Preparing Your 2015 Form 20-F

December 17, 2015

This memorandum highlights some considerations for the preparation of your 2015 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 2014 Form 20-F** memorandum, we discussed SEC rules that 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 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.

As discussed in our **Preparing Your 2014 Form 20-F** memorandum, in April 2014, the D.C. Circuit Court of Appeals found that a key aspect of the rule violates constitutional free-speech guarantees and the finding was **upheld** on August 18, 2015. A request for rehearing was denied and some observers expect the SEC will seek Supreme Court review. If the SEC does not seek such review, or if its petition is denied, the case will be returned to the District Court for further proceedings. It is unlikely that the litigation will be resolved soon and almost certainly not before the May 31, 2016 deadline for issuers to file their 2015 Form SDs.

Therefore, the **current conflict minerals rule**, as modified by the SEC's **April 2014 guidance**, remains in effect. The guidance provides that:

- No company is required to describe its products as ""DRC conflict free," having "not been found to be 'DRC conflict free'" or "DRC conflict undeterminable"; and
- An independent private sector audit will not be required unless a company voluntarily elects to describe a product as "DRC conflict free" in its Conflict Minerals Report.

Companies that use conflict minerals in their products are still, however, required to conduct supply chain inquiries and file a Form SD and a Conflict Minerals Report that contains the other disclosures contemplated by the rule and thus should continue with their compliance efforts in accordance with the current conflict minerals rule, as modified by the SEC's April 2014 guidance.

In early November (just days before the court's denial of the SEC's petition for rehearing), Keith Higgins, Director of the SEC's Division of Corporation Finance, publicly affirmed that the April 2014 guidance would continue to apply during the pendency of the litigation and should be followed for conflict minerals reports to be filed in 2016.

Resource Extraction Rule

As discussed in our **Preparing Your 2014 Form 20-F** memorandum, the SEC adopted a rule in 2012 implementing the Dodd-Frank Act's reporting requirements relating to resource extraction issuers, which was vacated by the U.S. District Court for the District of Columbia in 2013. In 2014, Oxfam America sued the SEC, seeking to force the SEC to propose a resource extraction rule by August 2015 and issue a final rule by November 1, 2015. In September 2015, the U.S. District Court for the District of Massachusetts determined that the SEC must file with the Court an expedited schedule for promulgating a final rule on resource extraction disclosure within 30 days. In October 2015, the SEC notified the court that it intends to hold a vote on adopting a final resource extraction rule on or before June 27, 2016. On December 11, 2015, the SEC voted to propose a new rule relating to resource extraction issuers, which would require a U.S. or foreign company that (1) files an annual report with the SEC and (2) engages in the commercial development of oil, natural gas or minerals, 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 disclose each government that received the payments, in order to further the commercial development of oil, natural gas or minerals. The disclosure would be made at the project level similar to the approach adopted in the European Union and Canada, and would be filed publicly with the SEC annually on Form SD. Public comments on the proposed rule are due by January 25, 2016. For additional information please see the Davis Polk blog posts, found **here** and **here**. As final resource extraction rules are not yet in effect, there is no current obligation to provide such disclosure in the Form 20-F, although FPIs may have home country reporting requirements that will result in disclosures in their Form 20-Fs.

Iran Sanctions and State Sponsors of Terrorism

On July 14, 2015, the United States and the other permanent members of the UN Security Council, plus Germany, the High Representative of the European Union for Foreign Affairs and Security Policy, and Iran agreed on the final text of a Joint Comprehensive Plan of Action (**JCPOA**) to provide Iran with phased sanctions relief in exchange for Iranian implementation of certain nuclear-related measures. JCPOA has not yet been implemented, although certain temporary sanctions relief under the prior Joint Plan of Action, initially agreed to in November 2013 and subsequently extended, is currently in effect. Moreover, issuers' disclosure obligations pursuant to Section 219 of the Iran Threat Reduction and Syria Human Rights Act of 2012, which we discussed in our **Preparing Your 2012 Form 20-F** and **Preparing your 2013 Form 20-F** memoranda, are not affected by the JCPOA. These disclosure obligations require that public companies include explanatory disclosure and make an IRANNOTICE filing on EDGAR if they or their affiliates knowingly engaged in certain Iran-related activities or transactions with persons designated for their support of terrorism or weapons of mass destruction proliferation during the period covered by the annual or quarterly report.

Additionally, the SEC has continued to focus on issuers' contacts with other countries besides Iran that have been identified as State Sponsors of Terrorism. In May 2015, the Obama administration and the U.S. State Department rescinded Cuba's designation as a State Sponsor of Terrorism. FPIs should consider relevant risk factor disclosure as well as other disclosure denoting the nature and materiality of contacts with countries identified as State Sponsors of Terrorism (currently Iran, Sudan and Syria).

SEC Disclosure Focus Areas

As in previous years, companies should keep the following SEC focus areas in mind when preparing their 2015 Form 20-F:

Audit Committees

On July 1, 2015 the SEC issued a **concept release,** a forerunner to a potential rulemaking proposal, seeking public comment on whether to expand disclosure requirements regarding audit committees. The

primary focus of the concept release is on the audit committee's responsibilities for oversight of the independent auditor. The public comment period for this release ended on September 8, 2015 and the SEC has not yet taken any subsequent actions. Davis Polk's comment letter is available **here**. The stated purpose of the concept release is to help the SEC determine whether additional disclosure about the audit committee would be useful to investors as they evaluate the audit committee's performance in connection with voting and investment decisions. For further information, please see our **Client Memorandum**.

SEC Request for Comments on Disclosure Effectiveness in Regulation S-X Requirements

In September 2015, the SEC **published its first request** for public comments regarding the financial disclosure requirements in Regulation S-X for certain entities other than a registrant. Portions of Regulation S-X are incorporated in the disclosure requirements of Form 20-F and a change to Regulation S-X disclosure could result in a change to the disclosure required under 20-F. The subset of the Regulation S-X disclosure requirements being evaluated for possible amendment include: Rule 3-05 (Financial Statements of Businesses Acquired or to be Acquired); Rule 3-09 (Separate Financial Statements of Subsidiaries Not Consolidated and 50 Percent or Less Owned); Rule 3-10 (Financial Statements of Guarantors and Issuers of Guaranteed Securities Registered or Being Registered); and Rule 3-16 (Financial Statements of Affiliates Whose Securities Collateralize an Issue Registered or Being Registered).

The public comment period for this release ended on November 30, 2015. Davis Polk's comment letter is available **here**.

Dodd-Frank Clawback Rule

On July 1, 2015, the SEC proposed a **rule** implementing Section 954 of the Dodd-Frank Act, which requires listed companies to implement clawback policies to recover incentive-based compensation received by current or former executive officers in the event of certain financial restatements. Issuers with securities listed on a national securities exchange, including FPIs, will be required to disclose their recovery policy as an exhibit to their Form 20-F once the listing standards are effective following publication of the SEC's final rules. It is not anticipated that this requirement will apply to 2015 Form 20-F filings. For more information, please see our **Client Memorandum**.

Cybersecurity

In our **Preparing Your 2014 Form 20-F** memorandum, we discussed the trend toward enhanced risk factor disclosure relating to risks associated with cybersecurity attacks, risks associated with loss of data and reputational risks. On October 14, 2015, SEC Commissioner Luis Aguilar delivered remarks describing cybersecurity as a particularly crucial problem and advised boards to be aware of the increased regulatory focus on cybersecurity oversight. He said he was glad to see boards getting increasingly serious about mitigating risk in this area, noting that "the frequency of cyberattacks—and the likelihood of more—has only served to ratchet up the pressure on company boards to effectively implement enterprise risk oversight. Indeed, shareholders have sued boards of directors for failing to guard against cyberattacks, alleging breaches of fiduciary duties and oversight failures, among other things." He cautioned, however, that there is no "one size fits all" approach to board oversight of risk management.

The NYSE, in collaboration with cybersecurity company Palo Alto Networks, has published a cybersecurity guide for public companies that offers advice and practice tips for directors and officers on how to tackle cybersecurity issues. "**Navigating the Digital Age: The Definitive Cybersecurity Guide for Directors and Officers**" consists of contributions from a variety of sources including CEOs, academics, practitioners, consultants and former government officials. The guide also features insights from organizations such as the National Association of Corporate Directors, Institutional Shareholder

Services and the World Economic Forum. FPIs should continue to focus on enhancing their cybersecurity risk factor disclosure in their 2015 Form 20-Fs.

Accounting and Financial Reporting

IASB Published Proposed Guidance on Materiality

The International Accounting Standards Board has published an exposure draft of a proposed International Financial Reporting Standards Practice Statement, **Application of Materiality to Financial Statements**. The purpose of the practice statement is to explain and illustrate the concept of materiality and help financial statement preparers apply this concept. It is part of the IASB's wider initiative to improve disclosures. Comments on the practice statement are due by February 26, 2016.

The IASB **press release** notes that the draft guidance has been developed in response to concerns that management is often uncertain about how to apply the concept of materiality and therefore uses the IFRS disclosure requirements as a checklist. This can result in excessive disclosure of immaterial information that can obscure useful information and also make financial statements cluttered and less understandable. It can also lead to useful information being left out.

Topics covered in the draft practice statement include characteristics of materiality; presentation and disclosure in the financial statements; omissions and misstatements; and recognition and measurement. For more information, see a high-level summary "**snapshot**" of the draft guidance.

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. This was **confirmed** by the SEC in October 2015, when it indicated that it is continuing to review taxonomies for use by FPIs. FPIs that 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.

Other Matters That May Be of Interest to FPIs

NYSE

NYSE MKT Annual CEO Certification

As discussed in prior memoranda, FPIs that follow their home country practice are exempt from various corporate governance requirements applicable to U.S. domestic issuers, 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. In January 2015, the NYSE MKT **amended its Company Guide** to require chief executive officers of listed companies to annually certify that they are not aware of any violations by their companies of NYSE MKT corporate governance listing standards. FPIs will not be required to make this certification, provided that the required disclosures are made in their Form 20-F.

Guidance on Changes to Earnings Release Dates

The NYSE issued **guidance** reminding listed companies of the importance of making a prior public announcement of the scheduling of their quarterly earnings release or any change in that schedule and of avoiding selective disclosure of such information prior to its broad dissemination. NYSE believes that providing this announcement to all market participants at the same time is important for the maintenance of a fair and orderly market.

Amendment of Rules Regarding Public Release of Material Information

As of September 28, 2015, the NYSE **amended its rules** regarding the public release of material information. Most importantly, the pre-market hours during which listed companies are required to notify the NYSE prior to disseminating material news have been extended to 7:00 am ET. The amendments also provide advisory guidance related to the release of material news after the 4:00 pm ET close of trading, permit the NYSE to halt trading in certain additional circumstances, and update the recommended methods for the public dissemination of material news. For more information, please see the **Client Memorandum**.

Nasdaq Guidance on Post-Market Close Release of Material News and Prompt Disclosure of Material Information

Nasdaq noted in an **issuer alert** that changes to a listed company's earnings release, dividend record and dividend payment dates may be material information that should be promptly disclosed publicly. In addition, companies are reminded that they must pre-notify Nasdaq MarketWatch about material information if the public release is made between 7:00 am to 8:00 pm ET. For material information released after the close of the regular market at 4:00 pm ET, Nasdaq recommends that companies wait until at least 4:01 pm ET, and preferably wait until 4:05 pm ET, so as to allow the Nasdaq closing cross to be calculated, unless there are specific circumstances where the company needs to act immediately.

Foreign Corrupt Practices Act

Foreign Corrupt Practices Act (**FCPA**) enforcement continues to be a high priority for the Department of Justice and the SEC. On November 17, 2015, Andrew Ceresney, Director of the SEC's Division of Enforcement, gave a **speech** on the SEC's FCPA program, in which he announced that, going forward, a company must self-report misconduct in order to be eligible for a deferred prosecution agreement or non-prosecution agreement. He noted that 2015 was an "especially active" year for FCPA cases, and 2016 is expected to be the same. Ceresney emphasized that the Enforcement Division is committed to aggressively pursuing violations of the FCPA by entities and individuals and noted the importance of self-reporting.

However, self-reporting alone is not enough and must be accompanied by other factors, such as a company's self-policing, remediation and cooperation efforts. Individual liability was also discussed, as the Enforcement Division considers individual liability in every case, and when it is able to recommend a case against individuals for FCPA violations, it does so. Over 20% of the SEC's FCPA cases this past year were brought against individuals. Ceresney emphasized that the SEC is committed to holding individuals accountable and said we should expect to continue to see more FCPA cases against individuals.

On an international level, Ceresney discussed the importance of effective coordination with international regulators and law enforcement and noted there has been an increase in cooperation from other governments and better access to evidence in foreign countries over the past several years. He said he expects the pace and extent of foreign agencies' cooperation in the FCPA space to grow over the coming years as the Enforcement Division continues to forge new relationships abroad and strengthen those it already has.

Ceresney closed by noting that "Bribes come in many shapes and sizes….the FCPA is properly read to cover providing valuable favors to a foreign official, as well as providing cash, tangible gifts, travel or entertainment," and gave as examples several recent successful FCPA cases where less traditional items of value were given in order to influence foreign officials, such as charitable contributions, student internships and other jobs or favors.

PCAOB Proposes New Public Form to Disclose Audit Engagement Partner and Issues Concept Release on Audit Quality Indicators

In July 2015, the PCAOB asked for public comment on whether to require audit firms to file a new form to make public the name of the engagement partner and information about other participants in the audit. This was viewed as a "middle ground approach" to balance investors' requests for the information with audit firms' concerns about increased liability risks. The PCAOB received 48 comment letters, which were largely supportive of the measure. On December 15, 2015, the PCAOB adopted new rules that require disclosure of the name of the audit engagement partner on a new PCAOB form, Auditor Reporting of Certain Audit Participants, or Form AP. Under these rules, firms would also be required to use Form AP to disclose information about other accounting firms participating in an audit, including the names of the firms and the extent of their participation. The new rules are subject to SEC approval, and would become effective for audit reports issued on or after January 31, 2017, or three months after the SEC approves the final rules, whichever date is later. For additional information, please see the **PCAOB website** and our **blog post**.

In addition, in July the PCAOB also issued a concept release seeking comment on the content and possible uses of 28 potential audit quality indicators (**AQIs**) covering three broad categories: 1) audit professionals, where proposed measures dealt with the availability, competence and focus of those performing the audit, 2) audit process, where proposed measures concerned an audit firm's tone at the top and leadership, incentives, independence, investment in infrastructure needed to support quality auditing, and monitoring and remediation activities, and 3) audit results, where proposed measures related to financial statements (such as the number and impact of restatements, and measures of financial reporting quality), internal control over financial reporting, going concern reporting, communications between auditors and audit committees, and enforcement and litigation.

The PCAOB received 47 comment letters in response to this concept release. PCAOB staff is reviewing the feedback, which has been mixed, with some commenters supporting the project but advocating the initiative should be voluntary, others in favor of mandating the use of AQIs and still others arguing that audit quality, while important, is elusive and complex, dependent on culture and character, and fundamentally unamenable to regulation. The early consensus is that although it may be too early to determine an optimal number of AQIs, 28 is too many, and thus a further narrowing of the most relevant potential AQIs is anticipated. The recently released **PCAOB 2015-2019 Strategic Plan: Improving the Quality of the Audit for the Protection and Benefit of Investors** identifies the further development of AQIs as a near-term priority for the Board. The plan also prioritizes outreach to and communication with audit committees on issues of mutual interest, such as audit quality and auditor independence, in order to assist audit committee members in their oversight of auditors.

Executive Compensation Disclosure

As part of its Dodd-Frank rulemaking responsibilities, the SEC has adopted a final **rule** requiring companies to disclose the ratio of their CEO's compensation to that of their median employee and proposed a **rule** regarding the disclosure of the relationship between executive compensation and the company's financial performance. These rules are not applicable to FPIs. For further information, please see our Client Memorandums on the adopted **pay ratio disclosure rule** and the proposed **pay versus performance rule.**

Environmental, Social and Governance (ESG) Issues in Focus by Stock Exchanges and in Investment Decisions

The World Federation of Exchanges, a global trade association of 64 stock exchanges which includes NYSE and Nasdaq, has recommended that its member exchanges voluntarily incorporate a set of 34 ESG factors into listed company disclosure standards, including energy consumption, water management, CEO pay ratio, gender diversity, human rights, child and forced labor, temporary worker rate, corruption

and anti-bribery, tax transparency, supplier code of conduct and codes of ethics. For more information, please see our **blog post**.

Filing Fee Decreased

As of October 1, 2015, the **filing fee** to register securities with the SEC decreased to $100.70 per million dollars from $116.20 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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