers were generally permitted to adopt them early, but all will be mandatory for the first time in an Annual Report for calendar 2021. In summary:

- **May 2021**. The SEC added new Item 16I to implement the Holding Foreign Companies Accountable Act, which will principally concern issuers with *Chinese auditors*. These amendments have been effective since May 2021, but as discussed below they will not affect Annual Reports filed in 2022.
- **December 2020**. The SEC adopted amendments to Item 5, which governs the *MD&A* (referred to in Form 20-F as Operating and Financial Review and Prospects), and eliminated Item 3.A (*selected financial data*). These amendments became effective in February 2021, and they are mandatory in Annual Reports for fiscal years ending on or after August 9, 2021.
- **September 2020**. The SEC adopted new rules governing disclosures by *banking* registrants. These rules are mandatory in Annual Reports for fiscal years ending on or after December 15, 2021.
- **March 2020**. The SEC adopted amendments to the rules governing disclosures by an issuer of *guaranteed debt securities*. These amendments are mandatory for Annual Reports for fiscal years ending after January 4, 2021.
- **October 2018**. The SEC adopted new rules governing disclosures by registrants engaged in *mining*. These rules are mandatory in Annual Reports for fiscal years beginning on or after January 1, 2021.
- **June 2018**. The SEC amended its XBRL rules to require the use of *inline XBRL*. For an FPI that presents financial statements under IFRS, this amendment is mandatory in Annual Reports for fiscal years ending on or after June 15, 2021. (For FPIs that use U.S. GAAP and that are large accelerated filers and accelerated filers, it was already mandatory.)

Each of these changes is discussed in turn below.

A. Implementation of the HFCA Act (New Item 16I)

The SEC amended Form 20-F in 2021 to add new Item 16I, which implements the Holding Foreign Companies Accountable Act (“HFCA Act”). As a practical matter, issuers will not need to respond to Item 16I in the Annual Report for the 2021 fiscal year, and in following years the requirements will only apply to a narrow class of issuer: very generally, any issuer that, in the previous year, filed an audit

report of a Chinese auditor. Details on Item 16I and the implementation of the HCFA Act are provided in Annex A to this memorandum.

B. Amendments to MD&A and Elimination of Selected Financial Data

The following is a summary of requirements that were adopted in prior years and that become mandatory for the first time for calendar-year end filers in their 2021 Annual Reports.¹ Generally these amendments were previously available for voluntary early adoption as described in our Guide for 2021, [available here](#). Last year most issuers appeared to take a “wait and see” approach on early adoption, so we expect many will be adopting these changes for the first time in their 2021 Annual Report.

- **Changes to the MD&A (Item 5)**. Important amendments to Item 5 of Form 20-F were adopted in November 2020 and are mandatory for an Annual Report covering a period ending on or after August 9, 2021.² A registrant was permitted to adopt them before the mandatory compliance date, but only if it adopted all the amendments to Item 5. A registrant should be mindful that disclosures that are no longer expressly required may still be advisable to avoid a material misstatement or omission.
 - *Principal Objectives of MD&A*. The first two paragraphs of Item 5 provide an updated description of the principal purpose and general requirements of MD&A disclosure. The language codifies longstanding SEC guidance that companies should provide a narrative explanation of their financial statements to enable investors to see the company “from management’s perspective.” It also emphasizes the importance of statistical data in enhancing a reader’s understanding of the company’s financial condition and results of operations.
 - *Elimination of Contractual Obligations Table* (Former Item 5.F). The requirement to present a table of contractual obligations, previously in Item 5.F, has been eliminated in favor of a principles-based liquidity and capital resources disclosure requirement focused on material long and short term cash needs.
 - *Elimination of Separate Section on Off-balance Sheet Arrangements* (Former Item 5.E). The requirement for a separately captioned section with disclosures about off-balance sheet arrangements, previously in Item 5.E, has been eliminated. There is a new instruction emphasizing the importance of discussing off-balance-sheet obligations and other commitments in the broader context of MD&A disclosure when they have or are reasonably likely to have a material current or future effect.
 - *Elimination of Requirement to Discuss Impact of Inflation* (Item 5.A.2). There is no longer a specific requirement to discuss the impact of inflation on the company and its business, except where the currency in which the financial statements are presented is of a country that has experienced hyperinflation (inflation exceeding 100% on a cumulative basis over three years).

- Critical Accounting Estimates Disclosure (New Item 5.E). Critical accounting estimates are those estimates made in accordance with generally accepted accounting principles that involve a significant level of estimation uncertainty and have had or are reasonably likely to have a material impact on the financial condition or results of operations of the registrant. Item 5.E codifies, and in some respects updates, SEC guidance dating back to 2003.³
 - Non-IFRS filers. A registrant whose primary financial statements are prepared under accounting standards other than IFRS must disclose information about its critical accounting estimates.
 - IFRS filers. A registrant whose primary financial statements are prepared in accordance with IFRS is not required to disclose critical accounting estimates in MD&A, because IFRS requires disclosure on this topic in the notes to the financial statements.
- New Language on Liquidity and Capital Resources (Item 5.B). The requirements for disclosures on liquidity and capital resources in Item 5.B have been revised to require registrants to disclose material cash commitments, including capital expenditures, and to discuss the registrant's ability to generate sufficient cash to meet its liquidity requirements in the short term and the long term.
- Elimination of Selected Financial Data Table (Former Item 3.A). There is no longer a requirement to include a summary table with selected historical financial data for the five most recent financial years (or such shorter period that the company has been in operation).

C. Disclosures by Issuers of Guaranteed Securities

- Simplified Disclosure Requirements for Issuers of Guaranteed and Collateralized Securities (Item 8; Instruction 17). The SEC amended Rule 3-10 of Regulation S-X to expand the circumstances under which a registrant that has outstanding guaranteed securities may omit the financial statements of a subsidiary issuer or guarantor.⁴ The disclosure requirements only apply where the outstanding guaranteed securities were issued in an SEC-registered offering (including an exchange offer) or are listed on a U.S. exchange. The primary impact of the amendment is that registrants that were required to include a consolidating footnote to the audited financial statements may now omit the footnote and provide disclosure required by new Rule 13-01 of Regulation S-X, and the disclosure may be included in Item 5 (MD&A) or as a footnote to the financial statements. The disclosures required by Rule 13-01 depend on the circumstances, and include narrative disclosures regarding the issuer and the guarantors, the terms of the guarantees, the structure of the corporate group and a description of factors that may affect payments (such as restrictions on dividends and enforceability of guarantees). Rule 13-01 also requires, with certain exceptions, summary financial information on subsidiary guarantors and issuers, with a scope and format that are more flexible than previously required under Rule 3-10.

Similar amendments were also made to the rules governing disclosures by an issuer of collateralized securities.

These rules became effective for periods ending after January 4, 2021, but a registrant was permitted to adopt them before they became effective. For an in-depth discussion of the applicable changes see our alert memo, [available here](#).

- **New Exhibit of Guarantor, Issuer or Co-Issuer Subsidiaries (Instruction 17)**. Rule 13-01 of Regulation S-X, discussed above, requires that registrants disclose the identity of any subsidiary that is a guarantor, issuer or co-issuer of guaranteed securities. New Instruction 17 to Form 20-F implements this requirement, and calls for a new exhibit listing each of the parent company's subsidiaries that is a guarantor, issuer or co-issuer for each applicable guaranteed security. As with other aspects of Rule 13-01, the new exhibit requirement became effective for periods ending after January 4, 2021, but was available for early adoption.

D. Disclosures by Mining Registrants

Mining companies will need to comply with a new set of rules, contained in Subpart 1300 of Regulation S-K, that aim to modernize property disclosure requirements.⁵ See our alert memo, [available here](#). The requirements, which replace former Industry Guide 7, more closely align SEC disclosure requirements and policies with current industry and global regulatory practices and standards. The new rules were available for early adoption in 2021, but very few companies used them and most mining companies now face a major change in disclosure practices in the Annual Report for 2021.

E. Disclosures by Banking Registrants

Banks, bank holding companies and savings and loan registrants will need to comply with a new set of rules in Subpart 1400 of Regulation S-K that replace former Industry Guide 3.⁶ The new rules are mandatory for fiscal years ending on or after December 15, 2021, but registrants have been able to voluntarily comply with the rules since they became effective on November 16, 2020. The rules aim to streamline statistical disclosure requirements for the banking industry, but they also expand certain disclosures that were called for in Guide 3, and will require additional information regarding interest-earning assets and interest-bearing liabilities, loan portfolio maturity, credit ratios, allowance for credit losses by loan category and uninsured deposits. Although the SEC aimed to decrease the reporting burden, the final rules impose certain near-term costs by requiring registrants to modify their systems to track and report this additional information. For an in-depth discussion of the applicable changes see our alert memo, [available here](#).

F. Inline XBRL

The requirement to submit Form 20-F financial statements in Inline XBRL format is mandatory for the first time for all FPIs that prepare their financial statements in accordance with IFRS and non-accelerated filers that prepare their financial statements in accordance with U.S. GAAP.⁷ Until now, these registrants labeled (or “tagged”) the information using Interactive Data Files that were included as exhibits in their Annual Report. Tagging allows the information to be machine-readable so that it can be processed by software for comparison and analysis. Inline XBRL allows tagging to be embedded directly in the text of an HTML document, and is both human- and machine-readable. The switch to Inline XBRL can require time and expenditures, so an issuer should determine early whether complying with the rule may require upgrades to its preparation software or changes by any third-party filing agent.

II. Areas of SEC Disclosure Focus

The following is a list of issues that have drawn the attention of the SEC and that may have to be addressed under several items of the Annual Report, including risk factors, description of business, MD&A, legal proceedings, disclosure controls and procedures, internal control over financial reporting and the financial statements.

A. Environmental, Social, and Governance (“ESG”) Generally

The focus on ESG disclosures has grown more intense throughout 2021. Beginning several years ago, the principal drivers of ESG disclosure have included (a) investors seeking information, commitments and comparability among issuers and among investment products, (b) providers of ratings and indexes addressing ESG matters, (c) institutions establishing ESG disclosure standards (including TCFD, SASB and many others), (d) European regulatory initiatives under the aegis of the European Green Deal and (e) of course, issuers themselves, preparing increasingly detailed and sophisticated reports on ESG or corporate social responsibility.

Now the SEC too is looking to drive ESG disclosures. Following the change in administration, during 2021 it changed its outlook and adopted what it calls an “all agency approach”. Among its initiatives, the following may affect FPIs directly, but even where they are limited primarily to domestic issuers they will affect the disclosure environment for all registrants, including FPIs.

- The SEC is developing proposed rules requiring disclosures relating to climate change, which are currently expected to be published early in 2022.⁸
- The SEC is separately developing proposed rules on human capital disclosures. These are also expected to be published in 2022.

- Beginning in September 2021, the Division of Corporation Finance has issued comments about climate-related disclosures to numerous issuers, and the Division issued disclosure guidance and a sample comment letter.⁹
- In March 2021, the Division of Enforcement established a Climate and ESG Task Force to conduct a Division-wide effort to develop enforcement action involved climate and ESG matters, including material misstatements or omissions by issuers.¹⁰

B. Climate Change

Many FPIs are already keenly focused on climate-related disclosures, though most have so far elected to provide them principally outside of the Annual Report – in a separate report, or in presentations to investors and other publications. The SEC has not publicly addressed whether its forthcoming rules, its comment-letter campaign or its enforcement initiatives will address FPIs, but it is prudent to assume that they will. For this reason among others, FPIs may want to consider whether they have sufficient ESG disclosures in the Annual Report, particularly in Risk Factors and in MD&A, and whether the information in the Annual Report is consistent with the climate-related information in other public communications. The September 2021 guidance and sample letter provide useful guidance in this respect, as does the 2010 Climate Change Guidance issued by the SEC, directing issuers to disclose where material the impact of pending or existing climate-change related legislation, regulations, and international accords, the indirect consequences of regulation or business trends, and the physical impacts of climate change.¹¹

C. Human Capital

The SEC amended its rules in 2020 to require the annual report of a domestic public company to include disclosure on human capital resources.¹² See our alert memo, [available here](#). This requirement was not added to Form 20-F, but it illustrates an increased focus on the topic by the SEC and other stakeholders.¹³ In 2021, SEC commissioners and staff have repeatedly said that the agency is working on additional disclosure requirements concerning human capital, without specifying whether those requirements will apply to Form 20-F.¹⁴ From their remarks it would appear that the proposed rules might concern workforce turnover, skills and development training, compensation, benefits, workforce demographics including diversity, and health and safety.

A related area that is of increasing interest to institutional investors, and to proxy advisory firms, is board diversity. There has been more attention to U.S. domestic companies, but an FPI should consider whether to address the topic in the Annual Report. FPIs that are listed on Nasdaq should also be considering Nasdaq's new board diversity rules, which will apply to FPIs as well as to domestic companies. There is a substantial phase-in period, and the disclosure requirements can be addressed either in the Annual Report or on the issuer's website.¹⁵

D. COVID-19 Disclosure

The Annual Report should include disclosure on the evolving impact of COVID-19 on the business, financial condition and results of operations of the company.¹⁶ Companies should avoid generic language and should instead focus on providing detailed disclosure on the “specific facts and circumstances” of the impact of COVID-19 related risks and effects on the company.¹⁷ Changes to the business and operations of companies and additional uncertainties may result in additional risk of material misstatement to the financial statements and additional or enhanced controls may be required to mitigate such risks. To the extent that any such change materially affects an FPI’s internal controls over financial reporting, such changes must be disclosed in the fiscal year in which it occurred. SEC enforcement action illustrates the importance of accurate and timely disclosure.¹⁸

E. Cybersecurity

Rulemaking related to cybersecurity risk remained on the SEC’s regulatory agenda in the past year.¹⁹ In a speech in October 2021, Commissioner Roisman emphasized that registrants should disclose all material cybersecurity risks and incidents.²⁰ Registrants should avoid generic and boilerplate language—disclosure should focus on specific cybersecurity risks and incidents involving harms material to the company, including injury to the company’s reputation, financial performance, and customer and vendor relationships, as well as potential litigation or regulatory investigations. Where a company has become aware of a material cybersecurity incident or risk, it will not be sufficient to merely disclose that such an incident “may” occur.²¹ Companies should ensure that information about material cybersecurity vulnerabilities and incidents is adequately disclosed.

F. LIBOR Transition

The SEC remains focused on the disclosure of risks associated with the planned discontinuation of the London Interbank Offered Rate (“LIBOR”). In preparing its Annual Report, a company that has significant LIBOR-based assets, liabilities or derivatives should disclose its progress toward risk identification and mitigation, and the anticipated impact of the discontinuation of LIBOR, if material. Disclosure may be required in risk factors, MD&A, disclosures on board risk oversight, and financial statements. Furthermore, the SEC encourages companies to provide qualitative disclosures and when material, quantitative disclosures to shed light on how the company is transitioning and the related risks.²²

G. China Disclosure

In addition to the disclosure requirements in process under the HCFA Act, as discussed above, SEC Chair Gary Gensler issued a statement on disclosure topics involving Chinese issuers, particularly those

that use a Variable Interest Entity (“VIE”) structure.²³ The guidance specifically addressed registration statements, but the requirements are suggestive also for the Annual Report of any issuer that has a VIE structure.

III. Additional Considerations

- **Financial Disclosures about Acquired and Disposed Businesses.** In May 2020, the SEC adopted a number of changes to the disclosure requirements that apply to companies that are acquiring or disposing of a significant business.²⁴ These rules apply to registration statements under the 1933 Act and to Form 10-K, but not to annual reports on Form 20-F. However, an FPI with a shelf registration statement may want to consider having updated financial statements prepared and available. Among other things, the amendments update the significance tests in Rule 1-02(w), require the financial statements of the acquired business to cover no more than the two most recent fiscal years, and permit target financial statements to be prepared under IFRS or reconciled to IFRS where (i) the acquiring company is an FPI that reports under IFRS and the target company is a foreign business using home-country GAAP or (ii) the target company is an FPI. These amendments also modify the adjustment requirements for acquisition pro forma financial statements. These new rules are mandatory for fiscal years ending on or after January 1, 2021. Companies that are making or considering significant acquisitions or dispositions should read our full alert memo [available here](#).
- **Resource Extraction Disclosure.** On December 16, 2020, the SEC adopted Rule 13(q)(1), requiring companies engaged in the commercial development of oil, natural gas or minerals to provide annual disclosures of amounts paid to governments for the purpose of such developments.²⁵ The rule exempts smaller reporting companies and emerging growth companies from compliance, and newly public companies have a grace period of one fiscal year. Two additional exemptions are also available where disclosure is prohibited by foreign law or by a pre-existing contract. A company that relies on these two exemptions must disclose when it is relying upon them. Rule 13(q)(1) provides an extended mandatory compliance date. After a two-year transition period, a company will be required to annually submit Rule 13(q)(1) disclosure not later than 270 days following the end of each fiscal year. A company with a December 31 fiscal year end would be required to submit by September 30, 2024, disclosure for the fiscal year ended December 31, 2023.
- **Auditor Independence Rules.** In October 2020, the SEC adopted a final rule amending certain provisions of the auditor independence rules, which became effective in 2021.²⁶ Among other things, the amendments limit the lookback period applicable to FPIs that are first-time filers to the “first day of the last fiscal year before the foreign private issuer first filed or was required to file a registration statement” with the SEC, provided that the issuer in question has been in full compliance with its home country auditory independence standards in all prior periods covered

by any registration statement filed with the SEC. The new rules permit certain auditor relationships that were not previously permitted under the auditor independence rules and introduce a materiality test for certain affiliate relationships.

- **NYSE Related-Party Transaction Review Requirement**. In April and August, 2021, the SEC approved proposals to amend Section 314 of the NYSE Listed Company Manual to require that the audit committee, or another independent body of the board, conduct prior review and oversight of related party transactions.²⁷ The reviewing body should prohibit the transaction if it determines that the transaction is inconsistent with the interests of the company and its shareholders. The previous version of the rule did not specify what body should review related party transactions (although it suggested that the audit committee might be considered as appropriate) or whether the review needed to happen before the transaction was consummated. The updated rule also defines “related party transaction” for an FPI as a transaction that requires disclosure pursuant to Item 7.B of Form 20-F. Registrants listed on the NYSE should review their corporate governance policies and practices to ensure compliance with the updated rule, and whether any changes to the registrant’s related party disclosures should be considered.

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Annex A – HFCA Act Implementation for Form 20-F Filers

- **Background.** The HFCA Act, signed into law on December 18, 2020, arises from the protracted standoff between the U.S. Public Company Accounting Oversight Board (“PCAOB”) – which is charged with inspecting the firms that audit financial statements of SEC-reporting companies – and authorities in China that prohibit China-based auditing firms from participating in PCAOB inspections or investigations.²⁸
- The HFCA Act focuses on public companies, i.e., those registered under Exchange Act, that retain auditors in a foreign jurisdiction that are not subject to inspection or investigation by the PCAOB because of positions taken by an authority in that foreign jurisdiction. (For simplicity, we will use the term “Problematic Jurisdiction” to refer to these jurisdictions and “Problematic Auditors” for auditors that the PCAOB is unable to inspect). The only jurisdictions in which PCAOB currently faces that challenge are China and Hong Kong.
- Under the HFCA Act, the SEC is required to identify each issuer that has retained a Problematic Auditor. An issuer that has been identified in this way is referred to as a Commission-Identified Issuer (“CII”).
- A CII will face two main consequences. First, under new Item 16I of Form 20-F, a CII will be subject to specific disclosure and submission requirements, as described below. Second, the Act requires the SEC to adopt rules prohibiting the trading of any securities of an issuer that has been a CII for three years; these rules have not yet been adopted. As discussed further below, the earliest year for complying with the additional disclosure requirements will be 2023 and the earliest possible date for trading suspensions pursuant to the HFCA Act will be in 2024, after issuers file their annual reports for 2023.
- **CII Status: Determination, Publication, Timing.** The process of identifying CIIs will begin with the PCAOB, which must first identify Problematic Auditors. The PCAOB will make a list of Problematic Auditors, submit the list to the SEC and publish the list on its website.²⁹ We expect that to occur before calendar-year issuers start filing annual reports on Form 20-F in 2022.³⁰

The SEC will use the PCAOB’s list of Problematic Auditors to designate CIIs after registrants file their annual reports. In making the determinations, the SEC will review the relevant annual report to determine if it was signed by a Problematic Auditor. Once the SEC identifies such a registrant, it will include the registrant’s name as “provisionally identified” on a list on the SEC’s website at www.sec.gov/HFCAA. The registrant will have a period of 15 business days to contact the SEC to say that it believes it has been incorrectly identified and present relevant evidence, which the SEC can use to decide if it should delete the registrant from the list. If the SEC does not agree with an objecting registrant, the determination will be conclusive. Furthermore, if the registrant does not contact the SEC with objections within 15 business days of being so designated, the determination will be conclusive. “Conclusive” and “provisional” designations will be separately identified on the list, and the list will also indicate for how many

years an issuer has been so identified, which is relevant to the HFCA Act's trading prohibitions discussed below.³¹

The SEC will identify CIIIs based on annual reports for years ending *after* December 8, 2021, so the first identifications will occur in early 2022. Compliance with Item 16I will be required beginning with the next Annual Report after an issuer has been identified as a CII, so compliance will be required beginning in early 2023.

- **Requirements of Form 20-F Item 16I.** Under new Item 16I of Form 20-F, a CII will be subject to the following requirements:
 - *Supplemental Submission.* A CII must submit documentation that establishes that the registrant is not owned or controlled by a Problematic Jurisdiction.³² The supplemental submission must be provided through the EDGAR system on or before the due date for the Annual Report (April 30 for calendar-year end FPIs).³³ This submission will be publicly available on EDGAR.
 - *Annual Report Disclosure Requirements.* A CII that is a foreign issuer (as defined in Rule 3b-4 of the Exchange Act) must disclose:
 - That a Problematic Auditor issued an audit report for the registrant for the immediately preceding annual financial statement period.
 - The percentage of shares of the registrant owned by governmental entities in the foreign jurisdiction in which the registrant is incorporated or otherwise organized.
 - Whether governmental entities in a Problematic Jurisdiction have a controlling financial interest in the registrant.
 - The name of each official of the Chinese Communist Party who is a member of the board of directors of the registrant or the operating entity with respect to the issuer.
 - Whether the articles of incorporation of the registrant or equivalent organizing document contains any charter of the Chinese Communist Party, including the text of such charter.

The disclosure must be included in the Annual Report filed for the year following CII designation. This means that the disclosure is required in that Annual Report even if the issuer has not used a Problematic Auditor for the audit report included in the Annual Report it is then filing.

- **Process for Trading Prohibitions.** The HFCA Act requires the SEC to prohibit trading on any U.S. exchange or other trading method subject to SEC regulation (including the OTC markets), the securities of any Exchange Act-registered issuer that has been determined to be a CII for three consecutive years. Once the SEC identifies a CII for three consecutive years, it will issue an order for a trading prohibition on the securities of that issuer, which will be effective on the fourth business day after the order is published by the SEC. The earliest date when these orders will be issuable will be in 2024, after registrants file their annual reports for 2023 (assuming a registrant has been a CII for each of 2021, 2022 and 2023).³⁴

¹ Our alert memo on the MD&A amendments is available at <https://www.clearygottlieb.com/news-and-insights/publication-listing/sec-adopts-major-changes-to-md-a-and-related-requirements>. These changes were part of a larger set of substantive revisions to reporting requirements aimed at replacing outmoded or duplicative requirements with a more principles-based approach to disclosure. For an overview of changes the changes, please see our Disclosure Simplification Explainer, available at <https://www.clearygottlieb.com/-/media/Files/DSE/Disclosure-Effectiveness-Initiative-Chart.pdf>.

² Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Release No. 34-90459 (November 19, 2020, available at <https://www.sec.gov/rules/final/2020/33-10890.pdf>).

³ The SEC published guidance in 2003 calling for disclosure of critical accounting estimates, and most registrants have included disclosure in response to this guidance. The new language of Item 5 is generally similar to the 2003 guidance, but it differs in some respects. Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, SEC, Release No. 34-48960 (December 19, 2003), available at <https://www.sec.gov/rules/interp/33-8350.htm>.

⁴ Financial Disclosures about Guarantors and Issuers of Guaranteed Securities and Affiliates Whose Securities Collateralize a Registrant's Securities, Release No. 34-88307 (March 2, 2020), available at <https://www.sec.gov/rules/final/2020/33-10762.pdf>.

⁵ Subpart 1300 of Regulation S-K; Modernization of Property Disclosures for Mining Registrants, Release No. 33-10570 (October 31, 2018), available at <https://www.sec.gov/rules/final/2018/33-10570.pdf>.

⁶ Subpart 1400 of Regulation S-K; Update of Statistical Disclosures for Banks and Savings and Loan Registrants, Release No. 33-10835 (September 11, 2020), available at <https://www.sec.gov/rules/final/2020/33-10835.pdf>.

⁷ See Inline XBRL Filing of Tagged Data, Release No. 33-10514 (June 28, 2018), available at <https://www.sec.gov/rules/final/2018/33-10514.pdf>.

The following phase-in schedule applies to the Inline XBRL requirement:

- Large accelerated filers that prepare their financial statements in accordance with U.S. GAAP: for periods ending on or after June 15, 2019.
- Accelerated filers that prepare their financial statements in accordance with U.S. GAAP: for periods ending on or after June 15, 2020.
- All other filers, including all FPIs that prepare their financial statements in accordance with IFRS: for periods ending on or after June 15, 2021.

Interactive Data, Compliance and Disclosure Interpretation, SEC, Questions 101.08 and .09 (Aug. 20, 2019), available at <https://www.sec.gov/corpfin/interactive-data-cdi>.

⁸ In March 2021, then-Acting Chair Allison Herren Lee requested public input on climate change disclosure requirements with a view to facilitate the disclosure of "consistent, comparable, and reliable information on climate change." Acting Chair Allison Herren Lee, Public Input Welcomed on Climate Change Disclosures (March 15, 2021), available at <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>. Hundreds of comments have been submitted. SEC, Comments on Climate Change Disclosures, available at <https://www.sec.gov/comments/climate-disclosure/cl112.htm>.

⁹ Sample Letter to Companies Regarding Climate Change Disclosures (September 22, 2021), available at <https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures>.

¹⁰ SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (March 4, 2021), available at <https://www.sec.gov/news/press-release/2021-42>.

¹¹ Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106 (Feb. 8, 2010), available at <https://www.sec.gov/rules/interp/2010/33-9106.pdf>.

¹² SEC Release No. 33-10825 (Aug. 26, 2020), available at <https://www.sec.gov/rules/final/2020/33-10825.pdf>.

¹³ See, e.g., Recommendation of the Investor Advisory Committee on Human Capital Management Disclosure (March 28, 2019), available at <https://www.sec.gov/spotlight/investor-advisory-committee-2012/human-capital-disclosure-recommendation.pdf>; Human Capital Management Coalition, Petition for Rulemaking (July 6, 2017), available at <https://www.sec.gov/rules/petitions/2017/petn4-711.pdf>.

¹⁴ Prepared Remarks at London City Week, Chair Gary Gensler (June 23, 2021), available at <https://www.sec.gov/news/speech/gensler-speech-london-city-week-062321>. During the 53rd Annual Institute on Securities Regulation at the Practising Law Institute (November 3 to November 5, 2021), members of the SEC staff echoed the importance of human capital disclosure and stated that the Division of Corporation Finance is considering prescriptive disclosure rules relating to workforce turnover, sales and development training, health and safety and employee demographics.

¹⁵ The Nasdaq Stock Market, Rules 5605(f) and 5606.

¹⁶ The SEC has repeatedly emphasized the importance of including timely and up to date disclosure on the impact of COVID-19 on the business, financial condition and results of operations of companies, even where the ultimate impact of the pandemic and related effects on the company may be uncertain. See CF Disclosure Guidance Topic No. 9: <https://www.sec.gov/corpfin/coronavirus-covid-19>; See CF Disclosure Guidance: Topic No. 9A: <https://www.sec.gov/corpfin/covid-19-disclosure-considerations>; Accounting Statements: <https://www.sec.gov/news/public-statement/teotia-financial-reporting-covid-19-2020-06-23>

¹⁷ Some of the specific facts and circumstances identified by the SEC for consideration by companies for inclusion in their COVID-19 disclosure include, among other things, how the company and management are responding to specific risks and effects related to COVID-19, any material operational challenges impacting the company, the overall liquidity position of the company, the ability of the company to access financing or other sources of funding, and the ability of the company to meet the covenants in its outstanding obligations and the ability of the company to service its existing obligations.

¹⁸ In a SEC enforcement action against The Cheesecake Factory for misleading COVID-19 disclosures, the order found that the company had stated in public filings that its restaurants were “operating sustainably” during the pandemic, failing to disclose a cash burn of approximately \$6 million per week and that the company had already informed its landlords that it would not pay rent in April due to the impact of the pandemic. SEC Press Release, SEC Charges The Cheesecake Factory For Misleading COVID-19 Disclosures (December 4, 2020), available at <https://www.sec.gov/news/press-release/2020-306>.

¹⁹ SEC Announces Annual Regulatory Agenda (June 11, 2021), available at <https://www.sec.gov/news/press-release/2021-99>.

²⁰ Commissioner Elad L. Roisman, Cybersecurity: Meeting the Emerging Challenge (October 29, 2021), available at <https://www.sec.gov/news/speech/roisman-cybersecurity-102921>.

²¹ On August 16, 2021, the SEC announced a settlement with Pearson plc for charges that the company misled investors about a cyber-intrusion in 2018 involving the theft of millions of student records. Among other things, the order found that in a semi-annual report filed in July 2019, Pearson referred to a data privacy incident as a hypothetical risk, when in fact the 2018 cyber intrusion had already occurred. The order also found that the company had inadequate disclosure controls and procedures. SEC Charges Pearson plc for Misleading Investors About Cyber Breach (August 16, 2021), available at <https://www.sec.gov/news/press-release/2021-154>.

²² SEC Staff Statement on LIBOR Transition—Key Considerations for Market Participants (December 7, 2021), available at <https://www.sec.gov/news/statement/staff-statement-libor-transition-20211207>.

²³ Statement on Investor Protection Related to Recent Developments in China, Chair Gary Gensler (July 30, 2021), available at <https://www.sec.gov/news/public-statement/gensler-2021-07-30>. The guidance builds on the SEC’s Division of Corporation Finance’s November 2020 guidance on disclosure considerations for companies based in or with significant operations in China. See Division of Corporation Finance, SEC, Disclosure Considerations for China-Based Issuers (November 23, 2020), available at <https://www.sec.gov/corpfin/disclosure-considerations-china-based-issuers>.

²⁴ Amendments to Financial Disclosures about Acquired and Disposed Businesses, Release No. 34-88914 (May 20, 2020), available at <https://www.sec.gov/rules/proposed/2019/33-10635.pdf>.

²⁵ Disclosure of Payments by Resource Extraction Issuers, Release No. 34-90679 (December 16, 2020), available at <https://www.sec.gov/rules/final/2020/34-90679.pdf>.

²⁶ Qualifications of Accountants, Release No. 34-90210 (October 16, 2020), available at <https://www.sec.gov/rules/final/2020/33-10876.pdf>.

²⁷ Order Granting Accelerated Approval to a Proposed Rule Change to Revise the Requirements for Related Party Transactions in Section 314.00, Release No. 34-91471 (April 2, 2021), available at <https://www.sec.gov/rules/sro/nyse/2021/34-91471.pdf>; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the Term “Related Party Transactions” under Section 314.00 of the NYSE Listed Company Manual, Release No. 34-92770 (August 26, 2021), available at <https://www.sec.gov/rules/sro/nyse/2021/34-92770.pdf>.

²⁸ Final text available at <https://www.govinfo.gov/content/pkg/COMPS-15889/pdf/COMPS-15889.pdf>.

²⁹ The identification process is governed by PCAOB Rule 6100, which was approved by the PCAOB in September 2021 and by the SEC in November 2021. Public Company Accounting Oversight Board; Order Granting Approval of Proposed Rule Governing Board Determinations Under the Holding Foreign Companies Accountable Act, Release No. 34-93527, available at <https://www.sec.gov/rules/pcaob/2021/34-93527.pdf>.

³⁰ The PCAOB will post the list on its website at <https://pcaobus.org/oversight/international/board-determinations-holding-foreign-companies-accountable-act-hfcaa>.

³¹ Holding Foreign Companies Accountable Act Disclosure, Release No. 34-93701 (December 2, 2021), available at <https://www.sec.gov/rules/final/2021/34-93701.pdf> (“HFCA Act Disclosure Release”).

³² The HFCA Act Disclosure Release states that each CII should determine the appropriate documentation to submit in response to the requirement, based on their organizational structure and other registrant-specific factors.

The terms “owned or controlled” and “controlling financial interest” used in Item 16I refer to a person’s or governmental entity’s ability to “control” the registrant as that term is used in the Exchange Act and the Exchange Act rules. HFCA Act Disclosure Release.

³³ A registrant can submit the documentation with its annual report, on Form 6-K, or “using another appropriate method.” HFCA Act Disclosure Release.

³⁴ The HFCA Act Disclosure Release outlines the procedures for terminating trading prohibitions, which can be done if a registrant certifies to the SEC that it has retained an auditor that the PCAOB has inspected to the satisfaction of the SEC, which will only be issued after the SEC and investors have access to an audit report signed by an auditor that is not a Problematic Auditor.