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SIDLEY UPDATE

Preparing Your 2022 Form 10-K: A Summary of Recent Key Disclosure Developments, Priorities, and Trends

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This Sidley Update highlights certain key disclosure considerations for preparing your annual report on Form 10-K for fiscal year 2022, including recent amendments to U.S. Securities and Exchange Commission (SEC) disclosure rules and other developments that impact 2022 Form 10-K filings, as well as certain significant disclosure trends and current areas of SEC focus for disclosures. As always, we invite you to contact us with any questions on these topics or any other SEC reporting and compliance matters.

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Holding Foreign Companies Accountable Act

The Holding Foreign Companies Accountable Act (HFCAA) became effective on January 1, 2021 to prohibit the trading on U.S. securities exchanges and in the over-the-counter (OTC) market of securities of a "Commission-Identified Issuer" after three years of being identified as such by the SEC. The SEC adopted amendments on December 2, 2021 to revise Form 10-K to implement the disclosure and submission requirements of the HFCAA, which became effective on January 10, 2022. On December 29, 2022, President Biden signed into law the Accelerating Holding Foreign Companies Accountable Act (AHFCAA) as part of the omnibus appropriations bill for 2023 to shorten the original trading prohibition timeline under the HFCAA from three years to two years.

The SEC identifies Commission-Identified Issuers based on whether the Public Company Accounting Oversight Board (PCAOB) has determined that the auditors of these issuers were not subject to full PCAOB inspection or investigation because of a position taken by an authority in a foreign jurisdiction where such auditors have a branch or office. With the adoption of the AHFCAA, once the SEC conclusively identifies a registrant as a Commission-Identified Issuer for two consecutive years, the SEC will issue an order prohibiting the trading of the registrant's securities on any U.S. securities exchange or the OTC market, which will become effective four business days thereafter. While the HFCAA does not require that securities subject to trading bans be delisted, and neither the New York Stock Exchange (the NYSE) nor the Nasdaq Stock Market (Nasdaq) has issued any listing rules specifically targeting the treatment of Commission-Identified Issuers, such issuers will likely be delisted when trading bans are imposed. Under Rule 12d2-2(b) of the Securities Exchange Act of 1934 (Exchange Act), U.S. securities exchanges will have discretion to delist securities subject to trading bans, but there is no affirmative duty to do so. A trading ban imposed by the HFCAA does not trigger any of the mandatory delisting criteria under Rule 12d2-2(a).

The PCAOB recently announced on December 15, 2022 that it had secured unprecedented access to conduct inspections and investigations of audit firms based in mainland China and Hong Kong. A current list of issuers identified under the HFCAA is available here. It remains unclear when or if the SEC will update its list of Commission-Identified Issuers, but at the very least the two-year timeline has been restarted for registrants in China and Hong Kong.

Regardless of jurisdiction of incorporation, Commission-Identified Issuers must submit documents annually (prior to their annual reports) evidencing that they are not owned or controlled by a governmental entity in their accounting firm's jurisdiction. For each year a Commission-Identified Issuer that is also a foreign issuer is identified by the SEC, it must disclose in its annual report:

- that, for the immediately preceding annual financial statement period, a registered public accounting firm that the PCAOB was unable to inspect or investigate completely, because of a position taken by an authority in the foreign jurisdiction, issued an audit report for the issuer;

- the percentage of its shares owned by governmental entities in the foreign jurisdiction in which the issuer is incorporated or organized;

- whether governmental entities in the same foreign jurisdiction as the issuer's accounting firm have a controlling financial interest in the issuer;

- the name of any official of the Chinese Communist Party who is a member of the board of directors of the issuer or any of its operating entities; and

- whether the articles of incorporation of the issuer (or equivalent organizational documents) contain any charter of the Chinese Communist Party, including the text of any such charter.

Effective January 10, 2022, as part of the amendments to implement the HFCAA, a foreign issuer identified by the SEC that uses a variable-interest entity (or similar structure) that results in additional foreign entities being consolidated in the financial statements of the registrant will be required to provide the typical HFCAA disclosures, as outlined above, for its consolidated foreign operating entity or entities, in addition to itself.

A detailed summary of the amendments implementing the HFCAA can be found in our December 29, 2021 Sidley Update.

Electronic Filing of "Glossy" Annual Report

On June 2, 2022, the SEC adopted amendments to its rules governing the electronic filing and submission of documents. These amendments mandate the electronic filing or submission of various forms and documents registrants were previously permitted to file in paper format or on their websites. Effective January 11, 2023, registrants will no longer be permitted to furnish paper copies of their "glossy" annual reports, or satisfy reporting obligations by posting to their websites. Instead, glossy annual reports must now be submitted electronically on EDGAR in PDF format. According to the EDGAR Filer Manual – Volume II, registrants will have the option to submit their "glossy" annual reports in Form ARS as a primary filing or in Form ARS as exhibit type 99. Foreign private issuers (FPIs) will have the additional option to submit their "glossy" annual reports in Form 6-K as exhibit type 99, but no such filing format is available in Form 10-K.

Amendment to Emerging Growth Company Filer Definition

On September 9, 2022, the SEC amended its filer definitions in order to implement inflation adjustments mandated by Titles I and III of the Jumpstart Our Business Startups Act. Effective September 20, 2022, the annual gross revenue threshold for emerging growth company status increased from $1.07 billion to $1.235 billion.

Amendments to Regulation S-K

We outline below some of the more notable changes to Regulation S-K applicable to Form 10-K, including proxy material incorporated by reference in Form 10-K. The most substantial amendments reflect the SEC's increasing focus on executive compensation and insider trading. Appendix A to this Sidley Update sets forth a summary checklist of significant Regulation S-K amendments affecting 2022 Form 10-K filings.

Item 402 – Executive Compensation

General Instruction G(3) to Form 10-K permits an issuer to incorporate disclosures required by Item 402 of Regulation S-K into its annual report from its definitive proxy material, if the definitive proxy material is filed within 120 days after the end of the issuer's fiscal year. Issuers that file their definitive proxy

materials after the 120-day period should take into account the SEC's recent amendments to Item 402 when preparing their annual reports.

Pay-Versus-Performance

On August 25, 2022, the SEC adopted final rules to implement Section 14(i) of the Exchange Act, which was added by Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). These rules created new Item 402(v) of Regulation S-K to require disclosure of the relationship between executive compensation and financial performance of the registrant (Pay-Versus-Performance).

Effective October 11, 2022, Item 402(v) requires all publicly traded companies, except emerging growth companies, FPIs, and registered investment companies, to provide new Pay-Versus-Performance disclosures in any proxy statement (in which disclosure under Item 402(v) is required) covering any fiscal year ending on or after December 16, 2022.

Unlike other aspects of Item 402, the new Pay-Versus-Performance disclosures are not required to be included in annual reports, even when definitive proxy material is filed with the SEC later than 120 days after the end of the registrant's fiscal year. A more detailed discussion of the expanded disclosure required in 2023 proxy statements can be found in our September 2, 2022 Sidley Update.

Issuers that do not elect directors annually, such as publicly traded partnerships, do not file annual proxy statements but may be required to include such information in proxy statements relating to special meetings of equity holders where Item 402 executive compensation disclosure is required (such as in connection with approvals of equity incentive plans or equity purchase plans). Accordingly, such issuers should consider potential timing of those special meetings and disclosure controls for Pay-Versus-Performance to make such information available when required.

Clawback Rules

On October 26, 2022, the SEC adopted its final rules regarding recovery (clawback) of erroneously awarded incentive-based compensation under the Dodd-Frank Act. As codified in new Rule 10D-1 under the Exchange Act, the SEC's clawback rules are designed to prevent executive officers of exchange-listed issuers from retaining "incentive-based compensation that was erroneously awarded on the basis of materially misreported financial information that requires an accounting restatement." The clawback rules compel exchanges to develop listing standards that require listed issuers to adopt their own clawback policies for the recovery of erroneously awarded incentive-based compensation and to comply with certain disclosure obligations.

Exchanges are required to file their proposed listing standards no later than February 27, 2023, and such listing standards must be effective no later than November 28, 2023. Listed issuers must then adopt compliant clawback policies no later than 60 days after the effective date of the applicable listing standard and begin to comply with disclosure requirements in annual reports (or proxy statements) filed thereafter. Below is a timeline of compliance dates.

- **February 27, 2023**: Deadline for exchanges to propose clawback listing standards.
- **November 28, 2023**: Deadline for clawback listing standards to become effective.

- **April 28, 2023 – January 27, 2024**: Deadline for listed issuers to adopt compliant clawback policies and comply with related disclosure requirements in their next annual reports (or proxy statements).

A listed issuer will be subject to delisting if it fails to adopt a clawback policy, fails to enforce its clawback policy or fails to make the required clawback disclosures.

Every listed issuer is covered by the SEC's clawback rules, with few exceptions. New Rule 10D-1 does exempt certain registered investment companies and management companies, but only to the extent that no executive officers have been granted incentive compensation in any of the last three fiscal years (or since the initial listing, if fewer than three years). Listed funds and externally managed business development companies are *not* exempt.

Exchanges have little discretion to shape the scope of their clawback listing standards. Instead, new Rule 10D-1 prescribes the following specific requirements that the listing standards must require listed issuers to adopt in their clawback policies.

- The policy must require the company to recoup excess incentive compensation paid to executive officers in all cases where the company is required to prepare a financial restatement to correct a material error. A "financial statement" includes any statement of financial position (e.g., a balance sheet), statement of comprehensive income, statement of cash flows, statement of stockholders' equity, related schedules, and accompanying footnotes required by applicable SEC rules and regulations.

- The policy must cover all Section 16(a) officers during the relevant performance period. Note, the SEC technically established a separate definition of "executive officer" in new Rule 10D-1, but such definition is consistent with the term "officer" as defined in Rule 16a-1(f) under the Exchange Act, in order to expressly include officers with an important role in financial reporting (the principal accounting officer).

- Incentive compensation must include any compensation that is granted, earned, or vested based wholly or in part upon the attainment of a financial reporting measure, including stock price, or total shareholder return (TSR). Incentive compensation that is granted, vested or earned based solely upon the occurrence of nonfinancial events would not be subject to the policy.

- The amount of incentive compensation to be recovered is the amount paid to the executive officer less what would have been paid had the incentive compensation been calculated based on the restated financial information.

- When incentive compensation is calculated based on stock price or TSR, the recoverable amount is calculated based on the company's reasonable estimate of the effect of the restatement on the company's stock price.

- The company must recover any excess portion of an equity award that would not have been granted, vested or earned based on the restated financials. If the equity award remains outstanding, the executive officer would forfeit the excess portion of any such award based on the restated financials. If the equity award has settled into shares that the executive officer still

holds, the company must recover the number of shares received in excess of the shares that would have been granted under the restated financials (less any exercise price paid for the shares). If the underlying shares have been sold, the company must recover the proceeds received from the sale of the number of shares received in excess of the shares that would have been granted under the restated financials (less any exercise price paid for the shares).

- The amount of excess incentive compensation subject to recovery is calculated on a pre-tax basis, and does not account for any portion of the erroneously received incentive compensation paid by the executive officer in taxes.

- The requirement to recover incentive compensation is subject to three exceptions, none of which is based on *de minimis* amounts: (i) the company reasonably determines that the expense paid to a third party to recover incentive compensation would exceed the amount of incentive compensation to be recovered, making recovery impracticable; (ii) recovery of incentive compensation would violate a law of the company's home country that was passed before November 28, 2022 (the date the adopting release was published in the Federal Register) (highly unlikely); or (iii) recovery of incentive compensation would draw from deferred compensation under tax-qualified retirement plans.

- Incentive compensation will be deemed "received" during the fiscal period in which the performance measure is attained, not when the award is actually granted, vested or paid.

- Incentive compensation will be subject to recovery if "received" during any of the three completed fiscal years immediately preceding the date on which the company was required to prepare a financial restatement.

Companies have discretion to choose the method of recovery, including, but not limited to, repayment by the executive officer over time or from future pay, compensation through after-tax funds, forfeitures of outstanding equity awards, cancellation of unvested equity and nonequity awards, and offsetting against amounts otherwise payable by the company to the executive officer.

The SEC's clawback rules also include new disclosure requirements on how clawback policies are implemented. Under new Item 402(w) of Regulation S-K, listed issuers will be required to disclose the following facts and circumstances in the case of any clawback.

- If an executive officer is subject to recovery of excess incentive compensation, the company will be required to provide the date of the relevant accounting restatement and detailed information regarding the recovery of excess incentive compensation.

- Form 10-K will include new check boxes to show whether included financial statements reflect the correction of an error to previously issued financial statements and whether any such error correction is a restatement that required a recovery analysis of incentive-based compensation.

- If the company was required to prepare an accounting restatement that required recovery of erroneously awarded compensation pursuant to the company's clawback policy at any time during or after the last completed fiscal year, or there was an outstanding balance as of the end of the last completed fiscal year of erroneously awarded compensation to be recovered from

the application of the company's clawback policy in connection with a prior restatement, then the next annual report (or proxy statement) must disclose:

  - the date on which the listed company was required to prepare an accounting restatement;

  - the aggregate dollar amount of erroneously awarded incentive compensation attributable to that accounting restatement, including an analysis of how the amount was calculated;

  - if the financial reporting measure for the incentive compensation was stock price or TSR, the estimates used to determine the excess incentive compensation based on the restatement;

  - the aggregate dollar amount of erroneously awarded incentive compensation that remains outstanding at the end of the last completed fiscal year;

  - if recovery is impractical, for each current or former executive officer and for all current and former executive officers as a group, the amount of forgone recovery and a brief description of the reason the company decided in each case not to pursue recovery; and

  - for each current and former executive officer, the amount of erroneously awarded compensation still owed that had been outstanding for 180 days or longer since the date the company determined the amount owed.

- If an accounting restatement does not require recovery, the company must disclose the reason why recovery is not required. If the company is relying on an exception to recovery, that must be disclosed, as well.

The company cannot indemnify or insure its executive officers against the recovery of erroneously awarded incentive compensation. An executive officer may purchase a third-party insurance policy to fund potential recovery obligations, but the company cannot pay for the premiums or reimburse the executive officer for the cost of any such third-party insurance policy.

Whereas Section 304 of the Sarbanes-Oxley Act (SOX) requires recovery only when a restatement results from company misconduct, and only from the chief executive officer and the chief financial officer, within the 12-month period following the first public disclosure of improper financial statements, the clawback rule applies to all Section 16(a) officers and applies even in the absence of misconduct for erroneously awarded incentive compensation "received" during any of the three completed fiscal years immediately preceding the date on which the company was required to prepare a financial restatement.

If recovery is required under both Section 304 of SOX and new Rule 10D-1, any amounts recovered through compliance with Section 304 would be credited toward the amount recovered under new Rule 10D-1. However, recovery under new Rule 10D-1 would not preclude recovery under Section 304 of SOX to the extent any applicable amounts have not been reimbursed to the company.

More information about the new clawback rules can be found in our November 11, 2022 Sidley Update.

Insider Trading Disclosures

On December 14, 2022, the SEC adopted final rules regarding Rule 10b5-1 insider trading plans and related disclosure obligations in annual reports and proxy statements. Issuers that are not smaller reporting companies will be required to comply with the new disclosure requirements in the first periodic report (or proxy statement) that covers the first full fiscal period beginning on or after April 1, 2023 (i.e., for most large domestic calendar year filers, the second quarter 2023 Form 10-Q). Smaller reporting companies will be required to comply in the first filing that covers the first full fiscal period beginning on or after October 1, 2023. Thus, for large domestic calendar year filers that are not smaller reporting companies, the new insider trading disclosure rules will apply to the 2023 annual report and the 2024 annual meeting proxy statement.

The final rules add new Item 402(x) of Regulation S-K, which requires narrative disclosure about the timing of option awards. The narrative disclosure must describe the issuer's policies and practices in connection with the timing of stock options, stock appreciation rights, or instruments with option-like features and must explain: (i) how the issuer's board determines when to grant such equity awards; (ii) whether and how the issuer's board or compensation committee considers material nonpublic information (MNPI) when determining the timing and terms of an award; and (iii) whether the issuer has timed the disclosure of MNPI for the purpose of affecting the value of executive compensation. These new disclosure requirements do not apply to restricted stock or restricted stock units.

New Item 402(x) also requires tabular disclosure if any such equity awards were granted to any named executive officer (NEO) within four business days before or one business day after the filing of an annual report on Form 10-K. If required, the table must include the following information on an award-by-award basis, as applicable:

- the name of the NEO;
- the grant date;
- the number of securities underlying the award;
- the per-share exercise price;
- the grant date fair value of the award; and
- the percentage change in the market value of the securities underlying the award between one trading day before and one trading day after disclosure of the MNPI.

A detailed discussion of the new insider trading disclosure rules can be found in our December 16, 2022 Sidley Update.

Item 404 – Transactions With Related Persons, Promoters, and Certain Control Persons

General Instruction G(3) to Form 10-K also permits an issuer to incorporate disclosures required by Item 404 of Regulation S-K into its annual report from its definitive proxy material, if the definitive proxy material is filed within 120 days after the end of the issuer's fiscal year. Issuers that file their definitive proxy materials after the 120-day period should consider the SEC's recent amendment to Item 404.

On October 26, 2022, the SEC amended Item 404(a) of Regulation S-K by adding Instruction 5.a.iii. to provide that a listed company may exclude discussion of its compensation recovery efforts in its related party transaction disclosure, as applicable, if it provides the clawback disclosure under new Item 402(w). See "Amendments to Regulation S-K—Item 402 – Executive Compensation—Clawback Rules" above for the effective dates under the new clawback rules.

Item 408 – Insider Trading Arrangements and Policies

As part of its December 2022 final rules, the SEC also added new Item 408 to Regulation S-K to mandate disclosure of trading arrangements by issuers or corporate insiders, as well as periodic disclosure of insider trading policies and procedures. New Item 408 will become effective at the same time as new Item 402(x); for most large domestic calendar year filers, new Item 408 will apply to the second quarter 2023 Form 10-Q and subsequent periodic reports. See "Amendments to Regulation S-K—Item 402 – Executive Compensation—Insider Trading Disclosures" above for the effective dates under the new insider trading rules.

Fourth-Quarter Disclosure

New Item 408(a) requires registrants, other than FPIs, to disclose in their annual reports whether any director or Section 16(a) officer adopted, modified, or terminated a Rule 10b5-1 plan and/or any non-Rule 10b5-1 trading arrangement during the registrant's fourth fiscal quarter (similar to disclosure required on a quarterly basis in Form 10-Q). If so, registrants must also provide a description of the material terms of any such Rule 10b5-1 plan or non-Rule 10b5-1 trading arrangement, other than pricing terms, such as:

- the name and title of the director or officer;
- the date of adoption or termination of the trading plan or arrangement;
- the duration of the trading plan or arrangement;
- the aggregate number of securities to be sold or purchased under the trading plan or arrangement; and
- whether the trading plan or arrangement is a Rule 10b5-1 trading plan or a non-Rule 10b5-1 trading arrangement.

New Item 408(a) will be added to Part II, Item 9B, "Other Information" of Form 10-K, and the new disclosures will be subject to the officer certifications required under Section 302 of SOX. Issuers will be required to comply with the new disclosure requirements in the first periodic report (or proxy statement) that covers the first full fiscal period beginning on or after April 1, 2023 (or October 1, 2023, in the case of smaller reporting companies). Thus, for large domestic calendar year filers that are not smaller reporting companies, new Item 408(a) will apply to the 2023 annual report. Form 10-K does not permit an issuer to incorporate the disclosures required by new Item 408(a) into its annual report from its definitive proxy material. Issuers must include such disclosures in their annual reports.

Insider Trading Policies and Procedures

Under new Item 408(b), registrants will be required to disclose in their annual reports (or proxy statements) whether they have adopted insider trading policies and procedures governing the purchase, sale, and other dispositions of their securities by directors, officers and employees, or by the registrant itself, that are reasonably designed to promote compliance with insider trading laws, rules, and regulations and any applicable listing standards. If a registrant has not adopted such insider trading policies and procedures, it must explain why it has not done so.

An issuer will be required to file a copy of its insider trading policy as an exhibit to its annual report. If an issuer's trading policies and procedures are included in its code of ethics, then filing the code of ethics as an exhibit will satisfy this requirement.

New Item 408(b) will be added to Part III, Item 10, "Directors, Executive Officers and Corporate Governance" of Form 10-K. Issuers will be required to comply with the new disclosure requirements in the first periodic report (or proxy statement) that covers the first full fiscal period beginning on or after April 1, 2023 (or October 1, 2023, in the case of smaller reporting companies). Thus, for large domestic calendar year filers that are not smaller reporting companies, new Item 408(b) will apply to the 2023 annual report. New Item 408(b) will be applicable to both domestic issuers and FPIs and will be subject to the officer certifications required by Section 302 of SOX. Unlike new Item 408(a), the disclosures required by new Item 408(b) can be incorporated by reference into an issuer's annual report from its definitive proxy material, if the definitive proxy material is filed within 120 days after the end of the issuer's fiscal year.

Item 601 – Exhibits

In connection with the SEC's new clawback rules, Item 601 of Regulation S-K has been amended to require listed issuers to file their clawback policies as an exhibit to Form 10-K. A listed issuer will be required to file its clawback policy with the first annual report after the applicable listing standard is adopted pursuant to new Rule 10D-1. See "Amendments to Regulation S-K—Item 402 – Executive Compensation—Clawback Rules" above for the effective dates under the new clawback rules.

Pursuant to the SEC's recently published final rules on insider trading, Item 601 has also been amended to require registrants to file their insider trading policies as an exhibit to Form 10-K. A registrant will be required to file its insider trading policy with the first annual report that requires disclosure under new Item 408(b); for large domestic calendar year filers that are not smaller reporting companies, this will be the 2023 annual report. See "Amendments to Regulation S-K—Item 402 – Executive Compensation—Insider Trading Disclosures" above for the effective dates under the new insider trading rules.

Disclosure Highlights for 2022 Annual Reports

Interest Rates, Inflation, and Related Matters

Interest and inflation rates have increased significantly in 2022, although the impacts have not been uniform across industries. While the 2020 amendments to Item 303 of Regulation S-K eliminated the requirement for registrants to discuss the impact of inflation and price changes, disclosure may still be required in the Management's Discussion and Analysis of Financial Condition and Results of Operations

section (MD&A) if inflation or changing prices have had a material impact on the registrant or are a known trend or uncertainty that is reasonably expected to have a material impact.

The SEC has recently issued comment letters asking companies to provide more information on how record inflation is affecting their businesses (e.g., requesting details about how inflation has affected results of operations, sales, profits, capital expenditures, maintenance, business goals, and pricing strategies). See, for example, the SEC's comment letter to Thermo Fisher Scientific Inc., dated September 22, 2022.

The same disclosure considerations apply to changes in interest rates, which may affect companies differently depending on specific business conditions. Risk factors and the forward-looking statements may require revisions for this reason. While companies generally are not providing standalone risk factors for interest rates or inflation, some have expanded existing disclosures regarding inflation and interest rates.

Russia-Ukraine Conflict

The SEC issued a sample comment letter in May 2022 to address disclosure obligations resulting from direct or indirect impacts of Russia's invasion of Ukraine under the federal securities laws. The sample comment letter includes the international community's response to Russia's invasion of Ukraine as an impact that could trigger disclosure obligations.

In particular, the SEC's Division of Corporation Finance (the Division) recommended that companies provide detailed disclosure, to the extent material or otherwise required, regarding: (i) direct or indirect exposure to Russia, Belarus, or Ukraine through their operations, employee base, investments in Russia, Belarus, or Ukraine, securities traded in Russia, sanctions against Russian or Belarusian individuals or entities, or legal or regulatory uncertainty associated with operating in or exiting Russia or Belarus; (ii) direct or indirect reliance on goods or services sourced in Russia or Ukraine or, in some cases, in countries supportive of Russia; (iii) actual or potential disruptions in the company's supply chain; or (iv) business relationships in, connections to, or assets in, Russia, Belarus or Ukraine. The Division further explained that financial statements may also need to reflect and disclose the impairment of assets, changes in inventory valuation, deferred tax asset valuation allowance, disposal or exiting of a business, de-consolidation, changes in exchange rates, and changes in contracts with customers or the ability to collect contract considerations.

Other reportable impacts do not require companies to have a connection with the Russian-Ukraine conflict, directly or indirectly. The heightened cybersecurity risks, increased or ongoing supply chain challenges, and volatility in commodities trading prices since Russia's invasion of Ukraine may warrant disclosure, if material, regardless of whether companies have operations in Russia, Belarus, or Ukraine.

Registrants should also consider how the Russia-Ukraine conflict affects management's evaluation of disclosure controls and procedures, management's assessment of the effectiveness of internal control over financial reporting and the role of the board of directors in risk oversight of any action or inaction related to Russia's invasion of Ukraine, including any consideration of whether to continue or to halt operations or investments in Russia and/or Belarus.

Recent filers have focused their disclosure on the Russia-Ukraine conflict as both a separate risk factor and how other risk factors have been affected (e.g., cybersecurity, operations and sales, etc.).

Registrants should consider whether these disclosures should appear in other parts of their annual reports, such as the MD&A.

For further details regarding the SEC's sample comment letter, please refer to our June 2022 Sidley Perspectives.

Environmental, Social, and Governance (ESG) Matters

Disclosures Generally

ESG matters, and climate change in particular, continue to be key disclosure topics for investors, including institutional investors such as BlackRock, State Street, and Vanguard. Institutional Shareholder Services (ISS) and Glass Lewis continue to pressure companies to improve ESG disclosures with their annual meeting proxy voting policies. For example, beginning in 2023, Glass Lewis expects companies to provide explicit disclosure in their proxy statements or governance documents about the board's role in overseeing ESG issues.

In light of increased scrutiny from institutional shareholders and proxy advisory firms, more registrants are including a separate risk factor for ESG matters in their annual reports. These new risk factors tend to focus on the potential negative reputational impact of failing to fulfill ESG commitments and the failure to correctly report ESG metrics. Some risk factors also emphasize the costs associated with ESG compliance. When drafting an ESG risk factor, companies typically consider whether the failure to adopt common ESG commitments will lead to increased shareholder activism in the future.

Proposed Rules on Climate Risk and Climate Disclosure

In past years, the SEC has been clear regarding its interest and focus on climate-related disclosures. In July 2021, SEC Chair Gary Gensler announced that he had "asked the SEC staff to develop a mandatory climate risk disclosure rule proposal." This statement built on then-acting Chair Allison Herren Lee's February 2021 announcement that the Division would enhance its focus on climate-related disclosure in public company filings. Shortly thereafter, the SEC created a Climate and ESG Task Force in the Division of Enforcement, with an initial focus of identifying any material gaps or misstatements in climate-related disclosures under existing rules.

On March 21, 2022, the SEC proposed rules that would require registrants to include certain climate-related disclosures in their annual reports, including climate-related financial statement metrics and risks that are reasonably likely to have a material impact on their business, results of operations, or financial condition. The SEC originally planned to announce final rules by October 2022, but has delayed its timeline while it continues to interpret thousands of public comments and considers a recent Supreme Court ruling that clouds the certainty of the SEC's authority to regulate disclosure in this area.

For more information regarding the SEC's proposed climate rules, please refer to our March 24, 2022 Sidley Update.

Climate Change Sample Comment Letter

In September 2021, the SEC released a sample comment letter regarding climate change disclosures. This remains the latest formal guidance from the SEC while the final rules are in flux. The letter

illustrates the type of comments the SEC has been issuing to companies, which typically ask detailed and specific questions regarding climate-related disclosures or the absence of such disclosures in companies' recent annual reports. The SEC's sample comment letter includes the following noteworthy topics.

- Considerations given to discrepancies between disclosures in a corporate social responsibility report or other voluntary ESG report and disclosures in SEC filings.

- Information on a wide range of risks related to climate change that may materially affect a business and its financial condition and operations, such as policy and regulatory changes, market trends that may alter opportunities, credit risks or technological changes, litigation, legislation, and international accords.

- Direct material expenditures for climate-related projects or increased compliance costs as well as material indirect consequences of climate-related regulation or business trends, such as a change in demand for goods or services or reputational risks.

- Material physical effects of climate change on operations and results, such as severe weather that impacts a company directly, as well as its major customers or suppliers.

As is always the case with sample comment letters, companies should respond as appropriate to their specific situation. In so doing, companies should also review their control procedures for climate-related disclosures made in SEC filings and materials made available on their websites.

Cybersecurity

The SEC continues to monitor, and evaluate the sufficiency of, registrants' cybersecurity disclosures. On March 9, 2022, the SEC proposed rules that would require companies to make prescribed cybersecurity disclosures related to material incidents, governance, and risk strategy. Similar to its proposed climate rules, the SEC has delayed adopting cybersecurity rules in the wake of thousands of public comments and legal headwinds, but the SEC's latest rulemaking agenda indicates that it expects to act by April 2023. For more information regarding the SEC's proposed cybersecurity rules, please refer to our March 11, 2022 Sidley Update.

Registrants should still be mindful of their disclosure obligations in this area, in light of the SEC's February 2018 interpretive guidance relating to disclosure of cybersecurity risks and incidents. There are several factors that registrants should consider when evaluating whether to disclose a cybersecurity incident, such as: the nature, extent and potential magnitude of the incident; the importance of any compromised information and the impact of the incident on the registrant's operations; and the potential range of harm to the registrant, which might include the registrant's reputation, financial performance or customer and vendor relationships as well as potential litigation or regulatory investigations. To follow the SEC's 2018 guidance, companies must adopt and implement disclosure controls and procedures to enable them to discern the impact of cybersecurity risks and incidents.

On February 8, 2021, ISS announced cybersecurity enhancements to its Governance QualityScore rating. Building upon the SEC's 2018 guidance, ISS will assess whether registrants have disclosed any information security breaches in the last three years and will expect disclosure for any such incidents. For more information on the cybersecurity disclosures that are encouraged by ISS, please refer to our February 16, 2021 Sidley Update.

Material cybersecurity risks and incidents may need to be disclosed in multiple sections of the annual report, such as the risk factors, the MD&A and the financial statements and accompanying notes. In addition, to the extent cybersecurity risks are material to a registrant's business, the registrant should discuss the nature of the board's role in overseeing the management of cybersecurity risks. While recent cybersecurity disclosures remain largely unchanged since 2021, registrants should consider whether they have experienced any increased risk of cyberattacks due to Russia's invasion of Ukraine or the use of remote technology to allow employees to work from home.

COVID-19 Pandemic

As we enter the third year in which COVID-19 disclosures are relevant for Form 10-K reporting, it is important for registrants to review their 2021 disclosures and make updates to reflect not only the actual impact of the pandemic over the past year but also be mindful of continuing impacts, particularly given the availability of vaccines and vaccination rates, variants, and break-through infections. Registrants should evaluate whether the COVID-19 risk factor has evolved over time and needs modification, and whether it should be moved further back in the risk factor section to de-emphasize COVID-19. In particular, registrants should consider updating their disclosures, to the extent applicable and material, to include the supply chain and other logistical impacts of COVID-19 and remove references to quarantines and shelter-in-place orders. Registrants need not revisit the history of COVID-19, but should focus on more specific disclosures instead.

Guidance issued by the SEC early in the COVID-19 pandemic continues to provide helpful guideposts for meaningful disclosures. The Division released Disclosure Guidance Topics 9 and 9A in March 2020 and June 2020, respectively, setting forth a framework for disclosure and other securities law obligations that registrants should consider in connection with the COVID-19 pandemic. The Division identified open-ended examples of questions and topics that registrants should consider in determining the impacts of COVID-19 and related governmental and societal responses. The Division emphasized that disclosures should be tailored to a registrant's particular facts and circumstances, should permit investors to "evaluate the current and expected impact of COVID-19 through the eyes of management," and should be proactively reevaluated and revised as circumstances change. For further details regarding the Division's COVID-19 guidance, please refer to our January 13, 2021 Sidley Update.

LIBOR Transition

The SEC continues to focus on disclosures about the market transition from the London Interbank Offered Rate (LIBOR). On December 7, 2021, the SEC issued a statement to remind companies of their disclosure obligations related to the LIBOR transition. The statement also reminded companies that the publication of the one-day, one-month, six-month, and one-year U.S. LIBOR maturities will cease immediately after June 30, 2023.

The SEC recommends that companies provide detailed and specific disclosure regarding progress toward LIBOR risk identification and mitigation and the anticipated impact on the company, if material. For instance, alternative benchmarks like the Secured Overnight Financing Rate may not perform as expected, which may warrant a brief disclosure in the registrant's risk factors. Outside of the risk factors, registrants typically include LIBOR transition disclosures in the MD&A.

Even though recent filers have left their LIBOR disclosures largely unchanged since the prior year, registrants should consider whether any material risks still remain in the transition away from LIBOR. On

December 16, 2022, the Board of Governors of the Federal Reserve System approved a final rule under the Adjustable Interest Rate (LIBOR) Act to establish benchmark replacements for certain LIBOR contracts with a benchmark replacement problem. For more information, please refer to our December 19, 2022 Sidley Update.

Human Capital Management

The August 2020 amendment to Item 101 of Regulation S-K, which added disclosure requirements regarding human capital management, became effective in November 2020. The changes to Item 101(c) expanded on the requirement to disclose the number of employees with a broader, principles-based requirement to disclose a description of the registrant's human capital resources, "including any human capital measures or objectives that management focuses on in managing the business, to the extent such disclosures would be material to an understanding of the registrant's business."

In response to these amendments, registrants have provided a range of quantitative and qualitative disclosures, including enhanced disclosures related to human capital management and diversity, equity, and inclusion (DEI), as well as labor relations. Common human capital measures include DEI with respect to the workplace, a breakdown of employees based on geographic location or type of position, and employee recruitment, turnover, retention, training and engagement. As a result of the COVID-19 pandemic, many companies have also added disclosure regarding workers' health and safety and remote and hybrid working arrangements. Disclosures under Item 101 are required to appear in the business section of Form 10-K, but many registrants also choose to discuss human capital management in their risk factors, especially in the context of their ESG initiatives.

Institutional investors have increasingly made human capital management disclosure and engagement a priority. While recent filers have left their human capital management disclosures largely unchanged since 2021, registrants should still consider the unique aspects of their business when reviewing and updating their principles-based disclosures under Item 101(c).

Iran Threat Reduction and Syria Human Rights Act of 2012

The Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA) requires disclosure when a company or an affiliate knowingly engaged in certain sanctionable activities, regardless of whether those actions violate U.S. law and without any materiality threshold. The ITRA disclosure requirement is statutory and is not referenced in the instructions for Form 10-K.

Although the ITRA typically applies to Iranian involvement, some of the statutory provisions are broader, such as Section 13(r)(1)(d) of the Exchange Act, which requires disclosure if the company or an affiliate knowingly conducted any transaction or dealing with any person, property, or interest that is blocked pursuant to Executive Order No. 13382. Several Russian entities and individuals have been designated under Executive Order No. 13382.

Companies dealing with Russia or Russian entities or individuals should consider modifying their disclosure controls and procedures to determine whether any Russian involvement requires disclosure. If a company is required to report sanctionable activity in its annual report, it must also separately file with the SEC, at the same time it files its annual report, a notice that such disclosure is contained in the annual report.

Non-GAAP Financial Reporting

On December 13, 2022, the Division announced updates to its Compliance & Disclosure Interpretations (CDIs) relating to the use of non-GAAP financial measures, which have been a continual focus of SEC scrutiny. Registrants that report non-GAAP financial measures should consider the potential impact of these new CDIs on their annual reports, especially if non-GAAP financial measures are reported in the MD&A. For a synopsis of these CDI updates, please refer to our December 2022 Sidley Perspectives.

Reminders

Although the following items are not new developments for 2022 Form 10-K reporting, they are worth mentioning here as reminders of recent developments. For additional information, please refer to our February 4, 2022 Sidley Update.

- Companies should be mindful of providing thoughtful, accurate and thorough risk factor disclosure, as recent SEC enforcement actions indicate the SEC is focused on misrepresentations or omissions in connection with risk factors. In particular, the SEC has alleged that hypothetical statements in a company's risk factors were materially misleading because a company stated that an event only "may" or "could" occur, when the event was no longer hypothetical at the time of the disclosure. Accordingly, a company should ensure that its risk factors accurately and fully describe the risks it faces, including risks that have already had an impact on the company, rather than describing these risks as merely hypothetical. Moreover, risk factor disclosure should clarify whether a potential material risk has in fact occurred to some degree, whether or not the degree of occurrence is material on its own.

- The SEC's December 2021 proposed amendments to require more frequent and detailed disclosure surrounding repurchases of an issuer's registered equity securities include expanded reporting requirements under Item 703 of Regulation S-K. The SEC's latest rulemaking agenda indicates that it expects to consider adoption of these amendments by April 2023. For more details on these proposed amendments, see our December 20, 2021 Sidley Update.

- The SEC continues to compare earnings call transcripts and other earnings materials to what is reported in the MD&A from both a content perspective and a depth-of-coverage perspective. Companies should ensure that disclosures are consistent in all material respects when discussing drivers of historical results and future trends, whether such disclosures are contained in SEC filings or other oral or written communications related to earnings. See, for example, the SEC's comment letter to Henry Schein, Inc., dated June 23, 2022.

Appendix A

Summary Checklist of Recent Amendments to Regulation S-K Items 402, 404, 408 and 601 that Impact 2022 Annual Reports on Form 10-K

Disclosure Requirement	Summary of Amendment
Executive Compensation – Compensation Clawbacks *New Item 402(w)*	On October 26, 2022, the U.S. Securities and Exchange Commission (SEC) adopted final rules relating to the recovery of erroneously awarded incentive-based executive compensation. The final rules add new Item 402(w) to Regulation S-K to require disclosure of clawback policies and recovery actions taken pursuant to such policies. Exchanges are required to file proposed listing standards that enforce clawback policies no later than February 27, 2023, and such listing standards must be effective no later than November 28, 2023. Listed issuers must then adopt compliant clawback policies no later than 60 days after the effective date of the applicable listing standard and begin to comply with disclosure requirements in annual reports (or proxy statements) filed thereafter. **Amendments** New Item 402(w) applies to all companies listed on a national securities exchange or association, including emerging growth companies, smaller reporting companies, foreign private issuers (FPIs), controlled companies, and companies with listed debt only. Clawback policies must cover any current or former executive officer, including the president, principal financial officer, principal accounting officer (or, if none, the controller), any vice-president in charge of a principal business unit, division or function and any other person who performs policy-making functions for the issuer. Recovery obligations are triggered for (i) material restatements of previously issued financial statements and (ii) restatements that correct errors that are not material to previously issued financial statements but would result in a material misstatement if the errors were left uncorrected or if the error correction was recognized in the current period. Compensation received within three years of the accounting restatement is subject to recovery. Recovery obligations apply even if an executive officer did not engage in misconduct and if the executive officer had no responsibility for the financial statement errors that resulted in the restatement. Any compensation that is granted, earned, or vested based, wholly or in part, upon attainment of any financial reporting measure, including stock price or total shareholder return (TSR), is subject to recovery. The recoverable amount is equivalent to any incentive-based compensation received based on erroneous

	data in excess of what would have been paid without the accounting restatement. Recovery is mandatory, except in three limited circumstances: (i) if the direct costs of enforcing recovery would exceed the recoverable amount; (ii) if recovery would violate home country laws applicable to the issuer that were in effect prior to the publication of the clawback rules; or (iii) recovery would violate rules governing tax-qualified retirement plans. An issuer will be prohibited from indemnifying executive officers against, or paying the premiums for an insurance policy to cover, losses incurred under the clawback policy. Any clawback with respect to deferred compensation under Section 409A of the Internal Revenue Code runs the risk of changing the time and form of payment. However, reductions in deferred compensation balances to reflect a clawback should not change the time and form of payment. Companies should consult their own tax advisers on how to calculate the clawback amount when there is interest and earnings on deferred compensation. An issuer must file its clawback policy as an exhibit to its Form 10-K. In the event of a restatement, issuers must disclose: • the date the issuer was required to prepare the accounting restatement and the amount of erroneously awarded incentive-based compensation resulting from the restatement; • an explanation of how the recoverable amount of compensation was calculated, including any estimates used to determine the recoverable amount of compensation based on stock price or TSR; • the total amount of erroneously awarded compensation that had not yet been recovered as of the end of the issuer's last completed fiscal year and the amount (for each applicable executive officer) unrecovered for more than 180 days since the date the issuer determined the amount; and • if recovery was viewed to be impracticable, the amount of recovery forgone and the reason recovery was viewed as impracticable.
Executive Compensation – Disclosure of the Timing of Option Grants *New Item 402(x)*	On December 14, 2022, the SEC adopted amendments that significantly alter Rule 10b5-1 under the Securities Exchange Act of 1934 (Exchange Act) and add new Item 402(x) to Regulation S-K to require the disclosure of policies and practices related to the grant of certain equity awards close in time to the release of material nonpublic information (MNPI). Issuers that are not smaller reporting companies will be required to comply with the new insider trading rules in the first annual report (or proxy statement) that covers the first full fiscal period beginning on or after April 1, 2023. Smaller reporting companies will be required to comply in the first filing that covers the

	first full fiscal period beginning on or after October 1, 2023. Thus, for large domestic calendar year filers that are not smaller reporting companies, the new insider trading disclosure rules will apply to the 2023 annual report and the 2024 annual meeting proxy statement. **Amendments** The amendments require registrants to discuss their policies and practices on the timing of awards of stock options, stock appreciation rights, or instruments with option-like features, including: (i) how the issuer's board determines when to grant such equity awards; (ii) whether and how the issuer's board or compensation committee considers MNPI when determining the timing and terms of an award; and (iii) whether the issuer has timed the disclosure of MNPI for the purpose of affecting the value of executive compensation. Disclosure is required if the registrant awarded options to a named executive officer in the period beginning four business days before the filing of Form 10-K and ending one business day after the filing or furnishing of such report.
Transactions With Related Persons, Promoters, and Certain Control Persons *New Instruction 5.a.iii. to Item 404(a)*	Item 404(a) of Regulation S-K requires listed companies to include a discussion of their compensation recovery efforts as part of their related party transaction disclosures. Recent amendments clarify that duplicative disclosures are not necessary in cases where the company is already required to provide clawback disclosures. **Amendments** The amendments add Instruction 5.a.iii. to Item 404(a) to allow a listed company to exclude discussion of its compensation recovery efforts in its related party transaction disclosure, as applicable, if it provides clawback disclosures under new Item 402(w), once effective.
Insider Trading Arrangements and Policies *New Item 408*	As part of its December 2022 amendments to Rule 10b5-1 under the Exchange Act, the SEC added new Item 408 to Regulation S-K to mandate disclosure of trading arrangements by issuers or corporate insiders, as well as periodic disclosure of insider trading policies and procedures. New Item 408 will become effective at the same time as new Item 402(x). **Amendments** New Item 408(a) requires registrants, other than FPIs, to disclose whether any director or Section 16(a) officer adopted, modified or terminated a Rule 10b5-1 plan and/or any non-Rule 10b5-1 trading arrangement during the registrant's fourth fiscal quarter. If so, registrants must also provide a description of the

	material terms of any such Rule 10b5-1 plan or non-Rule 10b5-1 trading arrangement, other than pricing terms, such as: • the name and title of the director or officer; • the date of adoption or termination of the trading plan or arrangement; • the duration of the trading plan or arrangement; • the aggregate number of securities to be sold or purchased under the trading plan or arrangement; and • whether the trading plan or arrangement is a Rule 10b5-1 trading plan or a non-Rule 10b5-1 trading arrangement. Under new Item 408(b), registrants will be required to disclose whether they have adopted insider trading policies and procedures governing the purchase, sale and other dispositions of their securities by directors, officers and employees, or by the registrant itself, that are reasonably designed to promote compliance with insider trading laws, rules, and regulations and any applicable listing standards. If a registrant has not adopted such insider trading policies and procedures, it must explain why it has not done so. An issuer will be required to file a copy of its insider trading policies and procedures as an exhibit to its Form 10-K. If an issuer's trading policies and procedures are included in its code of ethics, then filing the code of ethics as an exhibit will satisfy this requirement.
Exhibits *Item 601*	As part of its final rules regarding the recovery of incentive based compensation and amendments to Rule 10b5-1 under the Exchange Act, the SEC amended Item 601 of Regulation S-K to require registrants to file their clawback and insider trading policies with their annual reports. **Amendments** The SEC's clawback rules require listed issuers to file their written compensation recovery policies as an exhibit to Form 10-K, beginning after such policies take effect under applicable listing standards. Similarly, the amendments to Rule 10b5-1 require registrants to file their insider trading policies and procedures as an exhibit to Form 10-K, beginning after the new insider trading rules take effect.

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