Preparing Your 2020 Form 20-F

December 10, 2020

This memorandum highlights some considerations for the preparation of your 2020 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 2020 Form 20-F

There have been a few updates to the Form 20-F requirements this year, including those stemming from the SEC's guidance on COVID-19 disclosure.

SEC Guidance on COVID-19 Disclosure

The staff of the SEC's Division of Corporation Finance issued new Disclosure Guidance Topics **No. 9** and **9A** in March and June 2020, respectively, providing the SEC's views regarding disclosure that companies should consider with respect to COVID-19 and related business and market disruptions. Please see our **Client Memorandum** covering Disclosure Guidance Topic No. 9 and our **Client Memorandum** covering Disclosure Guidance Topic No. 9A.

As a general matter, the guidance "*encourage[s] companies to provide disclosures that allow investors to evaluate the current and expected impact of COVID-19 through the eyes of management and to proactively revise and update disclosures as facts and circumstances change.*" The guidance also includes a detailed list of questions for companies to consider when preparing disclosure and which are described in detail in the above-mentioned Client Memoranda, including questions relating to the impact of COVID-19 on a company's financial condition, operations, liquidity and capital resources, assets, material impairments, business operations, and ability to continue as a going concern. The issues outlined in Disclosure Guidance Topics No. 9 and 9A are likely to be an area of focus when reviewing annual reports this season.

Relatedly, the staff of the SEC's Office of the Chief Accountant also issued a **statement** on the continued importance of "high-quality" financial reporting in light of COVID-19.

Updates to Risk Factor Disclosure

On August 26, 2020, the SEC adopted **amendments** to, among other items, Item 105 of Regulation S-K relating to risk factor disclosures. The SEC's amendments to Item 105 apply to the 2020 Form 20-F to the extent it is incorporated by reference into an FPI's SEC registration statement. Our **Client Memorandum** on this topic provides more detail on these changes. The new rules move from a prescriptive to a more tailored approach and are generally consistent with recent changes to the European Prospectus Regulation and related ESMA guidance, and are aimed at reducing boilerplate and generic risks. To that end, the new rules:

- change the standard of disclosure from the "most significant" risks to "material" risks;
- require risk factors to be organized under relevant headings; and
- where a company's risk factors disclosure exceeds 15 pages, require a summary section consisting of a series of concise bulleted or numbered statements summarizing the principal factors that make the investment or offering speculative or risky.

Guide 3 Replacement

The SEC has finalized **rules** that will replace Guide 3, the industry guide for banking organizations. The final rules eliminate a number of the requirements under Guide 3, which now appear in the financial statements, and streamline many of those that remain. The three "new" credit quality ratios in the final rules are, in practice, already included in most registrants' disclosures, and thus are not significant new requirements. Please refer to our **Client Memorandum** on this topic for a detailed comparison between the existing requirements and the changes.

The revised rules will apply to all covered registrants including FPIs but generally take account of differences between IFRS and U.S. GAAP with respect to the categories and classes of financial instruments with respect to which disclosure is required. For example, FPIs that apply IFRS will be exempt from certain disclosures with respect to nonaccrual loans and troubled debt restructurings because those classifications of assets are not presented under IFRS. IFRS filers will also be exempt from disclosure of the allowance for loan losses by category of loan because that information is already required by IFRS in note disclosure.

The rules will apply in respect of fiscal years ending on or after December 15, 2021. Registrants filing initial registration statements will not be required to apply the final rules until an initial registration statement is first filed containing financial statements for a period ending on or after December 15, 2021. Voluntary compliance with the new rules will be accepted in advance of the mandatory compliance date (provided the registrant complies with them in their entirety), and given the streamlining that this first major update of Guide 3 since 1986 represents, many registrants may choose to comply early in the 2020 Form 20-F. Guide 3 will be rescinded effective January 1, 2023. As a reminder, the disclosures required by Guide 3 and the new rules 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.

SEC Guidance on Key Performance Indicators and MD&A (OFR) Disclosure

The SEC has also issued guidance on key performance indicators (**KPIs**) and Management's Discussion and Analysis of Financial Condition and Results of Operations (**MD&A**) (referred to as the "Operating and Financial Review and Prospects" in the Form 20-F) that should be considered when preparing the Form 20-F for 2020.

Key Performance Indicators and Other Metrics

While not materially altering current disclosure requirements, the **guidance** issued by the SEC in January 2020 encourages the disclosure of key performance indicators and other metrics as a way of facilitating the SEC's goal of allowing investors to see a company "through the eyes of management." At the same time, the guidance is a reminder to companies to accurately define and disclose any metrics, which should include:

- A clear definition of the metric and how it is calculated;
- A statement indicating the reasons why the metric provides useful information to investors; and
- A statement indicating how management uses the metric in managing or monitoring the performance of the business.

We have discussed the details of the interpretative guidance further in our **Client Memorandum.**

SEC Guidance on Revised MD&A Rules

The SEC further issued three new Compliance & Disclosure Interpretations (**C&DI**) in January 2020 intended to clarify last year's rule changes that allowed companies to omit discussion of the earliest of the three years in the MD&A included in their filings.

The new **C&DIs** clarify that when a company has omitted a discussion of the earliest of the three years in a filing, the required statement identifying the location of a discussion in a prior filing would not result in

the prior discussion being incorporated by reference into the filing. The new C&DIs also make clear that where a company believes a discussion of its earliest of three years is necessary to understand its financial condition, changes in condition, and results of operations, it may not omit the discussion pursuant to the new rules. For further details, please refer to our **Client Memorandum**.

SEC Adopts Changes to MD&A Disclosure
In addition, in November 2020, the SEC adopted **amendments** to significantly streamline and enhance MD&A disclosure. The changes include, among other things:

- Elimination of the requirement to include five years of selected financial data (i.e. Item 3.A of the 20-F);
- Separately captioned section of off-balance sheet arrangements replaced with a principles-based instruction to include a discussion of material commitments in liquidity and capital resources discussion;
- Codification of previous SEC guidance on critical accounting estimates disclosure;
- Identification of material trends (instead of most significant recent trends); and
- Requirement of tabular disclosure of contractual obligations (Item 5.F of the 20-F) replaced with disclosure as part of liquidity and capital resources discussion.

Compliance with the new rules is not required for the 2020 Form 20-F but voluntary compliance will be permitted after effectiveness of the new rules (provided the registrant complies with any amended item in its entirety). Please see our **Client Memorandum** for more detail on these rule changes.

Amended Rules Relating to Financial Disclosure Requirements for Registered Debt

The SEC has historically imposed burdensome financial statement requirements on companies that issue debt that is either guaranteed by subsidiaries or secured as previously governed by Rule 3-10 or Rule 3-16 of Regulation S-X. On March 2, 2020, the SEC voted to adopt **amendments** that significantly reduce the financial disclosures required and focus on information that is material to investors including changes to Rule 3-10 and a new Rule 13-01.

The adopted amendments to Rule 3-10 and new Rule 13-01 will replace the condition that a company may omit separate financial statements of a subsidiary issuer or guarantor if the subsidiary issuer or guarantor is 100% owned by the parent company with a condition that it may be omitted if the subsidiary issuer or guarantor is consolidated in the parent company's consolidated financial statements. Certain specific financial and non-financial disclosures would still be required to be included in the prospectus.

The new rules will become effective on January 4, 2021. Voluntary compliance is permitted in advance of the effective date. For further detail, please refer to our **Client Memorandum**.

New Rules for Financial Disclosure Requirements for Acquisitions and Dispositions

On May 21, 2020, the SEC adopted **amendments** to its financial disclosure requirements in registration statements relating to acquired and disposed businesses. The new rules are intended to reduce the costs and complexity of required financial disclosure as part of the SEC's ongoing disclosure effectiveness initiative pursuant to its legislative mandate under the FAST Act of 2015 to modernize and simplify SEC reporting requirements. The amendments principally affect Rule 3-05 and Article 11 of Regulation S-X and modify:

- The tests to determine whether a subsidiary or an acquired or disposed business is significant;
- The disclosure requirements for financial statements relating to the acquired or disposed business; and

- The presentation requirements for pro forma financial information relating to acquisitions and dispositions.

The amendments will be effective on January 1, 2021, but voluntary compliance, including for FPIs with registration statements, will be permitted in advance of the effective date (provided the registrant complies with them in their entirety). The amendments also include additional changes specific to real estate companies, companies in the oil and gas industry, investment companies and companies that qualify as smaller reporting companies. We have discussed the changes in detail in our **Client Memorandum**.

XBRL Related Changes and Changes to the Form 20-F

The cover page of Form 20-F has been updated this year and now also includes a mark to be checked if the FPI has filed a report on and attestation to its management's assessment of the effectiveness of its internal control over financial reporting under Section 404(b) of the Sarbanes-Oxley Act (15 U.S.C. 7262(b)) by the registered public accounting firm that prepared or issued its audit report.

As discussed in our **Preparing Your 2019 Form 20-F** memorandum, in August 2019 the SEC published 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 new Inline XBRL rules.

Sanction Disclosures

In past years, the SEC has sent numerous comment letters to 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, the Crimea region of Ukraine and the government of Venezuela, 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, or participation in certain investigations of the International Criminal Court. In addition, targeted sanctions apply to 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 or related to Burundi, the Central African Republic, Darfur, Hong Kong, Lebanon, Mali, Somalia and Yemen, and targeted individuals and 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 Disclosure Focus Areas: Hot Topics to Consider When Preparing Risk Factors and Other Disclosure

COVID-19

The SEC Division of Corporate Finance has communicated that it is monitoring how companies are reporting the effects and risks of COVID-19 on their business, financial condition and results of operations. In this context it has provided guidance on reporting, which we have discussed above. SEC

Chairman Jay Clayton and the Director of the SEC's Division of Corporation Finance have made **public statements** emphasizing the importance of disclosure in times of economic uncertainty and urging companies to provide as much information as is practicable regarding their current operating status and their future operating plans under various COVID-19-related mitigation conditions. In their statements, they also emphasized the importance of forward-looking disclosure and encouraged companies to avail themselves of safe harbors for such disclosure and also noted that they would not expect good faith attempts to provide appropriately framed forward-looking information to be second guessed by the SEC. The SEC's Co-Director of the Division of Enforcement has reminded issuers in a **speech** that while COVID-19 is a top priority for the Division of Enforcement, they are also reviewing disclosures, impairments, or valuations disguising previously undisclosed problems as COVID-19 related.

SEC Guidance on Non-GAAP Financial Measures

In the past, including in our **Preparing Your 2019 Form 20-F** memorandum, we emphasized the SEC's focus on compliance with its non-GAAP financial measures guidance given in its C&DI guidance.

The SEC continues to scrutinize non-GAAP financial reporting and this continues to be enhanced also by the impact of COVID-19. The SEC has brought charges for false and misleading disclosures concerning the calculation of key non-GAAP financial measures in violation of Sections 17(a)(2) and (3) of the Securities Act of 1933, and Section 13(a) of the Securities Exchange Act of 1934 and Rule 13a-11 thereunder, and Rule 100(b) of Regulation G relating to untrue statements or omissions of material facts in order to make the presentation of non-GAAP financial measures not misleading.

Cybersecurity

In our **Preparing Your 2019 Form 20-F** memorandum, we discussed the SEC's guidance and emphasis on the importance of cybersecurity disclosure. Cybersecurity remains one of the focus area of the SEC Office of Compliance Inspections (**OCIE**).

In January 2020, the OCIE published observations on **cybersecurity and resiliency practices** emphasizing the SEC's focus on disclosure of material cybersecurity risks and incidents. The OCIE reiterated its continued focus on cybersecurity issues, citing eight risk alerts related to cybersecurity it has published over the last few years. Our **Client Memorandum** on this topic provides more detail.

More recently, SEC Chairman Jay Clayton reaffirmed in a **public statement** that this remains an important focus of the SEC and reminded issuers of the SEC's guidance and asked issuers to "*consider whether their publicly filed reports adequately disclose information about their risk management governance and cybersecurity risks, in light of developments in their operations and the nature of current and evolving cyber threats.*"

Emerging Markets Risk Disclosure

The SEC emphasized in a **public statement** in April 2020 that companies having operations in emerging markets often face greater risks and uncertainties than in more established markets and issuers registered with the SEC, including FPIs, should clearly disclose these matters. The SEC reminds issuers in this respect that many risks are industry and jurisdiction specific and boilerplate disclosure is generally deemed insufficient or not useful. The SEC asks that these potentially unique considerations be considered not only in the context of risk factor disclosure but also in the financial and operational disclosures more generally, including disclosures of material risks, trends, uncertainties, accounting items and other items material to an investor.

Environmental and Climate-Related Disclosure

In our **Preparing Your 2019 Form 20-F** memorandum, we discussed the SEC's recent statements on climate change related disclosure. In a **statement** made in January 2020, SEC Chairman Jay Clayton

discussed environmental and climate-related disclosure efforts of the SEC. He emphasized that the disclosure should be "*rooted in materiality, including providing investors with insight regarding the issuer's assessment of, and plans for addressing, material risks to its business and operations.*" This has recently been reaffirmed by SEC Commissioner Allison Lee who called for financial institutions to disclose climate risks in a **statement** made in November 2020.

Risks Related to LIBOR Transitioning and Brexit

In our **Preparing Your 2019 Form 20-F** memorandum, we emphasized that the SEC staff is actively monitoring the extent to which market participants are identifying and addressing the risks associated with LIBOR transitioning and Brexit related disclosure. In a **statement** made in January 2020, SEC Chairman Jay Clayton reminded issuers that these topics remain a focus for the SEC.

Enforcement Matters

In its fiscal year ending on September 30, 2020, the **SEC's Division of Enforcement** brought 405 standalone actions in federal court or as administrative proceedings. The majority of these cases concerned securities offerings (32%), investment advisory and investment company issues (21%), and issuer financial reporting and disclosures and auditor issues (15%). The SEC also continued to bring actions, among others, relating to broker-dealers, insider trading and market manipulation. Monetary remedies for enforcement actions totaled $4.68 billion, representing a significant increase from prior years. Of this amount, $3.59 billion related to disgorgement of ill-gotten gains and $1.10 billion were in penalties.

In its Annual Enforcement Report, the SEC highlighted its cases against public companies, including accounting cases alleging earnings management, improper revenue recognition, creation of fictitious revenue, and misleading of auditors. The SEC also highlighted several cases alleging misleading or omitted disclosures, including topics such as the shipment of unneeded products, an abandoned plant expansion, the results of an internal audit, and practices designed to meet quarterly sales and earnings targets. The SEC also emphasized its ongoing efforts regarding non-GAAP metrics, and noted cases involving measurement of the success of a core business strategy, same store organic growth, and other non-GAAP performance metrics. Please see our **Client Memorandum** on this topic.

Other Matters That May Be of Interest to FPIs

SEC Updates to Auditor Independence Rules

The SEC has amended certain auditor independence requirements. The **amended rules** focus on materiality and exclude certain relationships with auditors, which under the previous framework would have not been permitted. It introduces, among others, amendments to the affiliate definitions by including a materiality standard and reduces the look-back period for FPIs as first time filers to the "first day of the last fiscal year before the FPI first filed or was required to file" provided the FPI fully complied with home country independence standards in prior periods. Additionally, specific relationships concerning certain student, mortgage, and consumer loans are deemed permissible. The new rules also ease the transition process in cases of independence violations following M&A transactions.

Holding Foreign Companies Accountable Act Passed

On December 2, 2020, the U.S. House of Representatives passed by unanimous consent the **Holding Foreign Companies Accountable Act** (**HFCA Act**), which would require the SEC to delist non-U.S. companies, including those with business operations in China, if the Public Company Accounting Oversight Board (**PCAOB**) is not permitted to inspect a company's accounting firm for three consecutive years. The HFCA Act would also require foreign companies to make certain disclosures about their ownership by governmental entities. While primarily aimed at China-based companies, the bill would

apply to any other non-U.S. companies located in jurisdictions where the PCAOB is not permitted access. Please see our **Client Memorandum** on this topic.

SEC to Permit Electronic Signatures in Filings

In November 2020, the SEC **amended** its rules to permit electronic signatures on documents (including CEO and CFO certifications filed as exhibits to Form 20-F) submitted to the SEC through EDGAR, as long as certain procedures are followed. We expect these amendments will significantly expedite the process for collecting signatures on documents. The current Rule 302(b) of Regulation S-T requires each signatory to an EDGAR filing to manually sign a signature page or other document (an "authentication document") before or at the time of the electronic filing. Pursuant to the new rules:

- a signatory will have the option, in lieu of a manual signature, to sign an authentication document electronically;
- when signing electronically, the signing process must follow certain procedures; and
- manual attestation will be required the first time a signatory uses an electronic signature to sign an authentication document.

We have described the further requirements in our **Client Alert**. It is expected that the new rules will become effective prior to the time most FPIs file their 2020 Form 20-Fs. However, the SEC has stated that it will not recommend enforcement if a company uses the procedures under the new rules prior to effectiveness as long as it fully complies with the new rules.

New SEC Guidance on Expiring Confidential Treatment Requests

In September 2020, the SEC issued **new guidance** on updating expiring confidential treatment requests (**CTRs**). The new guidance applies to CTRs that had been filed under the traditional method for confidential treatment pursuant to Rule 406 of the Securities Act or Rule 24b-2 of the Exchange Act, whereby a company would submit a detailed application to the SEC requesting confidential treatment. Under this procedure, the SEC would limit its order granting confidential treatment to ten years. As discussed in our **Preparing Your 2019 Form 20-F** memorandum, the SEC changed several of its exhibit filing requirements to allow companies to omit immaterial, competitively harmful information (the "redacted exhibit rules") without having to follow the procedures of the traditional CTR in 2019. There is no expiration date for the confidential treatment of information filed pursuant to the newer rules.

Under the new guidance, companies have a choice of three options when a CTR is about to expire:

- Refile the unredacted exhibit if the information no longer needs to be protected from public disclosure;
- Extend the confidential period: a company may request to extend the period of confidential treatment by filing an application under Rule 406 or Rule 24b-2 to continue to protect the confidential information from public release; or
- Transition to the new rules governing the filing of redacted exhibits: If it has been more than three years since the initial confidential treatment order was issued, and if the contract continues to be material, companies have the option to transition to the rules set out in Regulation S-K Item 601(b)(10) and other parallel rules referred to as the redacted exhibit rules allowing for filing of a redacted version without the need for a CTR.

Information Relevant to U.S. Public Securities Offerings

SEC Filing Fee Decrease

Effective October 1, 2020, the fee to register securities with the SEC will decrease to $109.10 per million dollars. View the SEC's fee rate advisory **press release**.

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