January 17, 2012

Preparing Your 2011 Form 20-F

This memorandum highlights some considerations for the preparation of your 2011 annual report on Form 20-F. Although the changes to Form 20-F itself are relatively minor this year and, for the most part, have been previously covered, certain areas of disclosure continue to be areas of focus for the U.S. Securities and Exchange Commission (**SEC**). In addition, the continued consequences of the ongoing economic and financial crisis warrant consideration by financial institutions, in particular, and other foreign private issuers (**FPIs**), when preparing their annual reports on Form 20-F for 2011.

This memorandum also highlights certain other U.S.-related regulatory actions and developments of interest to FPIs.

New Form 20-F Due Date

The 2011 Form 20-F is due four months, shortened from six months, after the fiscal year-end for companies with fiscal years ending on or after December 15, 2011 (i.e., on or before April 30, 2012 for calendar year-end companies). For companies with fiscal years ending before December 15, 2011, the 2011 Form 20-F is due six months after the fiscal year-end, as in prior years, but will be due four months after the fiscal year-end for subsequent fiscal years.

Disclosure Developments for 2011 Form 20-F

Required Reconciliation of Financial Statements under Item 18 of Form 20-F

As previously noted (see Davis Polk's memorandum: *SEC Publishes Final Amendments to Form 20-F, Foreign Private Issuer Status Determination and Going Private Rules*), the SEC is eliminating the more limited U.S. GAAP reconciliation option of Item 17 which had been available for FPIs and, for fiscal years ending on or after December 15, 2011, all FPIs are required to comply with the more fulsome financial statement requirements contained in Item 18 of Form 20-F.

Item 18 requires FPIs, other than FPIs that prepare financial statements in accordance with IFRS as issued by the International Accounting Standards Board (**IASB**), to provide all of the information required by U.S. GAAP and Regulation S-X.

XBRL Data – Phase-In Continues for U.S. GAAP Filers / Temporary Relief for IFRS Filers

U.S. GAAP Filers. In accordance with the three-year phase-in period adopted by the SEC in December 2008 (see Davis Polk's memorandum: *SEC Issues Rules Outlining Mandatory XBRL Requirement*), all FPIs that prepare financial statements in accordance with U.S. GAAP are now required to provide financial information to the SEC in an interactive data format using eXtensible Business Reporting Language (**XBRL**) and are also required to post XBRL data on their public websites. In addition, all FPIs that are large accelerated filers and that prepare financial statements in accordance with U.S. GAAP are now required to include detailed tagging of financial statement footnotes and schedules for fiscal periods ending on or after June 15, 2011 in accordance with the SEC's phase-in schedule (U.S. GAAP reporting FPIs with over $5 billion in public market capitalization were required to include detailed tagging of footnotes and schedules for fiscal periods ending on or after June 15, 2010). All other FPIs that prepare financial statements in accordance with U.S. GAAP will be required to include detailed tagging of footnotes and schedules for fiscal periods ending on or after June 15, 2012.

IFRS Filers. The SEC has issued a no-action letter confirming that FPIs that prepare financial statements in accordance with IFRS as issued by the IASB will not be required to provide financial information in an interactive data format using XBRL until the SEC specifies the XBRL taxonomy for IFRS financial statements. Under the SEC's XBRL phase-in schedule, FPIs that prepare IFRS financial statements

would have been required to provide financial information in XBRL format for fiscal periods ending on or after June 15, 2011; however, the SEC has not yet specified an XBRL taxonomy for use by FPIs that prepare IFRS financial statements (see Davis Polk's memorandum: *SEC Confirms IFRS Filers Will Not be Required to Provide Interactive Data Until SEC Specifies Taxonomy*). The SEC's no-action response does not provide any guidance as to when the IFRS taxonomy will be specified or whether the SEC will provide IFRS filers with an extension of the original deadline to process and implement the IFRS taxonomy once it has been specified. Consistent with prior years, FPIs that prepare IFRS financial statements should not check the box on the cover page of Form 20-F relating to compliance with the interactive data file submission requirements.

Home Country GAAP Filers. FPIs that prepare financial statements in accordance with their home country GAAP other than IFRS as issued by the IASB are not required to provide financial information in XBRL format.

Mine Health and Safety, Conflict Minerals and Government Payments

The SEC has adopted its final rule relating to Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the **Dodd-Frank Act**), which applies to any FPI that is an operator, or that has a subsidiary that is an operator, of a coal or other mine subject to the U.S. Federal Mine Safety Act of 1977 (generally mines located in the United States and its territories) and requires certain disclosures in the Form 20-F relating to mine health and safety as well as legal and regulatory developments with respect thereto. The disclosure requirements of Section 1503 have already been in effect (see Davis Polk's memorandum: *Preparing Your 2010 Form 20-F*) and the final rule adheres closely to the express requirements of Section 1503 reflecting the SEC's response to comments received following publication of its proposed rule in December 2010 (the proposed rule had called for additional disclosure beyond the express requirements of Section 1503). While Section 1503 and the SEC's final rule are inapplicable as to foreign mine health and safety issues, the SEC noted in its final rule that disclosure of such issues may be required otherwise to the extent that they are material to the relevant FPI.

In our memorandum of last year (see Davis Polk's memorandum: *Preparing Your 2010 Form 20-F*), we discussed specific disclosure requirements under the Dodd-Frank Act applicable to all companies in the area of conflict minerals (Section 1502) and to mining and natural resource companies in the area of government payments (Section 1504). The SEC's deadline to issue final rules implementing Sections 1502 and 1504 passed on April 17, 2011, and, to date, the SEC has not issued final rules implementing these Dodd-Frank Act sections. However, companies should be aware that the SEC's proposed rules relating to conflict minerals (Section 1502) do not include a transition or exemption period, although certain commenters, including Davis Polk, have urged the SEC to include such a period in the final rules. See Davis Polk's memorandum: *SEC Proposes Rules to Implement Dodd-Frank Requirements for Conflict Minerals Originating in the Democratic Republic of Congo*.

Independence Rules for Compensation Committees and Advisers

On March 30, 2011, the SEC proposed a rule to implement Section 952 of the Dodd-Frank Act regarding the independence of compensation committees and the appointment, payment and oversight of compensation consultants. Under the proposed rule, FPIs that disclose in their annual reports the reasons why they do not have an independent compensation committee are exempt from the compensation committee independence requirements. Although FPIs are not specifically exempted from the application of the proposed compensation consultant rules, the proposed rule provides for U.S. national securities exchanges, such as the New York Stock Exchange and NASDAQ, to have the authority to exempt any category of issuers consistent with the compensation committee independence rules. The disclosure requirements under the proposed rule relating to compensation consultants are not expected to be applicable to FPIs as they are generally exempt from preparing and filing proxy statements where the new disclosure is expected to be included. For more information, see Davis Polk's memorandum: *SEC Proposes Independence Rules for Compensation Committees and Advisers*.

SEC Disclosure Focus Areas

Aside from the new disclosure developments discussed above, companies should keep the following SEC focus areas in mind when preparing their 2011 Form 20-F:

Management's Discussion and Analysis

The SEC continues to focus on Management's Discussion and Analysis (**MD&A** or **OFR**) disclosure, particularly disclosure that tells the "company's story" in light of the current state of the financial markets and economy. As a result of this continuing focus, FPIs should re-familiarize themselves with our previous advice as to key focus areas, including disclosure regarding liquidity and capital resources, material known trends and uncertainties and short-term borrowings (see Davis Polk's memoranda: *Preparing Your 2010 Form 20-F* and *SEC Shines a Spotlight on Short-Term Borrowings: Issues Guidance and Proposes New Disclosure Requirements*).

Non-GAAP Financial Measures

The SEC has demonstrated a renewed interest in the use of non-GAAP financial measures and has reminded issuers that Regulation G prohibits disclosure of misleading non-GAAP financial measures in SEC filings, company press releases and other public disclosures. In addition, the SEC Staff continues to encourage issuers to provide consistent disclosure of information, including non-GAAP financial measures, in their SEC filings when such non-GAAP measures are otherwise being publicly disseminated through earnings calls and earnings releases and presentations. FPIs that prepare their financial statements in accordance with U.S. GAAP or IFRS as issued by the IASB should not present any non-GAAP financial measures that could be viewed as "misleading," for example, by omitting normal cash operating expenses necessary to operate the company's business. The SEC Staff has previously stated that a charge cannot be eliminated if it is reasonably likely to recur within two years or there was a similar charge within the prior two years.

European Economic and Sovereign Debt Crisis

The uncertainty surrounding the resolution of the economic and sovereign debt crisis in Europe continues to have a negative impact on financial markets and economic conditions more generally.

In light of this, companies should consider updating their MD&A and risk factor disclosures to address the potential effects that the European crisis has had, and may have, on their business, results of operations and financial condition. This may include an indication or more fulsome discussion of potential future events, such as the possibility that one or more of the current Eurozone countries could re-denominate their currency, depending on the potential likelihood of such events and the magnitude of the impact on the company if they were to occur. The SEC Staff has advised that risk factors, including risk factors relating to the European crisis, should specifically identify the risks relating to a company's particular circumstances and should therefore discuss how the crisis will impact the company, rather than providing "boilerplate" disclosure of economic risks. Further considerations relevant to financial institutions following from the European crisis are discussed below.

FPIs should closely monitor developments in Europe while preparing their annual reports as developments continue to occur in "real time."

Loss Contingencies

The SEC has indicated that accounting and disclosure of loss contingencies continues to be an area of focus in filing reviews and that, where not provided by a company, the Staff may request disclosure of an estimate of the reasonably possible loss associated with a company's loss contingencies. While the SEC Staff has indicated that it will not object to disclosure of reasonably possible ranges of loss in the aggregate for all contingencies, rather than on an individual contingency-by-contingency basis, the SEC Staff has indicated that it may request supplemental information where a company discloses that a contingency is not estimable. With respect to uncertainties regarding loss recoveries (i.e., indemnification

agreements and insurance), the SEC Staff has requested that registrants disclose (i) whether ranges of reasonably possible losses are disclosed gross or net of anticipated recoveries from third parties, (ii) risks regarding anticipated recoveries, and (iii) the accounting policy for uncertain recoveries.

Asset and Goodwill Valuation and Impairment

In part as a result of ongoing economic and political uncertainty, the SEC is expected to continue to focus on asset and goodwill valuation and impairment. In line with the SEC's guidance on material known trends and uncertainties, FPIs should provide "early-warning" disclosure if there is a risk of a material impairment charge to either assets or goodwill.

Financial Institutions

The following are disclosure focus areas of interest primarily to FPIs that are financial institutions:

- *European Sovereign Debt Exposures*. The SEC has recently issued disclosure guidance to address its concerns about financial institutions' disparate disclosures related to their direct and indirect exposure to European sovereign debt holdings. The guidance specifically requests that registrants consider providing (i) disclosures separately by country, segregated between sovereign and non-sovereign exposures, and by financial statement category, to arrive at gross funded exposure, (ii) separate disclosure of the gross unfunded commitments made and (iii) information regarding hedges in order to present an amount of net funded exposure. The SEC Staff declined to specify the countries covered by its guidance, noting that registrants should focus on those countries experiencing significant economic, fiscal and/or political strains such that the likelihood of default would be higher than would be anticipated when such factors do not exist. The SEC has indicated previously that such countries may include Greece, Italy, Ireland, Portugal, and Spain. The guidance includes an outline of areas of disclosure that the SEC Staff believes may be relevant and appropriate based on the particular facts of each registrant. As the amount and materiality of a financial institution's sovereign debt exposure may be subject to significant fluctuation, especially as a result of political and market developments, we recommend that Guide 3 and other disclosure regarding sovereign debt exposure be accompanied by appropriate cautionary language to reflect the changing nature of such exposure (such as by highlighting uncertainties in the MD&A, risk factors or forward-looking statement cautionary language). See Davis Polk's Client Newsflash: *SEC Staff Issues Guidance on European Sovereign Debt Exposures* for more information.
- *Loss Absorbency and Regulatory Capital.* Financial institutions should consider their disclosure in light of the ongoing regulatory discussions concerning loss absorbency and minimum regulatory capital requirements. Although Basel III and Solvency II and related comprehensive regulations such as the E.U. Capital Requirements Directive (**CRD**) IV have not been finalized and are yet to be implemented, these initiatives contemplate significant structural measures designed to strengthen the capital position and improve the loss absorption ability of financial institutions. Financial institutions should consider, to the extent relevant to their operations, the impact that the adoption of Basel III, CRD IV, Solvency II or similar regulatory reform rule proposals and guidance may have on their results of operations or financial condition or otherwise on the investment value of the financial institutions' securities to investors and provide appropriate disclosure, including in the risk factors, MD&A and other regulatory-related disclosures. For example, the Financial Stability Board, the Basel Committee on Banking Supervision, the Independent Commission on Banking in the United Kingdom and other authorities are recommending a number of structural measures that would have a significant impact upon financial institutions and investors, in particular the potential for loss absorption through the use of bail-ins. While such proposals have yet to be finalized, the potential impact to investors could be significant, and financial institutions should consider outlining the risks arising from these loss absorbency proposals.

- *Basel III Metrics.* The SEC has indicated that metrics based on Basel III guidance are non-GAAP financial measures because they are not disclosures required by a government, governmental authority or self-regulatory organization. Consistent with the Staff's position in this regard, disclosure metrics based on Basel III, Solvency II or other initiatives that have yet to be implemented by the relevant authorities should be indicated as being non-GAAP, as applicable. Financial institutions should provide further clarifying disclosures regarding the use of such metrics, including any significant judgments that went into the calculation of the metrics.
- *Quantification of Credit Rating Downgrades*. The SEC has shown an increasing interest in the financial impact of a credit rating downgrade on financial institutions and has supplementally asked in comment letters for the quantification of the impact of a one- or two-notch credit rating downgrade. It is unclear at this time whether the SEC Staff will eventually ask financial institutions to publicly disclose the financial impact of a credit rating downgrade on their financial condition and operating results, but financial institutions should be aware of this new focus area.[1]
- *Dodd-Frank Act and European Market Infrastructure Regulation.* Financial institutions should consider whether the implications of any of the rules promulgated under the Dodd-Frank Act or the European Market Infrastructure Regulation relating to derivatives could be expected to have a material effect on future results of operations or financial condition (similar consideration should be made in respect of prohibition of proprietary trading by the "Volcker Rule" under the Dodd-Frank Act). Disclosure of such implications should be considered as risk factors or material known trends and uncertainties, as applicable.

Cybersecurity

The SEC recently issued disclosure guidance on cybersecurity risks. The guidance does not impose any new disclosure obligations but rather frames cybersecurity as a business risk that, like other operational and financial risks, may call for disclosure if it could materially impact a company's operations. The guidance directs companies to provide risk factor disclosure related to cyber incidents if these issues are among the most significant factors that make an investment in the company speculative or risky and suggests that MD&A disclosure of cybersecurity matters may be necessary if the costs or other consequences associated with cyber incidents represent a material event, trend or uncertainty that is reasonably likely to have a material effect on the company's financial condition. For more information, see Davis Polk's memorandum: *Cybersecurity: SEC Staff Provides Guidance on Disclosure Considerations*.

Iran and Syria Sanctions; SEC's Office of Global Security Risk

The United States, the European Union, and other countries have been steadily intensifying sanctions on Iran.

The U.S. Comprehensive Iran Sanctions, Accountability and Divestment Act (**CISADA**), which became law on July 1, 2010, imposed significant new sanctions on Iran and firms and individuals doing business with Iran. CISADA is intended to create a secondary boycott against Iran, restricting access to specified areas of the U.S. economy to foreign firms that conduct targeted business activities with Iran. CISADA has increased the compliance burden on both U.S. and foreign companies, requiring foreign firms to

[1] As discussed further below, companies are reminded that the Dodd-Frank Act repealed Rule 436(g) under the Securities Act of 1933, as amended. When preparing their 2011 Form 20-F, companies should only provide credit ratings disclosure for the purposes of satisfying their disclosure obligations (e.g., in the context of a discussion of liquidity or cost of funds), including in risk factors and should not disclose credit ratings for the purpose of highlighting the financial strength of the company or the company's debt securities.

consider implementing controls to limit targeted activities with respect to Iran to preserve the full range of their business with the United States. For U.S. companies, particularly financial institutions, more due diligence activities are required. Since CISADA was enacted, the Office of Foreign Asset Control has been in contact with numerous non-U.S. financial institutions seeking information about their transactions relating to Iran in an effort to deter them from conducting business with Iran. For more information on CISADA, see Davis Polk's memorandum: *United States Enacts Sweeping Secondary Boycotts Targeting Iran*.

On November 21, 2011, in parallel with actions taken by Canada and the United Kingdom, the United States announced a significant tightening of Iran sanctions from the White House and the U.S. Departments of State and the Treasury. President Obama issued Executive Order No. 13590 to impose further secondary boycotts such as those created under the Iran Sanctions Act, as expanded by CISADA. The Executive Order targets companies that engage in transactions related to Iran's petroleum resources or petrochemical products above certain low threshold dollar amounts. In addition, the Director of the Financial Crimes Enforcement Network (**FinCEN**) found Iran to be a jurisdiction of primary money laundering concern, pursuant to Section 311 of the USA PATRIOT ACT.

On December 31, 2011, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2012 (the **NDAA**), which imposes new sanctions with respect to the financial sector of Iran. The NDAA designates the financial sector of Iran, including the Central Bank of Iran, as being of primary money laundering concern, which is simply a duplication, in statutory form, of the FinCEN finding already in effect. The NDAA also requires the President to block all property and interests in property of Iranian financial institutions (presumably including the Central Bank of Iran) that are within the United States or within the possession or control of a U.S. person. In addition, a provision of the NDAA, as well as the Iranian Financial Sanctions Regulations and proposed U.S. regulations, are intended to restrict the opening or maintaining in the U.S. of correspondent or payable-through accounts by non-U.S. financial institutions that knowingly engage in certain transactions involving Iran, including the Central Bank of Iran and other Iranian financial institutions. There are a number of exceptions and possible waivers in the NDAA with respect to the imposition of correspondent and payable-through account sanctions. See Davis Polk's memorandum: *Iran Sanctions Update: National Defense Authorization Act for Fiscal Year 2012, § 1245* for a more complete description of the new legislation.

The U.S. and the European Union have also imposed additional sanctions on Syria in the wake of the violent crackdown by the Syrian government on protesters there, including prohibiting the importation of crude oil and petroleum products from Syria.

The SEC's Office of Global Security Risk (OGSR) continues to monitor public company disclosure regarding business activities in or with State Sponsors of Terrorism (i.e., Cuba, Iran, Sudan and Syria) even where any activities with such states may appear financially immaterial. The SEC has noted in the past that "qualitative" materiality must also be considered, for example, where a company's dealings may have an adverse impact due to negative public perception. In particular, companies that conduct business activities in or with the State Sponsors of Terrorism should be aware that if the SEC's Office of Global Security Risk discovers such business, they may raise questions which will need to be answered publicly and may also request modifications to the company's Form 20-F disclosure. The Office of Global Security Risk does not hesitate to question FPIs about news reports or information on a company's website indicating that the company has business dealings with one of the State Sponsors of Terrorism. Since the enactment of CISADA, it has also been seeking information from issuers about the applicability of this law to these companies. In addition, any transactions by FPIs that benefit the Syrian government are likely to draw scrutiny from OGSR.

In light of the above, FPIs should consider relevant risk factor disclosure as well as other disclosure denoting the nature and materiality of such contacts with sanctioned countries or those identified as State Sponsors of Terrorism.

FPIs should also be aware that a number of U.S. states, municipalities and universities have adopted divestment or similar initiatives that target companies engaged in certain activities in a State Sponsor of Terrorism, in particular, Iran and Sudan. Many of these laws or policies are specifically directed at companies conducting oil, mineral and natural resource-related activities or activities related to the defense or nuclear industries in the targeted countries.

Accounting

Revised Financial Reporting Manual

The SEC's Division of Corporation Finance issued an updated Financial Reporting Manual on October 6, 2011. Among other changes, the revised manual adopts revised transition rules for interim financial statements for registrants that are transitioning to IFRS as issued by the IASB from their home country GAAP.

Fair Value Measurements

The Financial Accounting Standards Board (**FASB**) and IASB issued converged guidance on fair value measurements and disclosure requirements. The amendments do not extend the use of fair value accounting, but do provide guidance on how it should be applied where its use is required or permitted by other standards within U.S. GAAP or IFRS.

Fair Value Information Obtained from Third-party Pricing Services

The SEC is increasingly focused on the use of third-party pricing services to value financial instruments that are not actively traded and for which significant judgment is required to estimate value. In using third-party pricing services, companies should understand the valuation techniques and assumptions and should maintain appropriate internal controls over financial reporting to comply with financial reporting standards.

Segment Reporting

The SEC remains focused on the identification of operating segments and has indicated that it may comment on a registrant's segment reporting where there are inconsistencies between the segment footnote and the company's description of its business or where changing economic conditions suggest changes in segment reporting or aggregation.

Incorporation of IFRS into U.S. Financial Reporting

The SEC is continuing its investigation into the incorporation of IFRS into the U.S. financial reporting system, but has indicated that the timing of its final report is uncertain. One possible approach outlined in a SEC Staff Paper is for the FASB to incorporate new or amended IFRS standards into U.S. GAAP over a transition period by issuing converged standards. FPIs that prepare financial statements in accordance with U.S. GAAP should continue to monitor developments in this area.

PCAOB Concept Release on Auditor Independence

The Public Company Accounting Oversight Board (**PCAOB**) has issued a concept release on a proposal to improve auditor independence by imposing mandatory audit firm rotation after a set period of engagement (the comment period closed on December 14, 2011). In its release, the PCAOB noted that implementation of some aspects of a rotation requirement may require corresponding changes to SEC rules, thus development of a rotation rule would require coordination with the SEC. The PCAOB also noted that it would consider the necessity of a transition period for implementing a rotation requirement. At this time, there is no indication whether mandatory auditor rotation rules will be implemented or, if they are implemented, what form they will take. The PCAOB expects to hold a public meeting to further discuss this topic in March 2012.

PCAOB Concept Release on Changes to Auditor's Reporting Model

The PCAOB has issued a concept release relating to proposed changes to the auditor's reporting model (the comment period closed on September 30, 2011). The concept release discussed several alternatives for changing the auditor's reporting model, including a supplement to the auditor's report in which the auditor would be required to provide additional information about the audit and the company's financial statements, required and expanded use of emphasis paragraphs in the auditor's report, auditor reporting on information outside the financial statements and clarification of certain language in the auditor's report. FPIs should note that any amendments to the auditor's reporting model may result in corresponding changes to the company's representation letter. The PCAOB expects to propose an amended or new standard during the second quarter of 2012.

Other Matters Relevant to FPIs

Changes to Form F-3

In response to Section 939A of the Dodd-Frank Act, the SEC issued final rules that revised the Form F-3 transaction eligibility criteria such that issuers of nonconvertible debt securities that do not otherwise satisfy Form F-3 transaction eligibility rules (based on public equity float or other criteria) will no longer qualify to use these forms by issuing investment grade securities. The "investment grade" criterion has been replaced with four alternative criteria that allow issuers to meet the Form F-3 registrant requirements if they have issued, for cash, more than $1 billion in nonconvertible securities, other than common equity, through registered primary offerings over the prior three years, have outstanding at least $750 million of nonconvertible securities, are a wholly owned subsidiary of a well-known seasoned issuer (**WKSI**) or are a majority-owned operating partnership of a real estate investment trust that qualifies as a WKSI.

A grandfathering provision in the new rules allows issuers to continue to qualify to use Form F-3 for a period of three years from the effective date of the amendments if the issuer would have been eligible to register the securities offering under the old investment grade provision. See Davis Polk's memorandum: *SEC's Final Rules Modify Form S-3 and F-3 Transaction Eligibility Criteria for Debt Issuances*.

Changes to Review Process of F-1 Submissions

The SEC has traditionally allowed non-U.S. issuers to file initial public offering or other first-time registration statements on a "draft" non-public basis, enabling them to avoid the scrutiny associated with a public EDGAR filing; however, the SEC Staff has recently stated that it will only review initial registration statements of non-U.S. issuers that are submitted on a non-public basis where the registrant is a foreign government registering its debt securities, an FPI that is listed or is concurrently listing its securities on a non-U.S. securities exchange, an FPI that is being privatized by a foreign government or an FPI that can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction. As a result, FPIs that are doing their initial public offering and only listing on a U.S. exchange will no longer receive confidential treatment. For more information, see Davis Polk's memorandum: *SEC Staff to Limit Non-Public Initial Review Process for Non-U.S. Issuers*.

Filing Review Correspondence

The SEC Staff has announced that, beginning on January 1, 2012, it will publish comment letters no earlier than 20 business days following the completion of a filing review.

Credit Ratings

As discussed in our memorandum of last year (see Davis Polk's memorandum: *Preparing Your 2010 Form 20-F*), the Dodd-Frank Act repealed Rule 436(g) under the Securities Act of 1933, as amended (the **Securities Act**), which has the effect of requiring issuers to obtain and file consents from rating agencies when credit ratings are included or incorporated by reference in registration statements, subject to certain exceptions. At this time, the rating agencies are refusing to provide such consents. FPIs that include

separate credit ratings disclosure relating either to the credit or financial strength of the company or with respect to any particular class of debt securities may not be able to incorporate their Form 20-F into Securities Act registration statements. For more information on the permissible use of credit ratings in registration statements, see Davis Polk's memorandum: *Guidance on Use of Credit Ratings in Securities Offerings Following Dodd-Frank*.

SEC Large Trader Rule

The SEC's new large trader reporting rule should be reviewed by FPIs that exercise discretion over transactions in U.S.-listed stocks and options. Effecting even a single trade can require a corporation or individual to register as a "large trader"; however, most corporations outside the financial services industry and most individuals will not be subject to the rule. The new rule is designed to capture persons who trade actively, though the thresholds are low, and it does not apply to persons who merely hold large positions in securities or who purchase and sell securities as part of corporate business transactions. A failure to file the appropriate form when required (whether or not inadvertent) could subject the offender to the range of penalties available under the securities laws. Many ordinary corporate activities in listed stocks, such as self-tenders and other share repurchases, administering equity compensation plans, and engaging in mergers and acquisitions involving public companies, will not trigger registration. For more information, see Davis Polk's memorandum: *SEC Large Trader Rule: Impact on Corporations and Related Individuals*.

Whistleblower Rules

The SEC has adopted final rules implementing the whistleblower provisions of the Dodd-Frank Act, which are applicable to FPIs with securities registered under the U.S. securities laws. The final rules provide that any eligible whistleblower who voluntarily provides the SEC with original information that leads to the successful enforcement of an action brought by the SEC under U.S. securities laws must receive an award of between 10 and 30 percent of the total monetary sanctions collected if the sanctions exceed $1,000,000. The final rules also prohibit retaliation against the whistleblower. The final rules do not require employees to first report allegations of wrongdoing through a company's corporate compliance system. For more information, see Davis Polk's memorandum: *SEC Adopts Final Whistleblower Rules*.

Executive Compensation and Clawback

Section 954 of the Dodd-Frank Act requires the SEC to direct national securities exchanges to adopt clawback policies enabling the recovery of incentive-based compensation from current or former executive officers following a restatement of financial results. The amount to be clawed back is the amount in excess of what would have been paid under the restated results. To date, the SEC has not issued proposed rules to implement Section 954 of the Dodd-Frank Act. Assuming that the SEC delegates the implementation of Section 954 to the U.S. national securities exchanges, FPIs would not be able to assess the impact of the executive compensation and clawback rules until the exchanges issue listing standards implementing the SEC's final rules. For more information, see Davis Polk's memorandum: *Compensation Clawback under Dodd-Frank: Impact on Foreign Issuers*.

Employee and Director Hedging

Section 955 of the Dodd-Frank Act requires companies to disclose whether any employee or member of the board of directors is permitted to purchase financial instruments designed to hedge or offset any decrease in the market value of equity securities held by or granted to the employee or board member as part of his or her compensation. To date, the SEC has not issued proposed rules to implement Section 955 of the Dodd-Frank Act. While FPIs are generally exempt from the SEC's proxy rules, it will not be known whether the SEC intends to grant an exemption to FPIs from the application of Section 955 until the SEC issues its rule proposal. For more information, see Davis Polk's memorandum: *U.S. Dodd-Frank Act's Application to Non-U.S. Issuers That are Not Financial Institutions – Rulemaking Progress Report*.

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.

William F. Barron	+852 2533 3303	william.barron@davispolk.com
Maurice Blanco	+55 11 4871 8402 +1 212 450 4086	maurice.blanco@davispolk.com
Julia K. Cowles	+1 650 752 2007	julia.cowles@davispolk.com
Andrés V. Gil	+33 1 56 59 36 30	andres.gil@davispolk.com
Nicholas A. Kronfeld	+1 212 450 4950	nicholas.kronfeld@davispolk.com
Jeffrey M. Oakes	+44 20 7418 1386	jeffrey.oakes@davispolk.com
Theodore A. Paradise	+81 3 5561 4430	theodore.paradise@davispolk.com
John J. Satory	+44 20 7418 1027	john.satory@davispolk.com
Michael J. Willisch	+34 91 768 9610	michael.willisch@davispolk.com
Jeanine P. McGuinness (Sanctions)	+1 202 962 7150	jeanine.mcguinness@davispolk.com