

2023 Reporting Cycle: Form 20-F Amendments and Trends to Consider

December 2023



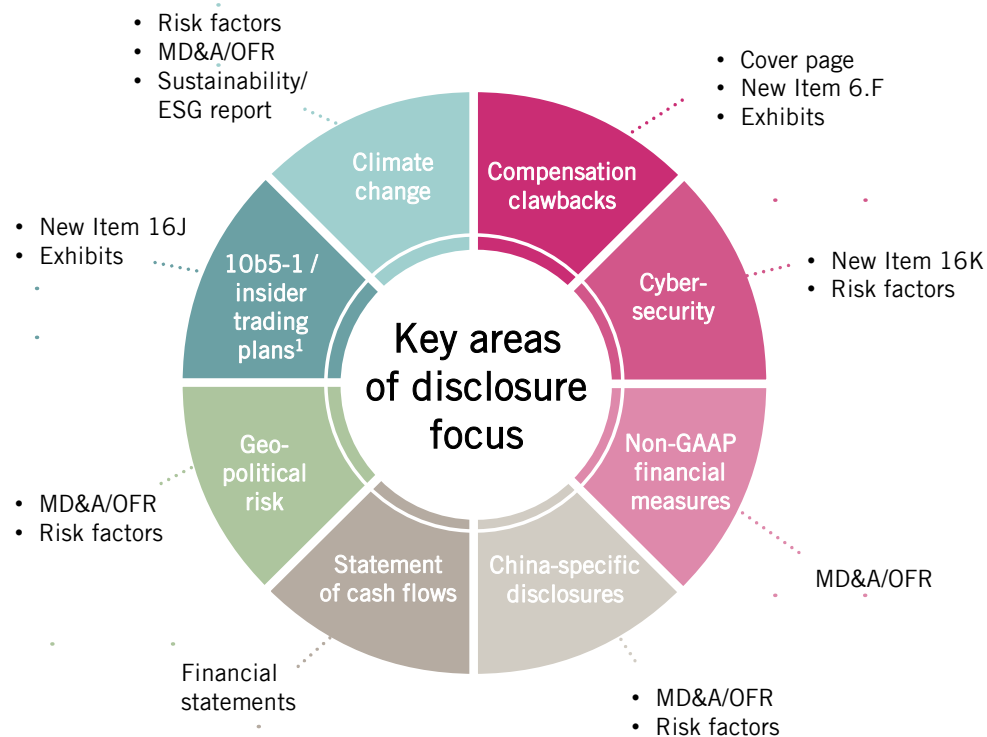
For the 2023 reporting cycle, foreign private issuers preparing their annual reports on Form 20-F will need to prepare for mandatory cybersecurity and compensation clawback disclosure.

Foreign private issuers with fiscal years beginning on or after April 1, 2023 will also have to comply with the new Rule 10b5-1/insider trading plan disclosure rules (requiring, among other things, insider trading plans to be filed as exhibits to Form 20-F), but most companies will not be required to make the new disclosures until their next reporting cycle.

Companies must draft this cycle's annual reports in the shadow of the SEC's climate change disclosure proposal, which had been expected to be adopted in 2023. While the rule's adoption has been pushed back to spring 2024, SEC guidance on climate change disclosure remains relevant and the SEC Staff continues to question climate change disclosure in comment letters.

Companies should also be aware that the SEC's Chief Accountant has issued guidance regarding the presentation of the statement of cash flows, and the SEC Staff is still very much focused on the use of non-GAAP financial measures.

Finally, companies should keep in mind the SEC's 2022 sample letter to companies regarding disclosures about Russia's invasion of Ukraine. Although the SEC has not issued a sample letter about the Israel-Hamas War, the Staff's sample letter on Ukraine is a useful reference for the types of questions the Staff may raise with regard to disclosure issues related to the war.



¹ For companies with fiscal years beginning on or after April 1, 2023

To assist you in preparing your annual report, our SEC Transactions and Compliance Group have put together a table at the end of this publication describing item-by-item considerations for your Form 20-F annual report. Please reach out to any of the Linklaters contacts at the end of this publication if you have any questions.

Cybersecurity

In July 2023, the SEC adopted rules requiring U.S.-listed companies (including foreign private issuers) to make disclosures about their cybersecurity risk management, strategy and governance in their annual reports for fiscal years ending on or after December 15, 2023.

The new rules add Item 16K to Form 20-F, which requires companies to disclose certain information regarding their cybersecurity risk management, strategy and governance in their annual reports.

Specifically, with respect to risk management, Item 16K requires companies to describe their processes, if any, for assessing, identifying and managing material risks from cybersecurity threats, as well as whether any risks from cybersecurity threats (including as a result of any previous cybersecurity incidents) have materially affected or are reasonably likely to materially affect them. Item 16K sets out a non-exclusive list of disclosure companies should provide based on their facts and circumstances.

With respect to governance, Item 16K requires companies to describe the board of directors' oversight of risks from cybersecurity threats (including identifying any board committee or subcommittee responsible for such oversight), as well as management's role in assessing and managing material risks from cybersecurity threats.

Companies do not need to tag responsive disclosure in Inline eXtensible Business Reporting Language ("Inline XBRL") in the 2023 reporting cycle, but they will be required to do so beginning with annual reports on Form 20-F for fiscal years ending on or after December 15, 2024.

For further details on the new rules, please see our [client briefing](#).

In conjunction with the new rules, you should be aware that the SEC's Enforcement Division is currently paying particular attention to cybersecurity disclosure. Most recently, the SEC brought an enforcement action against SolarWinds and its chief information security officer that highlights, among other things, the importance of accurate, balanced disclosure that is reflective of proper disclosure controls and procedures regarding cybersecurity. The SolarWinds action serves as a reminder that companies should review their disclosure controls and procedures to ensure that they appropriately detect and escalate cybersecurity risks and deficiencies to senior management, including the disclosure committee. Also, when considering cybersecurity risks, companies should assess risk in the aggregate and remember that individually immaterial risks may accumulate such that, when taken together, they may be material and require reflection in the company's public disclosure. For other key takeaways from the SolarWinds action, please see our [client briefing](#).

SEC Enforcement Director Gurbir Grewal has made it clear that the SEC has zero tolerance for gamesmanship around the disclosure decision (i.e., where companies are more concerned about reputational damage than about coming clean with shareholders and the customers whose data is at risk).

Compensation Clawbacks

The SEC's compensation clawback rules, as implemented by the NYSE and Nasdaq, require listed companies to adopt policies to recover incentive-based compensation following an accounting restatement, even when there is no misconduct on the part of the recipient, by December 1, 2023.

Along with filing their clawback policies as exhibits to their annual reports on Form 20-F, listed companies must also make disclosures relating to the recovery of any erroneously awarded compensation if the policy has been triggered.

If a listed company prepares a restatement that requires a clawback in the fiscal year, Item 6.F of Form 20-F requires the issuer to make certain disclosures relating to the calculation of the clawback amount and the clawback amounts that are outstanding for each current and former named executive officer. For foreign private issuers that use Form 20-F, individualized disclosure is required about members of their administrative, supervisory, or management bodies for whom the issuer otherwise provides individualized compensation disclosure in the filing.

If, following a restatement, a listed company determines that a clawback is not required under its policy or that recovery was impracticable, it must explain its reasoning. For further details, please see our [client briefing](#) on the new rules. These disclosures must also be tagged using XBRL.

Listed companies must also check boxes on the cover page of their Form 20-F if (a) the previously issued financial statements in the filing include an error correction, and (b) any such corrections are restatements that triggered a compensation recovery analysis during the fiscal year.



Climate change disclosure

According to the SEC's most recent [regulatory agenda](#), the SEC has pushed back the adoption of its climate change disclosure proposal to spring 2024. The SEC has received more than 16,000 comments on the proposal, prompting calls (including from SEC Commissioner Mark Uyeda) for a re-proposal, but the SEC's regulatory agenda suggests that the SEC is not considering a re-proposal.

In the meantime, companies should look to the SEC's prior guidance, such as the [2010 guidance](#) and the [2021 sample letter](#), and recent comment letters as a guide to disclosure. The SEC Staff continues to issue comments on climate-related disclosure in annual reports, focusing on their compliance with the 2010 guidance.

The 2010 guidance describes instances where disclosure regarding climate change may be required, including, but not limited to, disclosure related to (i) the impact of pending or existing climate change-related legislation, regulations and international accords; (ii) the indirect consequences of regulation or business trends; and (iii) the physical impacts of climate change. In 2021, the SEC's sample letter regarding climate change disclosure emphasized the continuing applicability of the 2010 guidance as well as companies' overarching obligation to disclose "such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading."

In recent comment letters, the SEC Staff has asked companies to discuss, to the extent material, the indirect consequences of climate-related regulation or business trends, such as:

- decreased demand for goods or services that produce significant greenhouse gas emissions or are related to carbon-based energy sources;

- increased demand for goods that result in lower emissions than competing products;
- increased competition to develop or utilize innovative new products that result in lower emissions;
- increased demand for generation and transmission of energy from alternative energy sources; and
- any anticipated reputational risks resulting from operations or products that produce material greenhouse gas emissions.

Further, if a company publishes an ESG or sustainability report that is not included in its annual report on Form 20-F, the Staff may ask whether disclosures made in the report (particularly risks and key metrics) should be included in SEC filings. Companies should be prepared to defend their determinations regarding the materiality of climate (or more broadly, ESG) disclosures to the Staff. Companies should take this time to consider whether the scope of their disclosure controls and procedures should be expanded to cover all ESG disclosures, even if made outside of their SEC filings.

In drafting their disclosures, companies should also be aware that California has adopted the [Voluntary Carbon Market Disclosure Act](#), which, possibly as early as January 1, 2024, requires entities that "operate within" and "make claims within" California (neither phrase is defined) of "net zero" or "carbon neutral" or similar claims must make disclosures on their corporate website regarding, among other things, how those claims were determined to be accurate or actually accomplished. The legislation applies to both U.S. domestic and foreign companies and does not have any minimum revenue requirements.

Statement of cash flows

Companies should also review their cash flow reporting method, following a [December 2023 statement](#) by SEC Chief Accountant Paul Munter emphasizing the critical role of the statement of cash flows in providing investors a complete picture of a company's financial health and urging companies to consider reporting operating cash flows under the direct method, rather than the more common indirect method.

Munter noted that the statement of cash flows is consistently a leading area of restatements. He encouraged issuers to carefully consider how best to present cash and non-cash information, and whether additional information should be disclosed to facilitate an investor's understanding of the statement of cash flows and the financial statements as a whole. For example, Munter suggested companies could:

- further disaggregate amounts reported in the statement of cash flows (e.g., disclosing specific major classes of gross cash receipts and payments, such as cash collected from customers, cash paid to employees, and cash paid to suppliers);
- disclose additional information to better enable investors to understand the relationships between amounts reported in the statement of cash flows and those in the statement of financial position; and
- consider reporting operating cash flows under the direct method.

Munter acknowledged that nearly all issuers continue to use the indirect method, despite the fact that under U.S. GAAP issuers are encouraged to report major classes of gross cash receipts and gross cash disbursements from operating activities using the direct method.

Munter reminded issuers and auditors to approach the preparation, review, and audit of the statement of cash flows with a view to quality for the benefit of investors, focusing on:

- **Materiality** – He was skeptical of many issuers' routine determination that errors in the statement of cash flows do not constitute a material error in prior periods, reminding issuers and auditors of the importance of performing an objective materiality analysis from the perspective of a reasonable investor. When evaluating errors, Munter said, a materiality level is established for the financial statements as a whole, and it would not be appropriate for the company or its auditors to establish a materiality level for the statement of cash flows that exceeds the materiality level for the financial statements as a whole.
- **Presentation and disclosure** – The requirement to disclose significant accounting policies includes those policies that materially affect the determination of cash flow classification. Issuers should also supplement the statement of cash flows with disclosure of non-cash investing and financing activities to help investors understand how these activities affect recognized assets or liabilities even when there are no resulting cash receipts or payments during the period.
- **Internal controls** – Because amounts reported in the statement of cash flows are reconciled to income statement activity and balance sheet changes, controls designed around those other financial statements may indirectly address risks in the statement of cash flows. More direct controls are critical and should not be overlooked, such as those regarding the classification of cash flows and the disclosure of noncash items.

Non-GAAP financial measures

Non-GAAP financial measures continues to be a major focus of SEC comments.

At the end of 2022, the SEC published [updated Compliance and Disclosure Interpretations](#) (“C&DIs”) about non-GAAP financial measures. The SEC Staff often refers to the C&DIs in its non-GAAP comments, so it is worth reviewing the guidance before drafting any non-GAAP disclosure.

The 2022 C&DIs include reminders that a non-GAAP financial measure can be misleading if:

- certain adjustments are made, such as excluding normal, recurring (even if occasionally) cash operating expenses necessary to operate the business;
- it is presented inconsistently between periods, such as adjusting a charge in the current period but not adjusting similar charges in prior periods, unless the change is disclosed and the reasons for it explained;
- it excludes charges but does not exclude equivalent gains; or
- it, and/or any adjustment made to it, is not appropriately labeled and clearly described (such as labeling non-GAAP financial measures with GAAP titles or as “pro forma” if not Article 11 compliant).

The C&DIs also address non-GAAP prominence issues, providing the following examples that the Staff views as making the non-GAAP measures more prominent than the GAAP measure:

- starting a reconciliation with a non-GAAP measure;

- presenting a non-GAAP income statement when reconciling non-GAAP measures to the most directly comparable GAAP measures; or
- presenting a forward-looking non-GAAP measure relying on the exception provided by Item 10(e)(1)(i)(B) of Regulation S-K (which allows exclusion of the quantitative reconciliation) without disclosing reliance upon the exception, identifying the information that is unavailable, and its probable significance in a location of equal or greater prominence.

Other Considerations

- **Rule 10b5-1 trading plans and insider trading plans** – Foreign private issuers with fiscal years beginning on or after April 1, 2023 must comply with the **new Rule 10b5-1/insider trading plan disclosure rules** (requiring, among other things, insider trading plans to be filed as exhibits to Form 20-F), but most companies will not be required to make the new disclosures until their next reporting cycle.
- **Geopolitical risks** – Companies should keep in mind the SEC’s 2022 **sample letter** to companies regarding disclosures about Russia’s invasion of Ukraine and related supply chain issues. The SEC Staff has made it clear that companies should consider the effect of the war in Ukraine on their business, even if they do not have operating assets or investments in Russia, Ukraine or Belarus. Although the SEC has not issued a sample letter regarding the Israel-Hamas War, the Staff’s sample letter on Ukraine is a useful reference for the types of questions the Staff may raise with regard to disclosure issues related to the war
- **China-specific disclosures** – For companies based in China or with a majority of their operations in China, SEC **guidance** issued in July 2023 is an important reminder that the SEC Staff continues to pay close attention to China-specific disclosures in SEC filings. The “Sample Letter to Companies Regarding China-Specific Disclosures” provides examples of comments that the SEC Staff may issue to companies during its review of SEC filings such as annual reports and registration statements. The sample letter focuses on disclosure obligations in three areas: (1) Holding Foreign Companies Accountable Act requirements; (2) the risk of intervention or control by the Chinese government; and (3) the impact of regulation such as the Uyghur Forced Labor Prevention Act.
- **Waiver of code of conduct** – Under Nasdaq’s **revised rules**, a listed foreign private issuer must disclose any waivers of its code of conduct for directors or executive officers on its website, in a Form 6-K, or by distributing a press release, within four business days. Prior to the amendments, foreign private issuers were allowed to make the disclosures in a Form 6-K (subject to the “promptly” requirement but not a specific deadline) or in their next Form 20-F.
- **XBRL** – In September 2023, the SEC Staff issued a new **sample letter** regarding XBRL disclosures, which includes comments regarding: Inline XBRL, reminding issuers that their filings must include the required Inline XBRL presentation; consistent disclosure of the common shares outstanding reported on the cover page compared to the balance sheet; the use of different XBRL elements to tag the same reported line item on the income statement from period to period; and the use of custom tags, which should only be used when an appropriate tag does not exist in the standard taxonomy.
- **Share repurchases** – A federal appellate court has vacated the SEC’s **share repurchase disclosure rule**, following the SEC’s failure to revise the rule per the court’s instructions. As adopted in May 2023, the rule would have required foreign private issuers to file new Form F-SR 45 days after the end of the first full fiscal quarter that begins on or after April 1, 2024, and related Form 20-F narrative disclosure in the first Form 20-F filed after the first Form F-SR filing. The SEC’s most recent regulatory agenda (which is non-binding), published in December 2023, does not include the share repurchase disclosure rule on its rulemaking schedule.

SUMMARY TABLE OF KEY CONSIDERATIONS FOR 2023 ANNUAL REPORTS ON FORM 20-F

Note that the below does not consist solely of new additions to Form 20-F, but also includes disclosure topics about which companies should refresh their understanding of SEC guidance, due to the SEC's current focus on these topics.

Form 20-F Items	Considerations for the 2023 Annual Report
Cover Page	<ul style="list-style-type: none"> • Error correction – Check a box on the cover page to indicate whether the financial statements included in the filing reflect the correction of an error to previously issued financial statements. • Clawbacks – Check a box on the cover page to indicate whether any of those error corrections are restatements that required a recovery analysis of incentive-based compensation received by any executive officers during the relevant recovery period.
Item 3. Key Information – Risk Factors	<ul style="list-style-type: none"> • Cybersecurity – Consider updating or adding risk factors regarding cybersecurity in parallel with drafting cybersecurity risk management disclosure. However, be careful about disclosing only as a risk factor any risks that have actually materialized. • Climate – The sample letter on climate change disclosure indicates that the Staff expects the disclosure of material climate change transition risks and litigation risks. • China – As set out in the sample letter, describe any material impact that intervention or control by the PRC government has or may have on your business or on the value of your securities.
Item 5. Operating and Financial Review and Prospects	<ul style="list-style-type: none"> • Statement of cash flows – Consider whether you should report using the direct method or supplement your indirect method of reporting the statement of cash flows, as stated in the Chief Accountant's statement. • Non-GAAP financial measures – The SEC Staff is still very much focused on non-GAAP financial measures. Review the SEC's updated C&DIs before using any non-GAAP financial measures. • Geopolitical risk – Consider how your business segments, products, lines of service, projects, or operations are materially impacted by supply chain disruptions due to geopolitical conflicts, such as the Russia-Ukraine war and the Israel-Hamas war. • Climate change – According to the sample letter, the SEC expects you to discuss, if material: <ul style="list-style-type: none"> ○ Recent legal and regulatory developments relating to climate change; ○ Material past and/or future capital expenditures for climate-related projects; ○ Indirect consequences of climate-related regulation or business trends; ○ Physical effects of climate change on your operations and results; ○ Increased compliance costs related to climate change; and ○ Purchase or sale of carbon credits or offsets and any material effects on the business, financial condition and results of operations. • China – To the extent material, describe how your business segments, products, lines of service, projects, or operations are impacted by the Uyghur Forced Labor Prevention Act, as described in the sample letter regarding China-specific disclosures.

SUMMARY TABLE OF KEY CONSIDERATIONS FOR 2023 ANNUAL REPORTS ON FORM 20-F

Form 20-F Items	Considerations for the 2023 Annual Report
Item 6F. Disclosure of Action to Recover Erroneously Awarded Compensation	<ul style="list-style-type: none"> • If at any time during or after the last completed fiscal year you had to prepare an accounting restatement that required a clawback, or there is an outstanding balance on a clawback due to a prior restatement, you must provide the following information: <ul style="list-style-type: none"> (i) For each restatement: <ul style="list-style-type: none"> (A) The date on which you were required to prepare the restatement; (B) The aggregate dollar amount of erroneously awarded compensation attributable to the restatement, including an analysis of how the amount was calculated; (C) If the financial reporting measure related to a stock price or total shareholder return metric, the estimates that were used in determining the erroneously awarded compensation attributable to the restatement and an explanation of the methodology; (D) The aggregate dollar amount of erroneously awarded compensation that remains outstanding at the end of the last completed fiscal year; and (E) If the aggregate dollar amount of erroneously awarded compensation has not yet been determined, disclose this fact, explain the reason(s) and disclose the information required in (B) through (D) in the next filing that is subject to this Item; (ii) If recovery would be impracticable, for each current and former named executive officer and for all other current and former executive officers as a group, disclose the amount of recovery forgone and a brief description of the reason you decided in each case not to pursue recovery; and (iii) For each current and former named executive officer from whom, as of the end of the last completed fiscal year, erroneously awarded compensation had been outstanding for 180 days or longer since the date you determined the amount the individual owed, disclose the dollar amount of outstanding erroneously awarded compensation due from each individual. • If at any time during or after your last completed fiscal year you were required to prepare an accounting restatement, and you concluded that recovery of erroneously awarded compensation was not required pursuant to your clawback policy, briefly explain why application of the recovery policy resulted in this conclusion. • Tag the disclosures in XBRL.

SUMMARY TABLE OF KEY CONSIDERATIONS FOR 2023 ANNUAL REPORTS ON FORM 20-F

Form 20-F Items	Considerations for the 2023 Annual Report
Item 8. Financial Information	<ul style="list-style-type: none"> • Statement of cash flows – Consider whether you should report using the direct method or supplement your indirect method of reporting the statement of cash flows, as stated in the Chief Accountant’s statement.
Item 16E. Purchases of Equity Securities By the Issuer and Affiliated Purchasers	<p>The share repurchase disclosure rule has been vacated.</p>
Item 16J. Insider Trading Policies	<p>[Only if you have a fiscal year beginning on or after April 1, 2023] Disclose whether you have adopted insider trading policies and procedures, and if not, explain why not. The insider trading policy must also be filed as an exhibit.</p>
Item 16K. Cybersecurity	<ul style="list-style-type: none"> • Risk management and strategy – You must describe: <ul style="list-style-type: none"> (1) Your processes, if any, for assessing, identifying, and managing material risks from cybersecurity threats in sufficient detail for a reasonable investor to understand those processes, including: <ul style="list-style-type: none"> ○ whether and how any such processes have been integrated into your overall risk management system or processes; ○ whether you have engaged assessors, consultants, auditors, or other third parties in connection with any of these processes; and ○ whether you have processes to oversee and identify such risks from cybersecurity threats associated with your use of any third-party service provider. (2) Whether any risks from cybersecurity threats, including as a result of any previous cybersecurity incidents, have materially affected or are reasonably likely to materially affect you, including your business strategy, results of operations, or financial condition and if so, how.

SUMMARY TABLE OF KEY CONSIDERATIONS FOR 2023 ANNUAL REPORTS ON FORM 20-F

Form 20-F Items	Considerations for the 2023 Annual Report
Item 16K. Cybersecurity (cont'd)	<ul style="list-style-type: none"> • Governance – You must describe: <ul style="list-style-type: none"> (1) Your board of directors' oversight of risks from cybersecurity threats, including, if applicable, identifying any board committee or subcommittee responsible for the oversight of risks from cybersecurity threats and the processes by which the board or committee is informed about such risks. (2) Management's role in assessing and managing your material risks from cybersecurity threats, including: <ul style="list-style-type: none"> ○ whether and which management positions or committees are responsible for assessing and managing such risks, and the relevant expertise of such persons in the detail necessary to fully describe the nature of the expertise (e.g., prior work experience in cybersecurity, any relevant degrees or certifications, and any knowledge, skills, or other background in cybersecurity); ○ the processes by which such persons or committees are informed about and monitor the prevention, detection, mitigation, and remediation of cybersecurity incidents; and ○ whether such persons or committees report information about such risks to the board of directors or a committee or subcommittee of the board of directors. • Tag the disclosure in XBRL.
Item 17. Financial Statements	<ul style="list-style-type: none"> • Statement of cash flows – Consider whether you should report using the direct method or supplement your indirect method of reporting the statement of cash flows, as stated in the Chief Accountant's statement.
Exhibits	<ul style="list-style-type: none"> • Clawback policies – You must file your clawback policies as exhibits to Form 20-F. • [Only if you have a fiscal year beginning on or after April 1, 2023] Insider trading policies – If you have adopted insider trading policies and procedures, file them as exhibits.
Other Disclosure	<ul style="list-style-type: none"> • Explanation of separate sustainability report – To the extent you provide disclosure on climate change, sustainability or other ESG matters separately from your annual report on Form 20-F, you should be prepared to explain to the SEC why these disclosures have not also been made in your annual report on Form 20-F.

Contacts

Yaroslav Alekseyev
Partner
Tel: +44 20 7456 2092
yaro.alekseyev@linklaters.com

Cheri De Luca
Counsel
Tel: +33 156 435 735
cheri.de_luca@linklaters.com

Jason Manketo
Partner
Tel: +44 20 7456 4654
jason.manketo@linklaters.com

Alexander Parkhouse
Counsel
Tel: +44 20 7456 3879
alexander.parkhouse@linklaters.com

Igor Rogovoy
Senior Associate
Tel: +44 20 7456 3949
igor.rogovoy@linklaters.com

Cole Smith
Counsel
Tel: +44 20 7456 5425
cole.smith@linklaters.com

Mike Bienenfeld
Partner
Tel: +44 20 7456 3660
mike.bienenfeld@linklaters.com

Mas Harntha
Senior Associate
Tel: +44 20 7456 5228
mas.harntha@linklaters.com

Emilio Minvielle
Counsel
Tel: +1 202 654 9212
emilio.minvielle@linklaters.com

Pierre-Emmanuel Perais
Partner
Tel: +1 212 903 9046
pierre-emmanuel.perais@linklaters.com

Luis Roth
Partner
Tel: +33 156 435 842
luis.roth@linklaters.com

Conrado Tenaglia
Partner
Tel: +1 212 903 9010
conrado.tenaglia@linklaters.com

Marco Carbonare
Partner
Tel: +49 697 100 3599
marco.carbonare@linklaters.com

Lipton Li
Partner
Tel: +852 290 15013
lipton.li@linklaters.com

Burc Ozcelik
Senior Associate
Tel: +1 212 903 9160
burc.ozcelik@linklaters.com

Matt Poulter
Partner
Tel: +55 11 3074 9525
matthew.poulter@linklaters.com

Catherine Russ
Counsel
Tel: +1 212 903 9426
catherine.russ@linklaters.com

Jeffrey Cohen
Partner
Tel: +1 212 903 9014
jeffrey.cohen@linklaters.com

Xiaoxi Lin
Partner
Tel: +852 290 15368
xiaoxi.lin@linklaters.com

Clara Pang
Partner
Tel: +1 212 903 9436
clara.pang@linklaters.com

Cecil Quillen
Partner
Tel: +44 20 7456 4347
cecil.quillen@linklaters.com

Pam Shores
Partner
Tel: +44 20 7456 4650
pam.shores@linklaters.com