Preparing Your 2014 Form 20-F

December 12, 2014

This memorandum highlights some considerations for the preparation of your 2014 annual report on Form 20-F. As in previous years, we discuss both disclosure developments as well as continued areas of focus for the U.S. Securities and Exchange Commission (**SEC**). In addition, we highlight certain U.S.-related regulatory actions and other developments of interest to foreign private issuers (**FPIs**).

Disclosure Developments for 2014 Form 20-F

While there has been no change in the actual Form 20-F requirements this year, below are selected disclosure developments worth highlighting for FPIs.

Conflict Minerals Rules

In our **Preparing Your 2013 Form 20-F** memorandum, we discussed SEC rules which implemented the Dodd-Frank Wall Street Reform and Consumer Protection Act (the **Dodd-Frank Act**) reporting requirements relating to "conflict minerals"—cassiterite, columbite-tantalite, gold, wolframite and other minerals determined by the U.S. government to be financing conflict in the Democratic Republic of the Congo or adjoining countries. Section 1502 of the Dodd-Frank Act and Rule 13p-1 under the Securities Exchange Act of 1934 (the **Exchange Act**) require all reporting companies, including FPIs, to make specialized disclosure and conduct related due diligence about conflict minerals (to the extent they use conflict minerals in their products). No disclosure is required in the Form 20-F, but the conflict minerals disclosures are required to be contained in a **Form SD** to be filed by May 31 for the prior calendar year.

While the SEC's conflict mineral rules are now largely in effect, a portion of the rules is still being challenged under the First Amendment to the U.S. Constitution. On April 14, 2014, while upholding the majority of the conflict minerals rules, the **United States Court of Appeals for the District of Columbia Circuit** struck down a portion of the rules that required companies to publicly state that certain products are "not found to be DRC conflict free" as a violation of the First Amendment (see our client newsflash: **SEC (Mostly) Forges Ahead on Conflicts Minerals**). Subsequently, the SEC and Amnesty International filed a petition with the Court of Appeals for rehearing of the case (see our blog posts: **Amnesty International Seeks Rehearing of Conflicts Mineral Case Based on Recent First Amendment Ruling** and **Davis Polk Reviews the First Wave of Conflict Mineral Filings and a Similar First Amendment Case Gets Decided**). On November 18, 2014, despite opposition from corporate representatives (see our blog post: **Corporate Representatives Argue Against Petition to Rehear Conflict Minerals Case**), the Court of Appeals granted the petition and the case will be reconsidered (see our blog post: **Panel Agrees to Rehear Conflict Minerals Case**). All FPIs required to make their initial Form SD filings would have already done so, and the rehearing of the case only relates to the requirement for the statement identifying products as "not found to be DRC conflict free," as further explained below.

The SEC issued a **partial stay** of the disclosure rule on May 2, 2014, stating that companies are not required to declare whether their products contain conflict minerals. Companies, including FPIs, however, still need to meet other conflict minerals disclosure requirements. According to an April 29, 2014 **statement** released by the Division of Corporation Finance, companies that do not need to file a Conflict Minerals Report with their Form SD should still disclose their reasonable country of origin inquiry and briefly describe the inquiry they undertook. For companies that are required to file a Conflict Minerals Report, the report should include a disclosure of the due diligence that the company undertook, but would not have to identify products as "DRC conflict undeterminable" or "not found to be 'DRC conflict free,'" though they are still required to disclose the facilities used to produce the conflict minerals, the country of origin of the minerals and the efforts to determine the mine or location of origin (see our client newsflash: **Conflict Minerals Update: SEC Formally Stands by Staff Guidance**).

In April 2014, the SEC also issued new **FAQs** on the rules, which included clarifications regarding the independent private sector audit requirement. For more information, see our client memoranda: **Implementing the SEC's Final Conflict Mineral Rules: Guidelines and Commonly Asked Questions**, updated as of April 17, 2014, for an overview of the rules and a template Form SD, and our client memorandum: **A Review of the First Wave of Conflict Mineral Filings**.

Resource Extraction Rule

As discussed in our **Preparing Your 2013 Form 20-F** memorandum, the SEC adopted a rule in 2012 implementing the Dodd-Frank Act's reporting requirements relating to resource extraction issuers. For more information, see Davis Polk's client newsflash: **SEC Adopts Final Rules Implementing Dodd-Frank Disclosure Requirements for Resource Extraction Issuers**. Under the rule, an FPI that (1) files annual reports with the SEC and (2) engages in the commercial development of oil, natural gas or other minerals, is required to disclose the type and total amount of payments made by the company, its subsidiaries or entities under its control to a foreign government or the U.S. federal government for each "project" and to each government in order to further the commercial development of oil, natural gas or minerals. The rule was vacated by the U.S. District Court for the District of Columbia in July 2013 in response to a lawsuit brought by certain trade groups. The SEC did not appeal the decision and, in May 2014, indicated in its **agenda** that it planned to issue a new proposal by March 2015. The SEC is under pressure from various parties, including non-profit organizations and the oil and gas industry, to address the issue promptly. Other jurisdictions—including the United Kingdom, Norway, Canada and the European Union—are making progress with their own resource extraction mandatory disclosure requirements, and there is concern that a delay by the SEC in announcing new rules puts companies at risk of having to comply with disparate reporting requirements (see our blog post discussing **Exxon Mobil and Royal Dutch Shell's letter** to the SEC). In September 2014, Oxfam America Inc. **filed a lawsuit** to compel the SEC to issue a resource extraction rule, alleging that the SEC's failure to do so directly violates Congress' deadline. Oxfam had previously sued the SEC for undue delay in issuing a rule in 2012 and the SEC adopted a final rule a few months later. It is presently unclear when new rules will be issued. As a result, there is no current obligation to provide such disclosure beyond an FPI's home country reporting requirements.

SEC Disclosure Focus Areas

As in previous years, companies should keep the following SEC focus areas in mind when preparing their 2014 Form 20-F:

Financial Reporting and Audit Task Force; Internal Controls Over Financial Reporting

As discussed in our **Preparing Your 2013 Form 20-F** memorandum, in July 2013, one of three new enforcement initiatives **announced** by the SEC was the creation of the Financial Reporting and Audit Task Force (the **Task Force**). The Task Force has 12 members—including lawyers and accountants—dedicated to detecting fraudulent or improper financial reporting and complements the SEC's ongoing enforcement efforts relating to accounting and disclosure fraud. In a February 2014 speech, Margaret McGuire, the Vice Chair of the Task Force, noted that key areas of focus for the Task Force will include Management's Discussion and Analysis (**MD&A**), revenue recognition, off-balance sheet transactions and instances where there are multiple revisions to financial statements over several reporting periods. The Task Force has launched various initiatives which include analyzing performance trends by industry, monitoring high-risk companies to identify potential misconduct, reviewing class action and other filings related to alleged fraudulent financial reporting, conducting street sweeps in particular industries and accounting areas and using academic work on accounting and auditing fraud. It is also utilizing new technologies such as the Accounting Quality Model, a computerized quantitative analytics model which identifies anomalies in a company's financial statements and generates results that will be analyzed by the SEC Staff to determine if further investigation is warranted. While the Task Force will not conduct full investigations, it will serve as an incubator for financial reporting actions that will be investigated by the SEC's Enforcement Division. In prepared congressional testimony before the U.S. House Financial Services Committee in April 2014, SEC Chair Mary Jo White said that the Task Force had launched a series of new investigations focused on both "traditional and emerging financial fraud" but did not elaborate on what the SEC has been finding, or what defines "emerging financial fraud." The Task Force also has a close working relationship with and is supported by the Public Company Accounting Oversight Board (**PCAOB**), which has a disciplinary responsibility interest with respect to auditors.

In addition, the SEC remains focused on issuers' internal controls over financial reporting. In July 2014, the SEC **charged** the CEO and former CFO of a Florida-based equipment company for "misrepresenting to auditors and the investing public the state of its internal controls over financial reporting." What makes the case unique is that it did not arise from a restatement of prior financials, but rather from alleged unreported deficiencies in the company's internal controls over its accounting functions. FPIs that identify internal control problems, large or small, should consider the need to report such issues to their auditors and, after evaluating the potential risks posed by the issue, the investing public.

Separately, the SEC has also ramped up its focus on gatekeepers such as external auditors and audit committee members. In March 2014, the SEC **charged** the former audit committee chairman of AgFeed Industries for his alleged role in failing to properly investigate an elaborate accounting fraud orchestrated in China. In a recent **speech**, SEC Chair Mary Jo White reiterated the SEC's focus on enforcement actions against individuals and indicated that one new approach will be to start using Section 20(b) of the Exchange Act, which imposes primary liability on a person who does anything "by means of any other person" that would be unlawful for that person to do on his or her own. This provision could be used to reach those who have participated in disseminating false or misleading information, but who were not themselves the "makers" of the statement. Commissioner Kara Stein echoed the theme of focusing on individuals in her recent **speech**, where one of her recommendations was to consider new forms of attestations, including one for lawyers on the accuracy of issuer disclosures. See our blog post: **SEC Commissioners Emphasize Focus on Individuals, Including Lawyers, in Enforcement Cases, and Brings an Auditor Independence Action Against an Audit Partner**.

Management's Discussion & Analysis

As discussed in our **Preparing Your 2013 Form 20-F** memorandum, the SEC continues to focus on MD&A disclosure. FPIs should re-familiarize themselves with our previous advice as to key focus areas, including disclosure regarding liquidity and capital resources, material loss contingencies, material known trends and uncertainties and short-term borrowings. The SEC has also advised that it will look for inconsistencies between the MD&A, litigation, risk factors and financial statements footnotes, as well as with less formal communications (*e.g.*, company press releases, blogs and social media) that are not filed with the SEC.

Cybersecurity

In our **Preparing Your 2013 Form 20-F** memorandum, we discussed the SEC's 2011 **disclosure guidance** on cybersecurity risks and, in particular, on the need to provide more specific risk factor disclosure as to material cyber attacks that have occurred or specific threats to security in the future, without providing a roadmap on informational technology vulnerability. Since 2011, there has been a trend towards enhanced risk factor disclosure relating to risks associated with cybersecurity attacks, risks associated with loss of data and reputational risks. At a June 2014 conference, SEC Commissioner Luis Aguilar urged public companies to go beyond the impact to their bottom line in making data breach disclosures, and pushed boards of directors to play a more active role in assessing cyber threats (see our blog post: **Commissioner Aguilar Urges Boards to Ensure Oversight of Cybersecurity Risks**). This follows the SEC's **Cybersecurity Roundtable** in March 2014 at which the panel discussed the cybersecurity landscape and issues faced by exchanges, other key market systems, broker-dealers, investment advisers, transfer agents and public companies and the appropriate disclosure in public filings (see our blog post: **SEC Cybersecurity Roundtable Panel Debate Public Disclosure and Board Roles**). In April 2014, the SEC also issued a **Risk Alert**, notifying firms that it will conduct cybersecurity examinations of more than 50 registered broker-dealers and investment advisers, and provided a sample 26-point questionnaire that the SEC may use in conducting cybersecurity preparedness examinations. FPIs should apply standard materiality rules when considering disclosures relating to cybersecurity risks.

Accounting and Financial Reporting

PCAOB New Auditing Standard for Related Party and Other Transactions

The SEC approved the new PCAOB **Auditing Standard No. 18**, which standard will become effective for financial years beginning on or after December 15, 2014. The new standard covers three key areas of increased risks for material misstatements: related party transactions, significant unusual transactions and financial relationships and transactions with executive officers. The PCAOB indicated that its inspection and enforcement activities found continuing weakness in auditors' scrutiny of these areas, and the new auditing standard requires additional risk-based procedures that are designed to assist the auditor in identifying red flags. The changes also affect auditors' communications with audit committees. FPIs should be aware that the auditing standard may result in additional risk-based procedures designed to assist auditors in identifying red flags that may cause material misstatements and opens up possible new lines of inquiries from auditors to boards of directors. For more information, see our blog posts: **PCAOB Adopts New Auditing Standard for Related Party and Other Transactions** and **Why Your Auditors May Be Asking Your Board About Related Party Transactions and Executive Compensation**.

Continued XBRL Relief for IFRS Filers

Consistent with prior years, until a taxonomy is specified by the SEC, FPIs that prepare financial statements in accordance with International Financial Reporting Standards (**IFRS**) as issued by the International Accounting Standards Board (**IASB**) will not be required to provide financial information in an interactive data format using eXtensible Business Reporting Language (**XBRL**) as the SEC has not yet specified the XBRL taxonomy (see our client memorandum: **SEC Confirms IFRS Filers Will Not Be Required to Provide Interactive Data Until SEC Specifies Taxonomy**). This was **confirmed** by the SEC in September 2013, when it indicated that it is continuing to review taxonomies for use by FPIs. FPIs who are not providing XBRL information should not check the box on the cover page of Form 20-F relating to compliance with the interactive data file submission requirements.

Non-GAAP Financial Measures

In our **Preparing Your 2013 Form 20-F** memorandum, we discussed the SEC's continued focus on the use and disclosure of non-GAAP financial measures in SEC filings, company press releases and other public disclosures. Speaking at a December 2013 American Institute of Certified Public Accountants conference, the chief of the Financial Reporting and Audit Task Force announced that the Task Force is scrutinizing companies' use of measurements that do not comply with GAAP. Particularly, the Task Force is focused on examining companies' uses of non-GAAP indicators that conflate commonly used performance-indicating terms with "nonstandard measures" to enhance their standing and claim profits rather than losses in a way that could potentially mislead investors. More recently, in May 2014, the SEC's deputy director of the Division of Corporation Finance, Shelley Parratt, stated in a speech that companies cannot assume that operating metrics are understood by the SEC and the investor community and must explain why a metric represents a useful device for explaining some aspect of corporate performance. If possible, companies should connect such metrics to traditional factors expressing financial performance.

Other Matters That May Be of Interest to FPIs

Foreign Corrupt Practices Act

Foreign Corrupt Practices Act (**FCPA**) enforcement continues to be a high priority for the Department of Justice (**DOJ**) and the SEC. As discussed in our **Preparing Your 2013 Form 20-F** memorandum, the DOJ and the SEC issued **guidance** on the criminal and civil enforcement provisions of the FCPA. The SEC remains (as the then-Co-Director of the SEC's Enforcement Division, Andrew Ceresney, stated in November 2013) "**the vigilant cop on the beat when it comes to the FCPA**." In a May 2014 **speech**, Mr. Ceresney, now Director of the SEC's Enforcement Division, noted that the SEC's FCPA unit in the past year had "teamed with the DOJ to bring significant cases against issuers and individuals," including reaching global settlements with **Alcoa** for over $380 million, with **Weatherford International** for over $250 million and with **Hewlett-Packard** for over $108 million. Most recently, in October 2014, the SEC charged the **Layne Christensen Company** with making improper payments to foreign officials in several African countries in order to obtain beneficial treatment and reduce the company's tax liability. The SEC recently reiterated—in an October 2014 speech by Kara Brockmeyer, chief of the SEC's FCPA unit, at the ABA's National Institute on International Regulation and Compliance in Washington, D.C.—that it will also continue to focus on bringing FCPA actions against individuals associated with bribery schemes.

The DOJ has also remained active in FCPA enforcement. In April 2014, the DOJ brought criminal charges against certain broker-dealer executives in connection with alleged bribes paid to a representative of the Venezuelan Economic and Social Development Bank. In a parallel action, the SEC filed charges against the same individuals, seeking civil penalties and disgorgement of ill-gotten gains. See our client memorandum: **DOJ and SEC Announce Filing of FCPA Enforcement Action Against Broker-Dealer Executives**. These parallel actions follow a March 2014 DOJ action against a Tokyo-based trading company for FCPA violations in which the company entered a guilty plea and paid a criminal fine of $88 million. In that case, there was no parallel enforcement action brought by the SEC, as the company was not an "issuer" within the meaning of the FCPA. See our client memorandum: **Marubeni Corp. Pleads Guilty to FCPA Bribery Charges**.

For more information relating to the FCPA, see our webcast: **FCPA: 2014 Mid-Year Review of Trends and Global Enforcement Actions**.

Disclosure Effectiveness

In our **Preparing Your 2013 Form 20-F** memorandum, we discussed the SEC's **report** regarding its review of the disclosure requirements in Regulation S-K, as required by Section 108 of the JOBS Act. In April 2014, Keith Higgins, Director of the Division of Corporation Finance at the SEC, laid out the SEC Staff's approach to the reform initiative at an **ABA meeting**. He indicated that the Division of Corporation Finance is leading the effort to develop specific recommendations for updating the disclosure requirements. The disclosure review project will start by focusing on the business and financial disclosure requirements that flow into periodic and current reports as well as industry guides and form-specific disclosure requirements. The Division will also consider disclosure requirements for certain categories of issuers such as smaller reporting companies. Later phases of the project will consider the proxy statement. The review will encompass Regulation S-K, Regulation S-X as well as how and when information is disclosed. In the speech, Director Higgins mentioned some of the things that the Division will consider, which could significantly alter the disclosure game. For example, it will consider whether to recommend a "company disclosure" or "core disclosure" system (in which certain aspects of company disclosure that do not change regularly would be set out in a core document that is not updated frequently) and whether disclosure requirements may benefit from a broader principles-based approach, similar to the current rules for MD&A. Director Higgins also gave three examples of things that can be done now to improve the focus and navigability of disclosure documents: reduce repetition, focus disclosure more specifically to the issuer and eliminate outdated information.

In a more recent October 2014 **speech**, Director Higgins noted that companies have made significant changes to their proxy statements and encouraged companies to make "similar strides" with their periodic reports, such as experimenting with layout, reducing duplication and eliminating stale information. He emphasized that the objective was not to reduce the volume of disclosure, and also noted the need to modernize the current set of industry guides and reduce redundancy in company filings. See our blog post: **SEC Corp Fin Director Discusses Disclosure Effectiveness Ideas**.

While it is clear that the reform initiative is a key agenda item for the SEC based on Chair White's **comments** earlier this year, it is still too early to assess the impact the reform will have on how companies prepare disclosure documents going forward. However, if certain of the above principles are adopted, it may also impact disclosures included in an FPI's annual report on Form 20-F.

Committee of Sponsoring Organizations of the Treadway Commission

As discussed in our **Preparing Your 2013 Form 20-F** memorandum, in May 2013, the Committee of Sponsoring Organizations of the Treadway Commission (**COSO**) released its updated **Internal Control—Integrated Framework** (the **Framework**) and related illustrative documents. The Framework was first published in 1992 and is the leading guidance for designing, implementing and conducting internal control and assessing its effectiveness. The 2013 Framework was updated to account for the many changes in business and operating environments and clarify the requirements for determining what constitutes effective internal control. The 1992 Framework is expected to be transitioned out by the end of 2014 and FPIs should now use the updated 2013 Framework. The SEC has publicly stated that they are monitoring the changes to the new model since SEC rules require the use of a "suitable, recognized control framework" in companies' internal controls over financial reporting. It has been suggested that companies should expect questions about the Framework at annual meetings and companies are well-advised to prepare for questions about the Framework. For more information, see our blog post: **Will Shareholders Ask About the New COSO Framework at Annual Meetings?**

Nasdaq Revised Listing Fees Structure

Nasdaq announced **changes** to its fee scheme effective January 1, 2015, which scheme will be applicable to FPIs as well. The most significant change is the adoption of an "all-inclusive annual fee" and the elimination of quarterly listing fees. Under the new all-inclusive fee scheme, an issuer will be required to pay increased fees in 2015 ranging from 0% to 40% depending on how many shares an issuer has outstanding. The new annual fee will include fees related to listing additional shares, record-keeping changes and substitution listing events. The all-inclusive fee scheme is optional for issuers until January 1, 2018, at which point it becomes mandatory. Issuers can opt in to the new all-inclusive fee scheme on Nasdaq's **website**.

In the meantime, issuers, including FPIs, may continue to use the existing fee structure—*i.e.*, pay an annual fee as well as quarterly fees to list additional shares. As discussed in our **Preparing Your 2013 Form 20-F** memorandum, under the existing scheme, FPIs are subject to listing fees of $7,500 per year for any amount of shares in excess of 49,999 shares issued during a year and do not pay any fees for issuances of up to 49,999 shares per year. Non-U.S. companies that are not FPIs are subject to the same fees as domestic companies, *i.e.*, an amount of $5,000 or $0.01 per share, whichever is higher, up to a maximum fee of $65,000 per year, for any amount of shares in excess of 49,999 shares issued during a quarter. There are no fees for issuances of up to 49,999 shares per quarter.

NYSE and Nasdaq Compensation Committee Listing Standard Certification

As discussed in our **Preparing Your 2013 Form 20-F** memorandum, FPIs that follow their home country practice are exempt from various corporate governance requirements applicable to U.S. domestic issuers, including the compensation committee independence and compensation adviser requirements, provided that they disclose the significant ways in which their corporate governance practices differ from those followed by U.S. domestic companies in their Form 20-F. The NYSE and Nasdaq recently amended their listing rules governing the independence of compensation committee members to implement Rule 10C-1 under the Exchange Act (see our client memorandum: **Preparing Your 2012 Form 20-F**). In February 2014, the two exchanges posted on their websites new forms that U.S.-listed companies must use to certify their compliance with the revised listing standards. As mentioned, FPIs will not be required to complete these forms or comply with the revised standards, provided that the required disclosures are made in their Form 20-F.

NYSE Interim Written Affirmation

FPIs that are listed on the NYSE are reminded of the need to submit NYSE interim written affirmations promptly (within five business days) after the occurrence of a triggering event, which includes, among other events, the appointment and departure of directors and changes in the membership of board committees. In addition, FPIs are reminded that the NYSE annual written affirmation is required within 30 days of the filing of their Form 20-F with the SEC.

Filing Fee Decreased

As of October 1, 2014, the **filing fee** to register securities with the SEC decreased to $116.20 per million dollars from $128.80 per million dollars. The SEC makes annual adjustments to the rates for fees and the annual rate changes take effect on the first day of each U.S. government fiscal year, *i.e.*, October 1.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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