A&O SHEARMAN

FORMS 10-K AND 20-F

Preparing for your *Annual report*

This guide discusses important themes and trends for the coming annual reporting season.
It also includes a "housekeeping checklist" designed to assist you as you prepare your annual report.

Our companion piece, a 2025 Proxy Quick Reference Guide, is available here.
Both Quick Reference Guides are designed to supplement **A&O Shearman's 22nd Annual Corporate Governance & Executive Compensation Survey**.

ANNUAL CYBERSECURITY DISCLOSURES

Over the past year, companies for the first time have been required to make the following annual disclosures related to their cybersecurity risk management and governance. As a reminder, these disclosures in the annual report on Form 10-K and Form 20-F must include:

- information about processes used to identify, assess and manage material risks from cybersecurity threats;
- whether any cybersecurity risks (including those related cybersecurity incidents) have materially affected the company;
- a discussion of the role of the board in cybersecurity governance, and processes by which the board stays informed of cybersecurity risks; and
- a discussion of the role of management in assessing and managing material cybersecurity risks, including relevant expertise and processes used in addressing such risks.

Companies should consider any relevant updates based on changes in their risk management and governance practices. To the extent a company has experienced a cybersecurity event, it is important to consider whether changes to annual disclosures should be made as a result to reflect revisions to policies and processes.

Companies should also review peer disclosures and consider observable disclosure trends. If changes are made to cybersecurity disclosures in the annual report, companies should also review disclosures in the annual proxy statement related to risk oversight generally and cybersecurity governance specifically to ensure statements are updated as needed to be consistent across disclosures.

COMMENT LETTER AND DISCLOSURE HOT TOPICS

With the coming change in leadership at the SEC and in the Division of Corporation Finance, we expect the focus of Staff comments in the areas of climate and sustainability disclosures will shift. The SEC staff have previously issued comments to companies asking them to include disclosures of climate-related impacts on the business and financial condition, including quantitative disclosures where appropriate, and asking for a materiality analysis of sustainability disclosures only included in sustainability reports, but not in Exchange Act filings. While the nature of these comments are important to consider as companies prepare disclosures for the annual report and the proxy statement, we do not expect the Staff to be issuing the same types of comments in the future.

The areas of focus in SEC comment letters that we believe will continue to be relevant in 2025 include the following disclosure areas:

MD&A: The MD&A remains one of the top comment letter focus areas. In its comments, the SEC Staff has emphasized the need for:

- increased specificity in disclosure of results of operations;
- specific disclosure of known trends or uncertainties, such as inflation, expected to impact near-and long-term results;
- proper contextualization of key performance indicators so that they are not misleading, including indicating clearly how they are calculated, if there are any underlying estimates or assumptions in those calculations, how they are used by management and why they are useful to investors;
- robust discussion of critical accounting estimates, including the judgments made in the application of significant accounting policies, sensitivity to change, and the likelihood of materially different reported results if different assumptions were used; and
- the avoidance of boilerplate disclosure regarding liquidity and capital resources, including clear discussion of drivers of cash flows and the trends and uncertainties related to meeting known or reasonably likely future capital expenditures and cash requirements.

Non-GAAP Measures: The SEC Staff has long expressed concerns about the improper use of non-GAAP measures and continues to focus on whether they comply with Regulation G, Item 10(e) of Regulation S-K and the SEC Staff's C&DIs. In December 2022, the SEC Staff issued seven new or revised C&DIs concerning non-GAAP measures and, in 2023, issued comments aligned with the new guidance. Following these new C&DIs, we have seen an increased focus in comment letters in the following areas:

- whether the most directly comparable GAAP financial measure is presented with equal or greater prominence as a disclosed non-GAAP measure and reconciled to that measure;
- appropriateness of adjustments to eliminate normal, recurring cash operating expenses or items identified as non-recurring, infrequent, or unusual; and
- whether certain non-GAAP adjustments to revenue or expenses have made the adjustments "individually tailored" such that they are misleading.

Segment Reporting: The SEC Staff continue to focus on how registrants apply the guidance in ASC 280, including:

- how registrants identify and aggregate operating segments;
- changes in reportable segments;
- whether registrants have inappropriately included non-GAAP measures in their segment disclosures; and
- whether registrants provide appropriate disclosures, including information about profit or loss for reportable segments, entity-wide disclosures and reconciliations.

The SEC Staff may review information provided by companies on websites or in earnings calls or request documents used by the chief operating decision maker to support management's conclusions. The SEC staff has asked registrants to explain any inconsistencies between how the business is described in public information and how it is described in their segment footnotes.

Revenue Recognition: ASC 606 requires disclosure of more qualitative and quantitative information regarding customer contracts than was previously required. SEC Staff comments addressed robustness of disclosures regarding:

- the nature and timing of performance obligations;
- transaction prices (including methods, inputs and assumptions used to estimate such prices and allocation to performance obligations);
- how variable consideration is estimated and its impact on transaction price;
- the method of revenue recognition, including timing of control transfer, recognition over time and accounting for licensing arrangements;
- judgments related to presentation of gross versus net revenue; and
- judgments related to the level of disaggregation disclosed and consistency of disaggregation disclosures throughout the filing and with information provided in other communications, such as investor presentations.

AI POWER AND RESPONSIBILITY

Since OpenAI released ChatGPT, use of generative artificial intelligence (AI) has accelerated, with many business leaders viewing it as a strategic imperative. As companies consider AI-driven opportunities in their businesses, it is important for the management teams and boards of all companies to consider the risks associated with deploying AI and to develop the appropriate governance mechanisms to ensure there is appropriate oversight over the selection of the AI tools and use of AI across the business, where the deployment of AI and related technologies are relevant to their businesses. Additionally, care should be taken that management is accurately describing how AI is being used in the business.

- **AI risks disclosure**. We expect the Division of Corporation Finance to increase its focus on how companies are describing the risks associated with AI. Companies should consider the following areas:
  - the competitive environment associated with deployment of AI and the associated loss of market share from AI-driven disruption;
  - elevated cybersecurity risks associated with AI use;
  - costs associated with AI adoption;
  - AI-related intellectual property disputes and infringement; and
  - costs of AI regulation.
- **AI washing**. It is important for companies to review public statements about AI opportunities to ensure they reflect an accurate and complete picture and that these statements are consistent with disclosures in periodic reports. The SEC's Division of Corporation Finance has stated that it will compare what management says about the use and impact of AI on earnings calls and other public statements to the actual disclosures included in SEC filings to ensure there is a consistent message. Although the Division of Enforcement has not brought a case against a public company for so-called "AI-washing" disclosures, in March 2024 the SEC settled an action against two investment advisors alleged to have been making false and misleading statements about their purported use of AI, and the SEC expressed that it is "committed to protecting [investors] against those engaged in 'AI washing.'" AI washing is firmly on the SEC's enforcement radar, and this annual report season, companies should critically review their disclosure controls with statements of AI use and opportunities in mind.
- **AI governance**. Companies should develop the appropriate oversight and risk management processes for AI if the opportunities and risks posed by AI are material. Even at this early stage, companies deploying AI should consider how management is overseeing AI across the business and whether the board should be receiving an update on how the company is addressing the opportunities and risks associated with AI, including what management is doing to determine how AI can be used in the business, how competitors and other similarly situated companies are deploying AI and what may be coming next. We expect to see more of these disclosures in proxy statements in the coming season, discussing how the board oversees this emerging risk, whether a committee of the board has been assigned responsibility for AI oversight and even whether directors have AI expertise. Although AI governance is in its early stages, emerging investor expectations and activist investor interests could put increasing pressure on companies to develop and disclose AI governance structures. In 2024, 13 AI-related shareholder proposals were submitted, with some calling for disclosure of the role of the board in overseeing AI. In "Innovating in your governance approach to generative AI," published as part of A&O Shearman's 2024 Corporate Governance Survey, Karen Buzard and Marcus Turner provide a framework to address AI risks without overhauling governance structures.

EU SUSTAINABILITY REPORTING AND DUE DILIGENCE

The adoption of the Corporate Sustainability Reporting Directive (CSRD) by the EU will require certain U.S. multinational companies, primarily via their European subsidiaries that qualify as a "large undertaking" (either on a standalone or a pro forma consolidated basis) to report certain ESG matters that either:

- have a material financial impact on the company, or
- that involve the company's business having a material impact (either directly or through its value chain) on people or the environment (the so-called double materiality standard).

Further, these EU reporting requirements may also apply at the U.S. parent level if the consolidated group's annual revenue for each of the last two consecutive fiscal years exceeds EUR150 million and the group has at least one large undertaking subsidiary. In that case, an EU subsidiary must prepare a consolidated CSRD report covering the full group as if it were the U.S. parent. A "large undertaking" has at least two of the following financial materiality thresholds:

- annual net turnover (revenue) of EUR50m,
- 250 or more employees, and
- total assets of EUR25m, each to be assessed as of the most recent balance sheet date.

CSRD reporting on these matters must include governance, due diligence, strategy, risk management, metrics and targets. For most large undertaking subsidiaries of U.S. companies, reporting will commence in 2026 for the 2025 reporting period. Consolidated reporting at the U.S. parent level, if applicable, is not expected to apply until 2029 for the 2028 reporting period.

In addition, U.S. multinational companies must consider the potential application of the EU's recently adopted Corporate Sustainability Due Diligence Directive (CS3D). The CS3D requires in-scope companies to implement fit-for-purpose policies and procedures designed to identify potential adverse environmental and human and social rights impacts of their businesses and to implement preventative measures, as well as appropriately mitigate and remediate any impacts identified. The CS3D will apply to EU companies (including subsidiaries) that generate worldwide net revenues of at least EUR450m (on a standalone or consolidated basis) and have at least 1,000 employees. The CS3D will also apply to non-EU companies if they indirectly or on a consolidated basis generate annual net revenues in the EU of EUR450m. These requirements will be phased in commencing in 2027 for the largest companies (EUR1.5 billion revenues, and for EU companies, at least 5,000 employees).

U.S. companies should initially identify which entities, both inside as well as outside of the EU, will be in scope of CSRD and CS3D. U.S. companies should determine what level CSRD reporting can be most efficiently complied with and analyze whether it is practical and achievable to perform the due diligence required by the C3SD at a group level and how this groupwide approach can be implemented (recognizing that each in-scope entity will remain fully liable for its own actions and subject to regulatory scrutiny). While it might be convenient to comply with CSRD at a European subsidiary level, consideration should be given to whether that will be the most efficient approach, including whether other applicable disclosure regimes may require consolidated global reporting, in order to avoid preparing several standalone reports and develop independent processes to do so.

Companies that are in scope should carefully review these new disclosure requirements to ensure that the responsive disclosures they implement comply with, and are consistent across, the various reporting regimes they may become subject to, and reflect an approach consistent with the company's existing sustainability reporting and brand. For more information, please see the more comprehensive article in our 22nd Annual Corporate Governance & Executive Compensation Survey.

CONFIRM FILER STATUS

Your filer status is determined as of the end of your fiscal year, although it will largely be dependent on your public float as of the end of the second fiscal quarter. Note that newly public companies which have been public for less than twelve calendar months and have not yet filed an annual report will be non-accelerated filers regardless of their float size or other parameters. If you are already an accelerated or large accelerated filer, note that public float requirements that must be met to downgrade the status are lower than those which must be met to initially attain it. If your company is an "emerging growth company," you will lose availability of exemptions from filing an auditor attestation of ICFR and the ability to rely on certain other scaled financial and other disclosure requirements. This will require substantial advance preparation.

CONSIDER ANY RESTATEMENTS AND "CHECKING THE BOX"

In the event a "Big R" or "little r" restatement to correct an error is reflected in financial statements for 2024, check the relevant box on the cover of the annual report and conduct a compensation recoupment analysis under your Dodd-Frank clawback policy, if required. The date of restatement, amount of erroneously awarded compensation and amounts due from any executive officer (if any), as well as details of reliance on any recovery exceptions, will need to be disclosed in the annual report.

CONSIDER IF ANY ADDITIONAL MATERIAL CONTRACTS ARE REQUIRED TO BE FILED

For U.S. companies, consider all material contracts entered into over the year, including those filed on Forms 10-Q and 8-K throughout the year. For FPIs, if you do not voluntarily file material contracts on Form 6-K throughout the year, be sure to leave enough time to consider which contracts are material and consider if any counterparty consents are needed.

FILE YOUR INSIDER TRADING POLICY

2024 is the first year that insider trading policies must be filed as exhibits to annual reports. Consider if any updates based on benchmarking analyses, recent developments or best practices may be advisable before your policy becomes public.

REFRESH YOUR LIST OF SIGNIFICANT SUBSIDIARIES AS OF YEAR-END

You can incorporate a previously filed list of significant subsidiaries by reference into the annual report if the list has not changed, but be sure to re-run the analysis as of year end to confirm that this is the case.

CONSIDER IF ANY UPDATES ARE REQUIRED TO THE "DESCRIPTION OF SECURITIES" EXHIBIT

This exhibit can be incorporated by reference from prior filings each year, but be mindful of any updates, including to organizational documents, that may require the exhibit to be refreshed.

REMEMBER A "GLOSSY" ANNUAL REPORT GETS FURNISHED ON EDGAR
Remember companies are required to furnish "glossy" annual reports on EDGAR as a PDF, in the same format as delivered to shareholders. For U.S. companies, the filing is made on Form ARS, and for FPIs the filing is made as Exhibit 99 to a Form 6-K. A "glossy" annual report could be, for example, the 10-K or the 20-F with a "wrap" that includes graphics and a shareholder letter.

CONSIDER IF THE EARLIEST-YEAR MD&A CAN BE CROSS-REFERENCED TO A PRIOR ANNUAL REPORT
SEC rules permit the earliest-year period-over-period comparison discussion in the MD&A to be cross-referenced to another SEC filing, without incorporating such discussion by reference into the current year annual report, if this discussion is not necessary to an understanding of the company's financial condition, changes in financial condition and results of operations. Consider if you want to take advantage of this provision or, if you have historically done so, whether continued reliance on it this year is appropriate.

REMEMBER TO "FORWARD" INCORPORATE PROXY STATEMENT DISCLOSURES
The Form 10-K includes governance, compensation, security ownership, related party transactions and other disclosure requirements that can be satisfied by reference to the proxy statement. See our Proxy Report Checklist for more information.

CONSIDER IMPACT OF AI
This year, consider turning attention to how, if at all, AI has presented opportunities or risks. AI-related disclosures could be especially relevant for the company's business description, MD&A, and risk factors. Ensure annual report disclosures are consistent with public statements about AI made in other forums and presents a balanced view of AI opportunities and risks. See AI Power and Responsibility.

REFLECT ON CHANGES IN THE BUSINESS
Review recent or emerging material changes in the business, such as new business lines, markets or acquisitions, and holistically consider their impacts on the entire annual report. For example, a material recent acquisition may, among other things, necessitate changes to the business description, a discussion of financial and capital impacts in the MD&A, a thoughtful consideration of new risks, and the filing of new material contracts.

REFLECT ON CHANGES IN THE EXTERNAL ENVIRONMENT
This year, consider, among other things, the impact of the recent U.S. presidential election, potential new U.S. socioeconomic and trade policies, such as the possible introduction of tariffs; U.S.-China and other relevant geopolitical relationships; falling interest and inflation rates; and ongoing conflicts between Russia and Ukraine and in the Middle East and tailor the business description, MD&A, and risk factors accordingly. Consider relevant guidance, such as the SEC's 2022 sample comment letter regarding disclosures of the effect of Russia's invasion of Ukraine on the business.

Annual report checklist

TAKE A FRESH LOOK AT THE RISK FACTORS
Consider whether the internal or external changes in the business require a discussion of new material risk factors and whether the order of significance and organization of existing risks remains appropriate. If any risks materialized, disclose related events so the risk is not discussed hypothetically. If this section has gotten long over time, consider thoughtful consolidation and pruning to make sure immaterial and generic risks are not disclosed and that the remaining risks are tailored, plainly described and concise. Remember that a two-page summary of risk is required if the risk factor section exceeds 15 pages.

REVISIT DISCLOSURES ABOUT CYBERSECURITY RISK MANAGEMENT AND GOVERNANCE
Reflect updates and changes in policies and procedures. See Annual Cybersecurity Disclosures.

CRITICALLY REVIEW THE MD&A
Ensure that disclosures are complete, company-specific and provide a view of the business "through the eyes of management". Consider direct and indirect impacts of current economic and industry trends on the company's current and future financial condition. Be sure that your MD&A, including trends, developments and uncertainties in the business, is consistent with other public statements, including earnings calls. See also Comment Letter and Disclosure Hot Topics.

CONSIDER IF THERE HAVE BEEN ANY SUBSEQUENT EVENTS
Significant changes since year end will be disclosed in the annual financial statements consider whether comparable disclosure is required in the body of the annual report. Changes can include financing transactions, director or executive officer appointments or resignations, acquisitions or dispositions and material partnerships and other transactions, among others.

REVISIT DISCLOSURE CONTROLS
Review existing processes to ensure disclosure controls capture new and developing events information related to key areas of disclosures particularly those related to strategic priorities, business objectives and risk factors.

REVIEW HUMAN CAPITAL DISCLOSURES
Consider whether any updates are necessary in light of changes to human capital strategy, potential public and investor scrutiny, or other developments in respect of diversity, equity and inclusion initiatives. Remember to update disclosed metrics.

UPDATE THE STOCK PERFORMANCE GRAPH
Confirm or update the benchmarks to which your returns will be compared. To the extent you opted to present returns of a peer group, consider if any updates to the group are required and ensure it is the same group as is used in your pay versus performance disclosures. If updates to the index or peer group are required, explain the reasons for the change and ensure that you present a comparison of total returns to those of the new index or group and the one used last year.

NON-GAAP FINANCIAL MEASURES
Review non-GAAP measures, particularly new ones, to determine if any changes should be made to ensure compliance with applicable rules. In terms of presentation, non-GAAP financial measures must be identified as such, clearly labeled in a way that distinguishes them from GAAP equivalents, reconciled, and must not be given greater prominence to the most directly comparable GAAP measure. See also Comment Letter and Disclosure Hot Topics.

CONSIDER IMPLICATIONS OF MATERIAL ACCOUNTING CHANGES
For example, if your company has recently undertaken (or plans to undertake) a resegmentation, consider proactively preparing for Corp Fin Staff queries by documenting specific details of your analysis of the characteristics of an operating segment under ASC280, critically reviewing segment measures, and ensuring that the way the business is described in segment footnotes is consistent with how it is described in public statements. Similarly, it is advisable to proactively document significant judgments and estimates relating to newly adopted revenue recognition policies. Consider whether the adoption of new accounting standards or policies necessitates a reclassification of prior year financial results to ensure comparability.

DISCLOSE THE RESULTS OF CONTROLS ASSESSMENTS AND ANY CHANGES IN ICFR
If you determined a material weakness existed during the fiscal year, ensure it is appropriately disclosed in appropriate areas of the annual report, including the risk factors. Note as well that disclosure controls and procedures encompass ICFR and cannot be assessed as effective in the presence of a material weakness. Describe the steps undertaken and steps to remediate the material weakness in ICFR.

CONSIDER THE 10B5-1 PLAN DISCLOSURE REQUIRED IN THE FORM 10-K
Like the disclosures required in the 10-Q, remember the same disclosure is required in Part II-Item 9B of the Form 10-K if a director or officer adopted or terminated a 10b5-1 trading plan during the fourth quarter. Consider adding a question to the D&O questionnaire to obtain this information or implementing another mechanism to collect it directly from relevant individuals.

CONFIRM FOREIGN PRIVATE ISSUER (FPI) STATUS

If the majority of your executive officers or directors are U.S. citizens or residents, 50% or more of your assets are located in the U.S. or your business is administered principally in the U.S., it is important to keep an eye on how much of your outstanding voting securities are directly or indirectly owned of record by U.S. residents. If, in these circumstances, such U.S. ownership is 50% or more as of the end of your most recent second fiscal quarter, you will lose FPI status. As U.S. ownership inches closer to 50%, consider preparing for the transition to domestic company status in advance. As a domestic company, you will, among other things, be required to apply U.S. GAAP and file U.S. proxy statements and other domestic forms, as well as become subject to the 8-K current reporting regime, Section 16 trade reporting, short swing profit disgorgement by directors and officers.

REFRESH PASSIVE FOREIGN INVESTMENT COMPANY (PFIC) ANALYSIS

A non-U.S. corporation is a PFIC for any taxable year if either at least 75% of its gross income for such year is passive income, or at least 50% of the value of its assets during such year is attributable to assets that produce or are held for the production of passive income. PFIC status results in certain adverse U.S. federal income tax consequences that could apply to U.S. holders, which would need to be appropriately disclosed in the annual report.

CONSIDER ANY CHANGES IN HOME COUNTRY COMPENSATION DISCLOSURE REQUIREMENTS

The SEC permits FPIs to include only aggregate compensation disclosure in the annual report, unless individualized disclosure is required in the home country or is otherwise publicly made. Consider if any revisions to compensation disclosure are required in light of home country regulatory updates or disclosures made throughout the year.

CONSIDER CHANGES IN CORPORATE GOVERNANCE OR PRACTICES

NYSE and Nasdaq both permit FPIs to follow home country corporate governance practices in lieu of many of their listing rules, as long as the company discloses which of the listing rules it does not follow in the annual report. If any changes to corporate governance or committee composition brought your company out of compliance with U.S. exchange rules, update your disclosure accordingly and confirm you have met other related requirements, including notifying the exchange and providing an opinion of local counsel.

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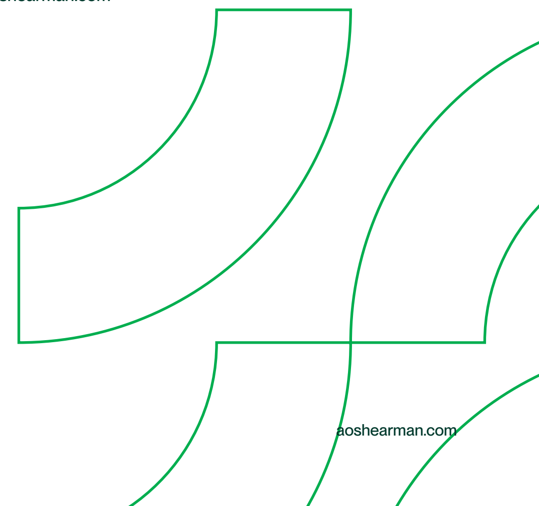

Looking *ahead*

We will be hosting a webinar with a discussion about updates and developing trends to consider when drafting your Annual Report and preparing for the proxy season on Wednesday, January 15, 2025.

We hope you will join us. Please reach out to AOShearmanPublicCompany@aoshearman.com if you would like to attend.

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