Preparing Your 2019 Form 20-F

November 26, 2019

This memorandum highlights some considerations for the preparation of your 2019 annual report on Form 20-F. As in previous years, we discuss both disclosure developments and continued areas of focus for the U.S. Securities and Exchange Commission (**SEC**). In addition, we highlight certain U.S.-related enforcement matters and other developments of interest to Foreign Private Issuers (**FPIs**).

Disclosure Developments for 2019 Form 20-F

There have been a few updates to the Form 20-F requirements this year, including those stemming from the SEC's mandate under the FAST Act of 2015.

Fast Act Rules

On March 20, 2019, the SEC voted to adopt rules under its FAST Act mandate intended to modernize and simplify public company disclosure, and reduce costs and burdens on public companies while continuing to provide all material information to investors. Please also see our **Client Memorandum** on this topic. The changes became effective earlier this year and will apply to the 2019 Form 20-F. Among other things, the new rules implement the following changes:

- **Provide flexibility in presenting Operating and Financial Review and Prospects under Item 5 of Form 20-F.** Under the prior SEC rules, FPIs generally needed to present three years of financial information in their Form 20-F and discuss all three years in Item 5. Under the new rules, a discussion of the earliest of the three years may be omitted if such discussion was already included in any other of the FPI's prior filings. For example, this would mean that FPIs can omit the year-over-year comparison of their second and third year back. FPIs electing not to include a discussion of the earliest year must include a statement that identifies the location of the prior filing where the omitted disclosure may be found.
- **Allow FPIs to omit confidential information from most exhibits without filing a confidential treatment request.** Under prior SEC rules, FPIs would need to file a request with the SEC seeking confidential treatment of redacted portions of any exhibit. FPIs are now allowed to redact portions of exhibits by omitting, without submitting a confidential treatment request, (i) schedules and attachments that are not material, (ii) personally identifiable information and (iii) confidential information in material contract exhibits that is both (x) not material and (y) competitively harmful to the company if publicly disclosed. Each exhibit filed for which schedules are omitted must contain a list briefly identifying the contents of any omitted schedules and FPIs must still clearly identify and mark any redacted exhibits, and remain responsible for determining if redaction is permissible. In addition, the requirement to include material contracts from the two-year period prior to the date of filing has been eliminated for all but newly reporting companies since these contracts would be available on EDGAR from prior filings. Accordingly, reporting companies would only need to list material contracts with ongoing obligations in their exhibit index. The SEC intends to review filings and assess whether redactions appear to fulfill these requirements. Upon the SEC's request, companies will have to provide supplemental materials, including unredacted paper copies and an analysis of why the redacted information is not material and would cause competitive harm if disclosed. The SEC could request the filing of an amendment if the supplemental materials do not support the redactions.

- **Update rules relating to hyperlinks for information incorporated by reference.** The new rules require hyperlinks to information that is incorporated by reference if that information is available on EDGAR.
- **Description of SEC Registered Securities.** FPIs must now provide as an exhibit a description of each class of capital stock, debt and other securities registered under the Exchange Act and outstanding as of the end of the period covered by the 20-F. The description must contain information on the type, class, rights and terms of such securities and may be incorporated by reference using an active hyperlink to a prior periodic filing containing such disclosure, so long as there has not been any change to the information since the filing date of the linked filing.

Proposed Updated Disclosure Rules for Business Description, Legal Proceedings and Risk Factors

On August 8, 2019, the SEC proposed updated **rules** for the business description, legal proceedings and risk factor disclosures that U.S. companies make in registration statements, annual reports and quarterly reports. This proposal is part of the SEC's continuing effort to modernize disclosure requirements, and follows several recent initiatives, including those summarized above under "Fast Act Rules". Comments on these proposals were due on October 22, 2019. Our **Client Memorandum** on this topic provides more detail on these proposals. The impact of the proposed changes to Form 20-F is not yet certain and subject to the outcome of the comment process. The proposed changes will not apply to the 2019 Form 20-F.

XBRL and Related Changes to Form 20-F

As discussed in our **Client Alert**, in August 2019, the **SEC published compliance and disclosure interpretations (CD&Is)** to clarify new Inline eXtensible Business Reporting Language (**XBRL**) requirements. FPIs are required to comply with the Inline XBRL requirements based on their filer status and basis of accounting. For FPIs that prepare their financial statements in accordance with IFRS, the new Inline XBRL requirements will apply for 20-Fs in respect of fiscal years ending on or after June 15, 2021. FPIs that are large accelerated filers and prepare their financial statements in accordance with U.S. GAAP must already comply with the XBRL rules.

Sanctions Disclosures

In 2018, the SEC sent comment letters to at least 42 public companies seeking more detail about disclosures related to dealings in countries that are the subject of U.S. sanctions enforced by the Treasury Department's Office of Foreign Assets Control (**OFAC**).

OFAC continues to administer and enforce comprehensive sanctions with respect to Cuba, Iran, North Korea, Syria and the Crimea region of Ukraine, as well as against targeted individuals and entities involved in narcotics trafficking, terrorism and terrorist financing, transnational crime, proliferation of weapons of mass destruction, malicious cyber activities and election interference, corruption and human rights abuses. In particular, the targeted sanctions are against individuals and entities in or related to former regimes in the Balkans, Iraq, Libya and Ukraine and current regimes in Belarus, the Democratic Republic of the Congo, Nicaragua, Russia, South Sudan, Venezuela and Zimbabwe, individuals and entities engaged in specific acts in Burundi, the Central African Republic, Darfur, Lebanon, Mali, Somalia and Yemen, and targeted entities operating in certain sectors of the Russian economy. FPIs should ensure they are compliant with U.S. law and, to the extent they are doing business in sanctioned countries (even if permissible without violating applicable U.S. law), should consider whether disclosure of such activities is appropriate.

SEC Proposes Guide 3 Update

In September 2019, the SEC published its long awaited **rule proposal** for updating Guide 3, the industry guide for banking organizations. The proposal eliminates a number of the current requirements under Guide 3 and streamlines many of those that remain, including to avoid overlapping with the disclosure requirements of U.S. GAAP and International Financial Reporting Standards (**IFRS**). Comments on the current proposal are due on December 2, 2019. As a reminder, the disclosures required by Guide 3 and the proposal are not required to be presented in the notes to the financial statements, and therefore are not required to be audited or submitted in XBRL format. Please refer to our **Client Memorandum** on this topic for a detailed comparison between the existing requirements and the changes proposed to be included in a new subpart 1400 of Regulation S-K, the replacement of Guide 3. The proposed changes to Guide 3 will not apply to the 2019 Form 20-F.

SEC Disclosure Focus Areas

SEC Guidance on Non-GAAP Financial Measures

In our **Preparing Your 2018 Form 20-F** memorandum we discussed the SEC's updated non-GAAP financial measures guidance given in its C&DIs.

Recently, the SEC has given a strong reminder of the importance of closely following its C&DI guidance. On December 26, 2018, the SEC imposed a $100,000 civil penalty on ADT Inc. and issued a **cease and desist** order against the company for its violations of Section 13(a) of the Exchange Act and Rule 13a-11 thereunder relating to equal prominence disclosure requirements concerning non-GAAP financial measures contained in Item 10(e)(1)(i)(A) of Regulation S-K.

Mining Property Disclosure Rules

The SEC adopted new rules to modernize the property disclosure requirements for mining registrants in October 2018. Mining registrants are not required to comply with the new rules codified in Subpart 1300 of Regulation S-K until their first fiscal year beginning on or after January 1, 2021. **The SEC stated that** a registrant could elect to comply early with the new mining property disclosure rules on a voluntary basis, subject to the SEC's completion of the necessary EDGAR reprogramming changes, and so long as a registrant abides by all of subpart 1300's requirements. If required to file a technical report summary, the registrant should file it as an additional exhibit under Item 601(b)(99) of Regulation S-K or Exhibit No. 15 of Form 20-F. Any maps, diagrams or other graphic material included in the technical report summary must meet EDGAR's technical specification requirements. Registrants not electing early compliance should continue to look to Guide 7 for their mining property disclosures until they are required to comply with the rules in Subpart 1300. Please also see our **Client Memorandum** for further information.

SEC Guidance on Cybersecurity Disclosure

In our **Preparing Your 2018 Form 20-F** memorandum we discussed the SEC's updated interpretive **guidance** on cybersecurity disclosure and the ways in which it assists public companies in preparing disclosures about cybersecurity risks and incidents.

Since the 2018 guidance was issued, SEC Chairman Jay Clayton has made public **statements** emphasizing the importance of cybersecurity disclosures. Director of the SEC's Division of Corporation Finance William Hinman also has discussed the need for companies to comply with the guidance and noted that, since the guidance was published, the SEC staff is seeing fewer boilerplate cybersecurity-related disclosures. The SEC staff looks at and comments on cybersecurity-related disclosures as part of its regular reviews of public company filings, including those relating to board risk oversight, the company's disclosure controls and procedures and insider trading policies. The staff also monitors news reports of cyber breaches to assist in this process.

Hot Topics to Consider When Preparing Risk Factors and Other Disclosure

Brexit

The United Kingdom's decision to withdraw from the European Union (**Brexit**), and the ongoing uncertainty with respect to the future relationship of the United Kingdom and the European Union, particularly after a possible transition period or as a result of a no-deal Brexit, has in the past three years caused many companies located or doing business in Europe to update their disclosure and discuss Brexit. A recent study conducted by the SEC found that Brexit-related disclosures in annual reports by U.S. companies increased from 18% in 2017 to 26% in 2018. Director of the SEC's Division of Corporation Finance, William Hinman, has made public **statements** confirming that the SEC will be focusing on companies' disclosure about Brexit. He asked that each company's Brexit disclosure provide tailored insights into how management views the risks posed to the business and operations and what actions it is taking to address these risks. In his speech, Hinman provided a set of disclosure topics for companies to consider, including:

- Is the business exposed to new regulatory risk given the uncertainty of which set of laws and regulations will apply and whether transition agreements will be in place?
- Are there significant supply chain risks due to the potential disruption to the U.K.'s access to free trade agreements with other nations and any resulting changes in tariffs on exports and imports? Will potential changes to customs administrations and delays materially impact a company's business, particularly if the business relies on just-in-time supply chains?
- Does the company face a material risk of losing customers, a decrease in sales or revenues or an increase in costs due to tariffs or other factors? Is demand for the company's products especially sensitive to exchange rates or changes in tariffs?
- Does the company have exposure to currency devaluation, foreign currency exchange rate risk or other market risk?
- What is the company's exposure to contractual risk in the face of Brexit? Has the company undertaken a review of its existing contracts with counterparties in the U.K. or the EU to determine whether renegotiation or termination is necessary in light of contractual obligations?
- Do Brexit-related issues affect financial statement recognition, measurement or disclosure items, such as inventory write-downs, long-lived asset impairments, collectability of receivables, assumptions underlying fair value measurements, foreign currency matters, hedge accounting or income taxes?

SEC Disclosure Guidance on Risks Related to LIBOR Transitioning

The London Interbank Offered Rate, known as LIBOR, is extensively used in the United States and globally as a "benchmark" or "reference rate" for various commercial and financial contracts, including corporate and municipal bonds and loans, floating rate mortgages, asset-backed securities, consumer loans, and interest rate swaps and other derivatives. It is expected that a number of private-sector banks currently reporting information used to set LIBOR will stop doing so after 2021 when their current reporting commitment ends, which could either cause LIBOR to stop publication immediately or cause LIBOR's regulator to determine that its quality has degraded to the degree that it is no longer representative of its underlying market. The expected discontinuation of LIBOR could have a significant impact on the financial markets and may present a material risk for certain market participants, including public companies, investment advisers, investment companies and broker-dealers. In its **Joint Staff Statement on LIBOR Transition**, the SEC staff confirmed it is actively monitoring the extent to which market participants are identifying and addressing these risks.

In this statement, the SEC's Division of Corporation Finance, emphasized that a number of existing rules or regulations may require disclosure related to the expected discontinuation of LIBOR, including rules and regulations related to disclosure of risk factors, operating and financial review, board risk oversight, and financial statements. The Division of Corporation Finance further stated that it is important to keep investors informed about the progress toward risk identification and mitigation, and the anticipated impact on the company, if material. In deciding what disclosures are relevant and appropriate, the Division of Corporation Finance encourages companies to consider the following guidance:

- The evaluation and mitigation of risks related to the expected discontinuation of LIBOR may span several reporting periods. Consider disclosing the status of company efforts to date and the significant matters yet to be addressed.
- When a company has identified a material exposure to LIBOR but does not yet know or cannot yet reasonably estimate the expected impact, consider disclosing that fact.
- Disclosures that allow investors to see this issue through the eyes of management are likely to be the most useful for investors. This may entail sharing information used by management and the board in assessing and monitoring how transitioning from LIBOR to an alternative reference rate may affect the company. This could include qualitative disclosures and, when material, quantitative disclosures, such as the notional value of contracts referencing LIBOR and extending past 2021.

Climate Change Disclosure

On March 15, 2019 at the 18th Annual Institute on Securities Regulation in Europe, William Hinman, Director of the SEC's Division of Corporation Finance, delivered a speech on *Applying a Principles-Based Approach to Disclosing Complex, Uncertain and Evolving Risks*.

He emphasized the continued interest investors and other market participants are taking in sustainability disclosure, in particular, climate-related disclosures. He noted that in addition to the SEC's 2010 **Interpretative Release** relating to climate-related disclosure, companies should ensure that their disclosure is sufficiently detailed to provide insight as to how the board plans to mitigate material risks and how its decisions in the area of risk could be material to the business and to investors.

Enforcement Matters

In Fiscal Year 2019, the **SEC's Division of Enforcement brought 526 standalone actions** in federal court or as administrative proceedings. The majority of these cases concerned investment advisory and investment company issues (36%), securities offerings (21%), and issuer financial reporting and disclosures and auditor issues (17%).

SEC Enforcement Action against Public Companies

The Division of Enforcement brought actions against public companies involving a wide range of alleged misconduct, including fraud, deficient disclosure controls, misleading risk factor disclosures and misleading presentation of non-GAAP metrics.

SEC Enforcement Action against Financial Institutions

In a series of actions, the SEC brought charges against a number of the world's largest financial institutions for engaging in improper conduct that undermined market integrity in connection with the "pre-release" of ADRs. These cases revealed widespread abuses in which ADRs were improperly provided to brokers in thousands of pre-release transactions when neither the broker nor its customers had possession of the foreign shares needed to support the newly issued ADRs. These fraudulent practices artificially inflated the total number of a foreign issuer's tradeable securities. Actions against 13 firms and

4 individuals over two fiscal years resulted in orders for more than $425 million in disgorgement and penalties.

Other Matters That May Be Of Interest To FPIs

PCAOB Rule Expanding Auditor's Report

As discussed in our **Preparing Your 2018 Form 20-F**, on October 23, 2017, the SEC **approved** a new PCAOB **audit standard** that requires the auditor's report to identify and discuss critical audit matters (**CAMs**) encountered in the audit, and on December 4, 2017, the PCAOB **published staff guidance** on implementing these changes to the auditor's report. A CAM is defined as a matter that was communicated or required to be communicated to the audit committee, and that (i) relates to accounts or disclosures that are material to the financial statements and (ii) involves especially challenging, subjective or complex auditor judgment. The new CAM disclosure requirements, applicable to audit reports filed by FPIs, apply to large accelerated filers beginning with fiscal years ending on or after June 30, 2019, and to others beginning with fiscal years ending on or after December 15, 2020.

The new audit standard also moves the auditor's opinion paragraph on fair presentation to the lead section and includes section titles to improve readability. Revisions to the content of the auditor's report include the addition of a statement that the auditor is required to be independent, the inclusion of shareholders and directors (or their equivalents, as well as any other addressee parties) as addressees and new standardized language about the role and responsibilities of the auditor.

For further information, see our Client Memoranda **PCAOB Adopts New Standard Expanding Auditors' Reports** and **SEC Approves PCAOB Rule Expanding Auditor's Report.**

Implementation of FASB Standards

The FASB has implemented new standards relating to revenue, leases and current expected credit losses. The SEC's **Office of the Chief Accountant (OCA) actively participates** in standard setting and plays a critical role in the implementation of the new FASB standards.

- *Revenue Recognition*. In its first year of reviewing how a wide range of registrants applied the new revenue standard and related cost guidance, the SEC staff focused on areas of judgment. The application of the new revenue recognition policy is one of the most frequent topics in SEC staff comment letters.
- *Leases*. Many public registrants adopted the new leases standard as of January 1, 2019. The leases standard will improve financial reporting about leasing transactions by generally requiring lessees to recognize on the balance sheet assets and liabilities for the rights and obligations created by leases.
- *Current Expected Credit Losses*. The current expected credit losses standard will be effective in 2020 for many companies. Companies are in the process of implementing the standard and stakeholders are proactively engaged in the process.

Information Relevant to U.S. Public Securities Offerings

SEC Filing Fee Increase

Effective October 1, 2019, the fee to register securities with the SEC increased to $129.80 per million dollars. The SEC's fee rate advisory press release can be found **here**.

Davis Polk

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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