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The Russia-Ukraine conflict: surveying SEC disclosure requirements and related topics

SPECIAL REPORT | The Ukraine Crisis

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The Russian invasion of Ukraine raises many issues for U.S. companies and foreign private issuers subject to SEC disclosure regulations. For many companies, an initial consideration was whether to cease doing business in Russia, and many companies have now announced the cessation of their business operations in Russia. Another key question going forward will be compliance with U.S. and global sanctions regimes that have been imposed on Russia. These and other issues will be addressed in companies' SEC filings regarding risk factor disclosures, Management's Discussion and Analysis (MD&A), and in industry-specific disclosures such as those for banks and oil & gas companies, a key industry sector for the Russian economy. Beyond periodic and annual reports, companies may also consider environmental, social and governance (ESG) issues associated with the war in Ukraine although, with few exceptions (e.g., human capital), these types of disclosures tend to be made without much formal regulatory guidance. The following discussion surveys the range of disclosures that companies subject to SEC reporting regulations may need to consider in the days, weeks, and months ahead.

SEC disclosures. U.S. companies with material business in Russia or Ukraine may need to update existing SEC disclosures to reflect the risks of doing business in these countries now that geopolitical tensions there have evolved into open hostilities. Russia's dependence on oil & gas exports may significantly impact businesses that interact with that segment of the Russian economy. The onset of open hostilities also has resulted in the imposition by the U.S. and other countries of economic sanctions against Russia. Several SEC disclosure requirements may apply.

- ***Risk factors—***Item 105 of Regulation S-K requires companies to, where appropriate, provide risk factors that explain the material factors that make an investment in the company or in a particular offering speculative or risky. Item 105 discourages the use of generic risk factors that state risks applicable to any company or offering, but also provides that, if such generic risk factors are included in SEC filings, they should be grouped together at the end of the risk factor section under the heading "General Risk Factors." Moreover, if the risk factor section is longer than 15 pages, the company must include an up to two-page, bulleted summary of the principal risks to the company or the offering in the forepart of the prospectus or annual report.

- ***MD&A trends—***Item 303 of Regulation S-K requires a company to include in its Forms 10-Q and 10-K a narrative disclosure that explains the nature of its business and results of operations in the words of its managers. Among the several things a company must discuss are those contained in Item 303(b)(2) regarding trends in the company's business. Specifically, a company must: (i) describe any unusual or infrequent events or transactions that materially affect its reported income from operations and the extent of that effect on income; (ii) describe known trends or uncertainties that have or are reasonably likely to have a material favorable or unfavorable impact on net sales or reserves or income from continuing operations; and (iii) if its statement of comprehensive income presents period-to-period changes in net sales or revenue, the company may need to also describe the extent to which these changes are attributable to changes in volume/amount of goods or services sold. The SEC's latest amendments to Item 303 became effective February 10, 2021, with compliance required for a registrant's first fiscal year ending on or after August 9, 2021. (See, Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Release No. 33–10890, November 19, 2020, 86 F.R. 2080, January 11, 2021).

Moreover, in the case of companies engaged in the oil & gas business, guidance included as part of the 2008 reforms of Regulation S-K listed a series of items that such companies may need to address in their MD&A. One of those items is the geopolitical risks that apply to material concentrations of reserves. (See, Modernization of Oil and Gas Reporting,

Release No. 33–8995, December 31, 2008, 74 F.R. 2158, 2178-2179, January 14, 2009).

Lastly, with respect to supplemental financial information, Item 302(b) of Regulation S-K also requires companies that engage in oil & gas producing activities, as defined in Rule 4-10(a)(16) of Regulation S-X, to present the information specified in FASB ASC 932 if those activities are significant in that they would meet one or more of the tests contained in FASB ASC 932-235. The Commission's proposal to amend Item 303 of Regulation S-K had proposed to eliminate Item 302(b), but the final rules retained Item 302(b) because FASB had not yet finalized its applicable revisions to GAAP. The Commission indicated that the elimination of Item 302(b) may be considered in a future rulemaking. (See, Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Release No. 33–10890, November 19, 2020, 86 F.R. 2080, 2087, January 11, 2021).

- ***Oil & gas industry disclosures—***The Russian economy is heavily dependent on its oil & gas industry. Companies engaged in the oil & gas industry in Russia may need to include specific disclosures about reserves, production, and drilling under federal securities regulations. Items 1201, et. seq., of Regulation S-K provide details on what must be disclosed and when that information must be disclosed. In general, material oil & gas producing activities must be disclosed, but limited partnerships and joint ventures that engage in certain activities may not have to include such disclosures. When disclosures are required to be "by geographic area" the disclosure must provide information by individual country, by groups of countries within a continent, or by continent.

Additionally, companies in the oil & gas industry should be aware of the Executive Order of March 8, 2022 prohibiting: (1) the importation to the U.S. of Russian oil and related products; (2) new investment by U.S. persons, wherever located, in Russia's energy sector; and (3) financing by a U.S. person, wherever located, of a transaction by a foreign person that flows into Russia's energy sector, if the transaction would be prohibited to a U.S. person. The EO applies to "new" investments and a senior administration official conformed via a press call that the EO allows for "wind downs of deliveries for existing purchases that were already contracted for." The Treasury Department may issue regulations that implement the EO. The House also has passed the Suspending Energy Imports from Russia Act (H.R. 6968) by a vote of 414-17. The bill would ban all Russian products classified under Chapter 27 of the Harmonized Tariff Schedule of the U.S., which addresses mineral fuels and related products. As with any economic sanctions regime, companies should monitor events for developments that could result in the expansion of existing sanctions or the addition of new sanctions.

- ***Resource extraction issuers—***Following Congressional disapproval of the SEC's original resource extraction issuer rules under the Congressional Review Act, the Commission reissued similar rules in 2020. The resource extraction issuer rules require companies engaged in extractive industries to disclose information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the federal government for the purpose of the commercial development of oil, natural gas, or minerals.

The reissued resource extraction issuer regulations became effective on March 16, 2021, but the Commission also adopted a two-year transition period for compliance. As a result, a resource extraction issuer must comply with Exchange Act Rule 13q-1 and Form SD no earlier than two years after the effective date of the final rules. The final rules provide the following example: "if the rules were to become effective on March 1, 2021, the compliance date for an issuer with a December 31 fiscal year-end would be Monday, September 30, 2024 (i.e., 270 days after its fiscal year end of December 31, 2023)."

Questions may arise regarding the enforceability of the reissued rules because the Congressional Review Act provides that an agency may not reissue rules that are in substantially the same form as the disapproved rules without new Congressional authority. To date, no such new legislative authority has been enacted into law, although legislation has been proposed to accomplish that objective. (See, e.g., a discussion draft of the Oil and Minerals Corruption Prevention Act, proposed by Rep. Brad Sherman (D-Calif)).

The Commission's December 2020 re-write noted that the Congressional disapproval resolution did not alter the original Congressional mandate and, thus, the Commission had an obligation to issue new rules. However, to avoid issuing rules in substantially the same form as the disapproved rules, the Commission focused on revising two items over which it believed it had discretion: (1) rules for the publication of issuers' payment disclosures as compared to anonymization;

and (2) the "relative granularity" regarding how "project" is defined. The latest version of the regulation also includes conditional exemptions regarding conflicts of law, conflicts with pre-existing contracts, and emerging growth companies and smaller reporting companies (See, Disclosure of Payments by Resource Extraction Issuers, Release No. 34–90679, December 16, 2020, 86 F.R. 4662, January 15, 2021).

Disclosure of payments by resource extraction issuers remains on the Commission's Fall 2021 Unified Agenda of Regulatory and Deregulatory Actions.

- ***Bank disclosures—***Under Item 1401(d) of Regulation S-K, bank holding companies (BHCs) must disclose foreign financial activities only if the information to be presented meets the thresholds for separate disclosure contained in Rule 9-05 of Regulation S-X. Under Rule 9-05 of Regulation S-X, a BHC must provide separate disclosure of its foreign activities for each period in which either its (1) assets, or (2) revenue, or (3) income/loss before income tax expense, or (4) net income/loss, each associated with its foreign activities, was greater than 10 percent of the corresponding amount in its related financial statements. Certain types of information must be presented separately for each significant geographic area and in the aggregate for non-significant geographic areas. Rule 9-05 defines "foreign activities" to mean loans and other revenue producing assets and transactions in which the debtor or customer, whether an affiliated or unaffiliated person, is domiciled outside the United States. Rule 9-05 defines "significant geographic area" to mean an area in which assets or revenue or income before income tax or net income exceed 10 percent of the comparable amount as reported in the financial statements.

  Instruction 5. to Item 1402 of Regulation S-K states that if disclosure under Item 1401(d) is required, the information required by Item 1402 must be further segmented between domestic and foreign activities for each significant category of assets and liabilities. Moreover, a BHC must, for each period, present separately, on the basis of averages, the percent of total assets and total liabilities attributable to foreign activities.

  The Instructions to Item 1405 of Regulation S-K provide that certain information regarding allowances for credit losses need not be disclosed if the BHC is a foreign private issuer that follows IFRS.

  Several provisions regarding deposits contained in Item 1406 of Regulation S-K may apply to a BHC's foreign activities. For one, Item 1406(c) states that, if material, a BHC must disclose separately the aggregate amount of deposits by foreign depositors in domestic offices but need not identify the depositors' nationality. Under Item 1406(e), a foreign banking or savings and loan registrant must disclose the definition of uninsured deposits appropriate for its country of domicile. Item 1406(f)(2) requires that a BHC state the amounts of otherwise uninsured timed deposits by the time remaining until maturity as specified by Item 1406; the disclosure would include non-U.S. time deposits in excess of any country-specific insurance fund limit.

  Revisions to the Regulation S-K banking disclosure requirements became effective November 16, 2020, with a compliance date of December 15, 2021, also known as the mandatory compliance date. Prior to the mandatory compliance date, the Commission retained, and banks were advised to follow, the Securities Act and Exchange Act Guide 3 titled "Statistical Disclosure by Bank Holding Companies." The two Guide 3 documents will be removed and reserved as of January 1, 2023. (See, Update of Statistical Disclosures for Bank and Savings and Loan Registrants, Release No. 33–10835, September 11, 2020, 85 F.R. 66108, October 16, 2020).

Inability to timely file reports. It is conceivable that some companies may encounter difficulties in making timely SEC filings because of the fluidity of events in Russia and Ukraine. For these companies, Exchange Act Rule 12b-25 may provide a temporary reprieve for certain types of reports (or portions of reports) that cannot be timely filed. The rule applies to, among other things, Forms 10-Q, 10-K, and 20-F. To obtain extra time to make these filings, a company must, within one day after the prescribed due date of the report, file Form 12b-25 with the Commission in which the company discloses in detail the reasons for its inability to file the report.

Under Rule 12b-25, the late report is deemed filed on the prescribed due date if: (1) the company, if applicable, furnishes an exhibit that includes the signed statement(s) of any person(s) who cannot furnish a required opinion(s) and why they cannot furnish the opinion(s); (2) the company states that the reason causing the inability to timely file the report could not be eliminated without unreasonable effort or expense; and (3) the company then files the report according to the time frames set forth in the rule. As a result, Forms 10-K and 20-F would be filed no later than the 15th calendar day after the prescribed due date. Form 10-Q would be filed no later than the 5th calendar day after the prescribed due date.

Forms 8-K and 6-K. Companies subject to Exchange Act reporting requirements use Form 8-K to report unscheduled material events. A company generally must file or furnish (as appropriate) Form 8-K within four business days after a reportable event has occurred, subject to some adjustments in timing for weekends and holidays, and subject to the requirements for Regulation FD disclosures (Rule 100(a) of Regulation FD distinguishes between simultaneous and prompt disclosures depending on whether the Regulation FD disclosure was intentional or non-intentional, respectively) and "other" disclosures (discussed below). Some of the more common Items within Form 8-K can apply generically to almost any business, while some of them may have greater relevance to companies engaged in banking or the extractive industries:

Items 1.01 and 1.02—Entry into/termination of a material definitive agreement.

Item 1.03—Bankruptcy or receivership.

Item 2.01—Completion of acquisition or disposition of assets.

Item 2.02—Results of operations and financial condition.

Items 2.03 and 2.04—Creation of/triggering events related to a direct financial obligation or an obligation under an off-balance sheet arrangement of a registrant.

Item 2.06—Material Impairments.

Item 5.05—Amendments to the registrant's code of ethics, or waiver of a provision of the code of ethics.

Items 6.01 to 6.06—Asset-backed securities.

Item 8.01—Other events. Companies may disclose on Form 8-K other events that are not explicitly required to be disclosed on such form but which the company deems to be important to holders of its securities.

A foreign private issuer that is required to furnish reports under Exchange Act Rules 13a-16 or 15d-16 would file Form 6-K, which is similar to Form 8-K.

Impairment of goodwill. SEC staff routinely issue comment letters to companies during times of financial stress to inquire about how those companies have considered GAAP standards for goodwill impairment. Although these staff comment letters often come in response to major declines in domestic and global macroeconomic conditions, they can be issued at any time that a company may face changed financial circumstances.

Generally, goodwill must be tested for impairment on an annual basis but may need to be tested on an interim basis if circumstances warrant. SEC staff will sometimes ask companies how they considered whether goodwill was impaired under FASB ASC 350-20-35-3C. This standard requires a company to consider whether it is more likely than not that the fair value of a reporting unit is less than its carrying amount. A company must consider a variety of factors, including macroeconomic conditions, such as the inability to access capital, changes in exchange rates, and changes in equity and credit markets. Additional factors within FASB ASC 350-20-35-3C address topics such as changes in the cost of raw materials, changes in labor costs, changes in management or key personnel, and changes in customers.

SEC staff OFAC comment letters. As part of the SEC's filing review process, SEC staff occasionally issue comments to companies regarding compliance with Office of Foreign Assets Control sanctions regimes. These OFAC-themed staff comment letters often focus on the potential that a company will suffer reputational harm from violations of the various sanctions regimes overseen by OFAC.

A somewhat recent example of such a dialogue involved PayPal Holdings, Inc., in which SEC staff asked PayPal to further explain its settlement with OFAC regarding sanctions violations and to clarify its disclosures regarding a news media report that PayPal had received related DOJ subpoenas. PayPal's initial response explained that the transactions flagged by OFAC had involved payments processed by PayPal or its subsidiaries that, due to human error, had evaded PayPal's screening system. PayPal also said that because it was unsure whether OFAC would consider the transactions to be violations, the company could not state what potential reputational harm could result from the transactions. PayPal also indicated that the DOJ subpoenas reported by media outlets may have been previously disclosed in its earlier Forms 10-K and 10-Q in relation to an anti-money laundering issue rather than potential sanctions violations.

An SEC follow-up letter reiterated the staff's prior request for the names of the countries involved. PayPal responded that the countries included North Korea, Iran, Sudan, and Syria. PayPal also said the transactions did not involve the governments of those countries, were negligible and de minimis with respect to total volume and dollar value, and that the transactions accounted for only a small portion of PayPal's global revenue from its transaction processing business. PayPal also stated that it has policies and procedures to prevent such transactions

from being processed, denies account registration to prohibited persons and entities in sanctioned countries, blocks access to PayPal websites by sanctioned countries, and blocks IP addresses known to be associated with persons in sanctioned countries. Overall, PayPal said the transactions at issue were not material to a reasonable investor, although the company noted uncertainty about what, if any, action OFAC may take.

The SEC staff's dialogue with ING Groep N.V. also provides an earlier example of OFAC-themed comments in the context of a traditional bank. There, the SEC staff inquired regarding an alleged effort by several of the company's global offices to hide transactions with Cuba and Iran that were banned under federal law. ING eventually agreed to abide by deferred prosecution agreements with federal and New York law enforcement agencies, requiring the company to pay a $619 million penalty. ING's related settlement with OFAC was the largest settlement of its kind at the time. The SEC's comment letters emphasized the potential for ING to suffer reputational harm.

Cybersecurity. The outbreak of open hostilities between Russia and Ukraine and the imposition by the U.S. and its European allies of strong economic sanctions against Russia heightens the need for companies to adhere to best practices for cybersecurity. It is plausible that Russia could retaliate against nation states or businesses operating in nation states that support sanctions against Russia and that that retaliation could take the form of government-sanctioned cyberattacks or cyberattacks perpetrated by criminal groups or other state or non-state actors who sympathize with Russia. U.S. businesses should be alert to the possibility of cyberattacks associated with any developments regarding Russia and Ukraine.

The Commission's 2018 interpretation related to cybersecurity disclosures updated its prior guidance that was issued in 2011 (CF Disclosure Guidance: Topic No. 2) but retained the emphasis on materiality while adding new guidance on the need for companies to have cybersecurity policies and procedures and for companies to avoid scenarios that could involve insider trading related to cyber incidents. The Commission reiterated that a company need not make disclosures that would provide hackers with a "roadmap" to the company's vulnerabilities, but the company should disclose cybersecurity risks and incidents that are material and discuss the related financial, legal, or reputational consequences. Cyber disclosures can evolve over time as the facts of a cyber incident become known and, thus, companies may need to correct earlier disclosures. (See, Commission Statement and Guidance on Public Company Cybersecurity Disclosures, Release No. 33–10459, February 21, 2018, 83 F.R. 8166, February 26, 2018). The Commission recently proposed to extend cybersecurity regulations to investment advisers, registered investment companies, and business development companies.

Moreover, the Cybersecurity & Infrastructure Security Agency (CISA) has issued an alert urging U.S. businesses to raise their state of alert regarding Russia and Ukraine. CISA suggested that firms working with organizations in Ukraine take additional steps to monitor, inspect, and isolate online traffic with those organizations, including a review of access controls. "While there are not currently any specific credible threats to the U.S. homeland, we are mindful of the potential for the Russian government to consider escalating its destabilizing actions in ways that may impact others outside of Ukraine," said the alert. According to the alert, Russia has employed cyber to project force around the globe during the past decade, including via previous operations in Ukraine.

CFIUS merger reviews. The Committee on Foreign Investment in the United States (CFIUS), housed within the Treasury Department, reviews transactions involving foreign investment in the U.S and real estate transactions by foreign persons for the purpose of understanding how those transactions may impact the national security of the U.S. Through CFIUS reforms enacted via the Foreign Investment Risk Review Modernization Act (FIRRMA) of 2018, Congress has continued to sharpen its focus on limiting the influence of Chinese companies in U.S. markets, especially those companies with ties to China's Communist government, as a way of blunting the growing economic and military rivalry between the U.S. and China. However, CFIUS reviews extend to transactions with businesses in other countries. Transactions in which Russian or Ukrainian companies make investments in the U.S. could receive CFIUS scrutiny. Companies should also consider that certain types of transactions may no longer be possible because they may violate U.S. and global sanctions regimes.

FCPA issues. The Foreign Corrupt Practices Act (FCPA), with many of its operative provisions contained in portions of the Exchange Act, sets forth two related approaches to corrupt business practices by focusing on bribery and accounting provisions. The accounting provisions are further subdivided into provisions requiring companies to maintain books and records and internal accounting controls.

Beyond these basics, the FCPA contains some exceptions, including an exception for matters concerning U.S. national security.

Specifically, Exchange Act Section 13(b)(3)(A) provides for an exception to the internal accounting controls provision contained in Exchange Act Section 13(b)(2) by stating that: "no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any federal Department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives." The Criminal Division of the U.S. Department of Justice and the Enforcement Division of the SEC have published "*A Resource Guide to the* U.S. Foreign Corrupt Practices Act" (Second Edition) which, at footnote 223, describes the national security exception as a "narrow" one intended by Congress to prevent the disclosure of classified information.

To the extent the FCPA could apply to the Russia-Ukraine conflict, such as companies seeking to enter or exit Russian markets before the conflict began, or companies seeking to remain in or exit Russian markets after the conflict began, or companies seeking to reenter Russian markets after the conflict ends, practitioners should be aware of several recent developments regarding the definition of "foreign official" and the use of disgorgement in FCPA actions.

First, the FCPA can apply broadly as at least one recent court opinion demonstrates. The FCPA, at 15 U.S.C. §78dd-2(h)(2)(A), defines "foreign official" to mean "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization." The word "instrumentality," however, is undefined. The Eleventh Circuit in *U.S. v. Esquenazi* (2014) (cert. den'd), defined "instrumentality" to mean "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own."

The Eleventh Circuit noted that the judicially-created explanation of "instrumentality" requires a factual evaluation of what it means to "control" and what it means for a function to be "a function the government treats as its own." The court said "control" can be shown by examining: (1) the foreign government's formal designation of the entity; (2) whether the government has a majority interest in the entity; (3) the government's ability to hire and fire the entity's principals; (4) the extent to which the entity's profits, if any, go directly into the governmental fisc or the extent to which the government funds the entity if it fails to break even; and (5) the length of time these indicia have existed.

Likewise, "a function the government treats as its own" can be demonstrated by showing: (1) whether the entity has a monopoly over the function it exists to carry out; (2) whether the government subsidizes the costs associated with the entity providing services; (3) whether the entity provides services to the public at large in the foreign country; and (4) whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.

Second, the conference report for the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (NDAA) (H.R. 6395), secured the SEC's right to seek, and the authority of federal courts to order, disgorgement in securities enforcement matters. The SEC's disgorgement authority had been challenged in *Kokesh v. SEC* (2017), in which the Supreme Court held that disgorgement is a "penalty" subject to the general federal five-year limitations period. The NDAA retained the five-year limitation period for many such violations but added a new 10-year limitations period for scienter-based violations. Although the SEC now has clearer disgorgement authorities, a subsequent Supreme Court opinion in *Liu v. SEC* (2020) held that a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is permissible equitable relief, thus stating some key limiting principles for the SEC when it seeks disgorgement. The *Liu* opinion, however, stated two additional limiting principles on the SEC's disgorgement authorities, which also can apply in the FCPA setting: (1) courts must deduct legitimate expenses before ordering disgorgement; and (2) joint and several liability can be imposed where, as the common law allowed, partners have engaged in concerted wrongdoing.

It is unclear if the FCPA would have an immediate impact on companies doing business in Russia and neighboring countries now that Russia and Ukraine are engaged in open hostilities because FCPA cases can take months or years to be fully investigated before any charges are brought. Nevertheless, any U.S. business currently or formerly operating in Russia or Ukraine should have in place appropriate internal controls and written policies and procedures to reduce the risk for potential FCPA violations.

ESG implications. At a press conference announcing a ban on imports of Russian oil, President Biden remarked that many U.S. companies have ceased operations in

Russia. "Major companies are pulling out of Russia entirely, without even being asked — not by us," said President Biden.

Just over a week later, in an historic video address to Congress on March 16, 2022, Ukrainian President Volodymyr Zelensky echoed President Biden's observation about companies exiting Russia. Zelensky's address called for additional U.S. aid, including a no-fly zone, and included a graphic video of the destruction inflicted on Ukraine by Russian troops. Zelensky mostly spoke via a translator. With respect to U.S. companies doing business in Russia, Zelensky said: "All American companies must leave Russia from their market, leave their market immediately, because it is flooded with our blood."

Zelensky then appealed directly to members of Congress to encourage U.S. companies to exit Russia. "Ladies and gentleman, members of Congress, please take the lead. If you have companies in your district who finance the Russian military machine, leaving business in Russia, you should put pressure. I'm asking to make sure that the Russians do not receive a single penny that they use to destroy people in Ukraine." Zelensky closed this portion of his address by referencing the costs of freedom as they relate to companies doing business in Russia: ""...Peace is more important than income and we have to defend this principle in the whole world."

The Russia-Ukraine conflict potentially implies the entire range of ESG issues—environmental, social, and governance. A few sample disclosures from U.S. companies, even if not explicitly ESG disclosures, and even though some of the disclosed actions may be required under current U.S. and global sanctions regimes, nevertheless suggest the ESG-related issues with which companies must grapple:

- ***Visa, Inc.—***According to a March 2, 2022 Form 8-K: "Regarding the invasion of Ukraine, our number one priority is ensuring the safety and security of our colleagues and their families who are directly impacted. Visa is in the process of complying with all applicable global sanctions. As part of that compliance, we have suspended access to Visa for certain clients. It is difficult to reasonably estimate the full potential financial impact of this situation on Visa at this time. In fiscal full-year 2021, total net revenues from Russia, including revenues driven by domestic as well as cross-border activities, were approximately 4% of Visa Inc. net revenues and total net revenues from Ukraine were approximately 1% of Visa Inc. net revenues."

- ***Mastercard Incorporated—***According to a March 5, 2022 Form 8-K and statement attached to the Form 8-K as an exhibit: "It's with all of this in mind – and noting the unprecedented nature of the current conflict and the uncertain economic environment – we have decided to suspend our network services in Russia. " The company added: "This decision flows from our recent action to block multiple financial institutions from the Mastercard payment network, as required by regulators globally." The company also addressed its history of operations in Russia: "We don't take this decision lightly. Mastercard has operated in Russia for more than 25 years. We have nearly 200 colleagues there who make this company so critical to many stakeholders. As we take these steps, we will continue to focus on their safety and well-being, including continuing to provide pay and benefits. When it is appropriate, and if it is permissible under the law, we will use their passion and creativity to work to restore operations."

- ***The Coca-Cola Company—***According to a March 8, 2022 Form 8-K: "On March 8, 2022, The Coca-Cola Company (the "Company") announced that it is suspending its business in Russia." The company also addressed the scope of its business in Russia and Ukraine: "While the impact to the Company is not yet fully known, as a point of reference, in 2021, the Company's business in Russia and Ukraine contributed approximately 1% to 2% of the Company's consolidated net operating revenues and operating income. In addition, as of December 31, 2021, the Company had an approximate 21% ownership interest in Coca-Cola HBC AG, the Company's bottling and distribution partner in the region."

- ***ExxonMobil Corporation—***According to a March 1, 2022 Form 8-K and a press release attached as an exhibit: The company stated that it supports the Ukrainian people, that it "deplore[s] Russia's military action," and supports the "strong international response." The company also stated that it would undertake no new investments in Russia and would exit a particular project: "ExxonMobil operates the Sakhalin-1 project on behalf of an international consortium of Japanese, Indian and Russian companies. In response to recent events, we are beginning the process to discontinue operations and developing steps to exit the Sakhalin-1 venture." The company also discussed the process for exiting this project: "As operator of Sakhalin-1, we have an obligation to ensure the safety of people, protection of the environment and integrity of operations. Our role as operator goes beyond an equity investment. The process

to discontinue operations will need to be carefully managed and closely coordinated with the co-venturers in order to ensure it is executed safely."

The cessation of business operations in Russia can raise a number of potential ESG issues for U.S. companies. Some actions companies with business in Russia may take will be voluntary, while other actions will be taken in response to the reaction of governments around the world to Russian aggression against Ukraine. Perhaps the most immediate concern will be compliance with global sanctions regimes that limit or prohibit certain activities in Russia and Belarus. With respect to sanctions, much of the concern for companies will be the potential for significant penalties and for the reputational harm that may arise from a failure to comply with global sanctions regimes (see the discussion above regarding SEC staff comment letters regarding OFAC penalties). In other respects, ESG remains an amorphous area with few guideposts.

With respect to U.S. regulations, already a variety of required disclosures may indirectly implicate ESG issues, such as risk factor disclosures. More ESG-specific disclosures, however, are primarily focused on human capital. Climate disclosures which, in the context of Russia may be relevant for banking and oil & gas companies, still follow a Commission interpretation. However, the Commission is expected to propose a new climate risk disclosure regulation at an open meeting scheduled for March 21, 2022. If adopted, that regulation will not be finalized and become effective until at least some date later in 2022. The following discussion focuses on human capital dislcosures and the SEC's current climate risk disclosure guidance.

- Human capital— The SEC adopted a basic human capital disclosure requirement in 2020. Under current regulations, companies must abide by a flexible, principles-based human capital disclosure regime contained in the SEC's Regulation S-K. The Commission characterized examples of disclosures cited in the regulation as "potentially relevant subjects, not mandates."

  With respect to the Commission's choice of a principles-based regime, the rulemaking release stated: "...we did not include more prescriptive requirements because we recognize that the exact measures and objectives included in human capital management disclosure may evolve over time and may depend, and vary significantly, based on factors such as the industry, the various regions or jurisdictions in which the registrant operates, the general strategic posture of the registrant, including whether and the extent to which the registrant is vertically integrated, as well as the then current macro-economic and other conditions that affect human capital resources, such as national or global health matters" (footnotes omitted).

  In a June 2021 speech, Gensler announced that he had asked SEC staff to prepare recommendations for the Commission on climate risk and human capital. With respect to human capital, Gensler said the recommendation may address workforce turnover, skills and development training, compensation, benefits, workforce demographics including diversity, and health and safety. The scope of the expected recommendation would appear to address topics already identified in proposed legislation introduced in Congress.

- ***Climate risk—***Existing SEC disclosure requirements for climate risk and other environmental issues center on a small number of provisions in Regulation S-K. Item 101(c)(2)(i), for example, requires disclosure of "the material effects that compliance with government regulations, including environmental regulations, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries, including the estimated capital expenditures for environmental control facilities for the current fiscal year and any other material subsequent period." A similar provision contained in Item 101(h)(4)(xi) provides for scaled disclosures by smaller reporting companies. Items 103, 105, and 303 of Regulation S-K also may require climate change or other environmental disclosures regarding legal proceedings, risk factors, and Management's Discussion and Analysis, respectively (See, Modernization of Regulation S–K Items 101, 103, and 105, Release No. 33–10825, August 26, 2020, 85 F.R. 63726, October 8, 2020 (effective November 9, 2020)).

  Commission guidance issued in 2010 also provides recommendations for climate change disclosures. Specifically, in addition to disclosures required by Regulation S-K, a company may need to disclose information about: (1) the impact of legislation and regulations; (2) international accords; (3) indirect consequences of regulations or business trends (e.g. reputation risk); and (4) the physical impacts of climate change (Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106, February 2, 2010, 75 F.R. 6290, February 8, 2010; SEC Codification of Financial Reporting Policies 501.15 (largely restating the Commission's guidance).

  Any new climate risk disclosures adopted by the Commission in the near term would

not be immediately applicable given that they will likely have a significant lead time before they become effective and compliance would be required.

Looking ahead. There are news reports that some diplomatic talks have occurred between Russia and Ukraine, although the outcome of those talks remains uncertain. If a diplomatic resolution resulted in the cessation of hostilities between Russia and Ukraine, businesses might then potentially reconsider their decisions to cease business operations in Russia, while remaining mindful that U.S. and global sanctions prohibiting certain types of business opeations in Russia may not be lifted for some period of time after the conflict ends. However, the cessation of hostilities would not necessarily mean that the business environment in Russia would be any more hospitable. U.S. companies would still have to assess the financial, business, and reputational harm from resuming operations in a challenging business environment. Regardless of the outcome of the war in Ukraine, businesses will have to periodically reassess their applicable disclosures made to investors through their SEC filings. ■