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Preparing Your 2010 Form 20-F

This memorandum highlights some considerations for the preparation of your 2010 annual report on Form 20-F. Although there are no changes to Form 20-F itself this year, the economic and financial crisis has resulted in significant U.S. regulatory actions, which will affect all companies preparing their annual reports on Form 20-F for 2010 (not just financial institutions). The principal such regulatory actions are described below.

Form 20-F Due Date

As in prior years, the 2010 Form 20-F is due six months after the fiscal year-end (June 30, 2011 for calendar year-end companies). This deadline will be shortened to four months for fiscal year-ends beginning with the first fiscal year ending on or after December 15, 2011.

New Disclosures as a Result of U.S. Dodd-Frank Act

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the **Dodd-Frank Act**) became law. The Dodd-Frank Act impacts the disclosure by foreign private issuers (**FPIs**) principally in the following manner:

Mining and Natural Resource Companies

The Dodd-Frank Act contains three new disclosure requirements applicable to mining and natural resource extraction companies:

- *Mine health and safety*. Section 1503 of the Dodd-Frank Act requires SEC registrants who operate coal or other mines to provide disclosure in their Form 20-F about their violations of health or safety standards. Section 1503 sets out the specific required disclosures that may have previously been considered immaterial. This provision is already in effect. On December 15, 2010, the SEC issued a **fact sheet** and **rule proposal** to implement Section 1503 (comments are due by January 31, 2011). The new rules are expected to amend Form 20-F to require the specified mine safety disclosure by foreign private issuers. As Section 1503 is already in effect, the recommended approach would be to include the required disclosure in the 2010 Form 20-F. For more information, see Davis Polk's memorandum: ***SEC Proposes Rules to Implement Dodd-Frank Mine Safety Disclosure Requirements***.
- *Government payments*. Section 1504 of the Dodd-Frank Act requires the SEC to issue final rules, by April 17, 2011, that require "resource extraction issuers" (i.e., SEC registrants that engage in commercial development of oil, natural gas or minerals) to make certain disclosures in their annual report about payments made to the U.S. or foreign governments for the purpose of the commercial development of oil, natural gas, or minerals, including:
    - the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals; and
    - the type and total amount of such payments made to each government.

  On December 15, 2010, the SEC issued a **fact sheet** and **rule proposal** to implement Section 1504. Comments on the proposed rules are due by January 31, 2011. For more information, see Davis Polk's memorandum: ***SEC Proposes Rules Implementing Dodd-Frank Disclosure Requirements for Resource Extraction Issuers***.

- *Conflict minerals*. Section 1502 of the Dodd-Frank Act requires the SEC to issue final rules, by April 17, 2011, requiring public companies to disclose the use of "conflict minerals" originating in the Democratic Republic of Congo or an adjoining country if used in production or a product manufactured by or for the company. "Conflict minerals" are defined as columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives, or any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of Congo or an adjoining country with armed groups. On December 15, 2010, the SEC issued a **fact sheet** and **rule proposal** to implement Section 1502. Comments on the proposed rules are due by January 31, 2011. For more information, see Davis Polk's memorandum: ***SEC Proposes Rules to Implement Dodd-Frank Requirements for Conflict Minerals Originating in the Democratic Republic of Congo***.

Credit Ratings

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 or prospectuses. Rating agencies that consent to the inclusion of a rating in a registration statement will be exposed to liability as experts under Section 11 of the Securities Act for material misstatements or omissions with respect to such included ratings. At this time, the rating agencies are refusing to provide such consents. As a result, when preparing their 2010 Form 20-F, companies should generally not include separate ratings disclosure which sets out specific credit ratings, relating either to credit or financial strength of the company or with respect to any particular class of debt securities. However, in specific situations identified by the SEC, disclosure including ratings (*e.g.*, in the context of risk factors relating to the importance of a rating in accessing the capital markets, in a discussion of funding and liquidity generally, or when describing debt covenants, interest or dividends that are tied to ratings) is still permitted. For more information on the use of ratings in registration statements and the related consent requirement, see Davis Polk's memorandum: ***Guidance on Use of Credit Ratings in Securities Offerings Following Dodd-Frank***.

Disclosure Focus Areas

Aside from the new disclosure requirements discussed above, companies should keep the following SEC staff "focus" areas in mind when preparing their 2010 Form 20-F:

Management's Discussion and Analysis (MD&A) Disclosure

The SEC continues to focus on MD&A disclosure, particularly disclosure that tells the "company's story" in light of the current state of the financial markets and economy. The staff's past MD&A guidance, in particular the **2003 MD&A guidance**, remains relevant and may serve as a good "refresher" for MD&A drafters.

In our memorandum of last year, we noted certain areas, which remain relevant and should be considered when preparing the 2010 Form 20-F:

Liquidity and Capital Resources. Liquidity and capital resources disclosure continues to be a focal point of MD&A and should:

- provide clear analysis of the company's sources and uses of liquidity;
- set forth anticipated capital expenditures on a discretionary and nondiscretionary basis along with anticipated funding sources;
- address the circumstances that might give rise to a need for, and the company's ability to access, short-term credit, and any implications of the company's potential inability to access such funds;

- discuss the factors that may materially influence credit ratings, implications of potential changes in ratings and management's expectations (see "New Disclosures as a Result of U.S. Dodd-Frank Act – Credit Ratings" above); and
- discuss covenant compliance, including the implications of a breach of financial or other covenants and the company's capacity for additional borrowing under its covenants.

In further emphasizing the importance of liquidity and capital resources, the SEC released **new guidance** relating to disclosure of Liquidity and Capital Resources on September 17, 2010. Apart from reiterating communications in previous guidance, including the above, the new guidance discusses the following:

- *Liquidity disclosure*. The new guidance provides additional examples of important trends and uncertainties relating to liquidity: difficulties in accessing the debt markets, reliance on commercial paper or other short-term financing arrangements, maturity mismatches between borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral, and counterparty risk. In addition, the new guidance suggests that, in certain circumstances, existing rules already require the disclosure of material intra-period borrowing variations and certain types of repurchase agreements. It is clear that the SEC was reminding registrants that transactions like the Lehman Brothers Repo 105 transactions require disclosure.
- *Leverage ratio disclosure*. The new guidance reminds companies that any leverage ratio or other metric included within the MD&A must comply with the SEC's rules on the use of non-GAAP measures, to the extent the metric is a non-GAAP measure, and be accompanied by a clear explanation of the calculation methodology.
- *Contractual obligations table disclosure*. The new guidance reminds companies that the objective of the contractual obligations table is to improve transparency of a company's short-term and long-term liquidity and capital resources needs and provide context for investors to assess the relative role of off-balance sheet arrangements.

Material Known Trends and Uncertainties. Companies should continue to focus on their disclosure of material known trends or uncertainties. MD&A disclosure of a trend, demand, commitment, event or uncertainty is required unless a company is able to conclude either that it is not reasonably likely that the trend, uncertainty or other event will occur or come to fruition or that the trend, uncertainty or other event is not reasonably likely to have a material effect on the company's liquidity, capital resources or results of operations. SEC guidance also calls for an analysis of "factors which are expected to make reported historical results or trends either indicative or not indicative of future operating results and related financial condition" and "matters which have had an impact on past operations but are not expected to continue to do so, as well as any matters expected to impact future operations even though they have not had an impact in the past."

Short-term Borrowings. On September 17, 2010, the SEC proposed **amendments** that would require public companies to disclose additional information to investors about their short-term borrowing arrangements. In addition to banks, non-financial companies will now be required to provide average balance data concerning short-term borrowings. The proposed amendments would require both quantitative and qualitative disclosures of companies' short-term borrowings.

Companies would be required to provide quantitative disclosures in tabular form, which would include, for each specified category of short-term borrowings:

- the amount outstanding at the end of the reporting period and the weighted average interest rate on those borrowings;
- the average amount outstanding during the period and the weighted average interest rate on those borrowings; and

- the maximum amount outstanding during the period.

To provide context for the quantitative data, companies would be required to provide the following qualitative disclosure:

- a general description of the short-term borrowings arrangements included in each category and the business purpose of those arrangements;
- the importance to the company of its short-term borrowings arrangements to its liquidity, capital resources, market-risk support, credit-risk support or other benefits;
- the reasons for the maximum reported level for the reporting period; and
- the reasons for any material differences between average short-term borrowings and period-end short-term borrowings.

The proposed requirements distinguish between companies that engage in financial activities as their business and all other companies. Financial companies would be required to provide averages calculated on a daily average basis (which is consistent with existing guidance included in the SEC's bank holding company disclosure guide known as Guide 3), and to disclose the maximum amount outstanding on any day in the period. All other companies would be permitted to calculate averages using an averaging period not to exceed a month and to disclose the maximum month-end amount during the period.

For additional information on the SEC's proposed amendments on short-term borrowings and new guidance on liquidity and capital resources disclosures, see Davis Polk's memorandum: ***SEC Shines a Spotlight on Short-Term Borrowings: Issues Guidance and Proposes New Disclosure Requirements***.

Climate Change

The SEC has published its **interpretive guidance** focusing on disclosure of climate change issues in public filings. The guidance does not change or add to any existing SEC disclosure obligations; the SEC confirmed that the need for climate change disclosure will continue to be governed by the existing and well-established "materiality" standard – a substantial likelihood that a reasonable investor would view the information as important when making an investment decision. Importantly, the guidance also indicates that a company must consider whether it has sufficient disclosure controls and procedures to process climate-change related information. For more information on this and the existing rules on disclosure of environmental matters in SEC filings, see Davis Polk's memorandum: ***Environmental Disclosure in SEC Filings – 2011 Update***.

Accounting

Revised Financial Reporting Manual. The SEC's Division of Corporation Finance issued an updated **Financial Reporting Manual** on December 6, 2010.

Loss Contingencies Disclosure. The Financial Accounting Standards Board (**FASB**) has published a proposal to amend its disclosure requirements for loss contingencies. The amended disclosure requirements, if ultimately adopted by the FASB, would replace the current disclosure requirements contained in FASB Codification Topic 450-20 Contingencies—Loss Contingencies (historically known as FASB Statement No. 5, Accounting for Contingencies). The proposal would not change the recognition guidance for loss contingencies. For more information, see Davis Polk's memorandum: ***FASB Reproposes Amendments to Loss Contingency Disclosures***.

The SEC staff has indicated, however, that it is taking a closer look at compliance with existing FASB standards for the disclosure of loss contingencies and pressing companies for additional and better disclosure under these standards. The staff issued a **"Dear CFO" letter** on disclosures related to

foreclosures in October 2010 in which it emphasized the need to disclose loss contingencies under existing standards as well as material trends and uncertainties. Staff members have also indicated that they are likely to question companies that announce material litigation settlements without any previous disclosure.

Financing Receivables Disclosure. The FASB has issued **Accounting Standards Update No. 2010-20, Disclosures about the Credit Quality of Financing Receivables and the Allowance for Credit Losses** (the **Update**). The Update requires companies to provide more information in their disclosures about the credit quality of their financing receivables (including loans, lease receivables, and other long-term receivables) and the credit reserves held against them. The additional disclosures required include:

- aging of past due receivables;
- credit quality indicators; and
- modifications of financing receivables.

Iran Financial Sanctions

On July 1, 2010, the Comprehensive Iran Sanctions, Accountability and Divestment Act (**CISADA**) became law, imposing significant new sanctions on Iran and firms and individuals doing business with Iran. The sweeping provisions of CISADA have the potential to affect many non-U.S. entities, including financial institutions (banks, investment banks, insurance and reinsurance companies, broker-dealers, mutual funds, and others), petroleum and natural resource companies, exporters of refined petroleum products to Iran, shipping companies, U.S. government contractors and those with investments in Iran's energy sector, among others. The aim of CISADA is 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 will increase the compliance burden on both U.S. and foreign companies, requiring foreign firms to 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 will be required. For more information on CISADA, see Davis Polk's memorandum: ***United States Enacts Sweeping Secondary Boycotts Targeting Iran***.

On August 16, 2010, the U.S. Department of the Treasury issued the Iranian Financial Sanctions Regulations (**IFSR**) to implement subsections 104(c) and 104(d) of CISADA. The IFSR regulates the use of correspondent or payable-through accounts in the United States by foreign financial institutions that are found by the Secretary of the Treasury to engage in certain transactions involving Iran and prohibits subsidiaries of U.S. financial institutions from engaging in certain transactions involving Iran. For more information, see Davis Polk's memorandum: ***Treasury Department Issues Iranian Financial Sanctions Regulations***.

The SEC's Office of Global Security Risk 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 Iran 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.

Oil and Gas Reporting Requirements

As a reminder, in December 2008, the SEC adopted final rules aimed at modernizing its oil and gas company reporting requirements. The new rules began to apply to annual reports on Form 20-F for fiscal years ending on or after December 31, 2009. Calendar year-end companies will need to continue

observing such requirements in their 2010 Form 20-F and non-calendar year-end companies must comply with these requirements for the first time in their 2010 Form 20-F. For a discussion of the current oil and gas reporting requirements, see the Davis Polk memorandum entitled: ***SEC Finalizes Revisions to Oil and Gas Disclosure Requirements: New Rules Provide for Wider Range of Reserves Disclosures with Potential Impact on Upstream Valuations***.

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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