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Preparing your 2021 Form 20-F

December 17, 2021 | Client Update | 19-minute read

This client update highlights some considerations for the preparation of your 2021 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 2021 Form 20-F

SEC changes to MD&A disclosure become mandatory

As discussed in our Preparing Your 2020 Form 20-F client update, 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);
- Modification of the forepart of Item 5 to specify the purpose of MD&A and highlight the item's objective;
- Separately captioned section of off-balance sheet arrangements replaced with a principles-based instruction to include a discussion of material commitments in the 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.

Despite the deletion of the requirement to include five years of selected financial data, the SEC has cautioned that FPIs should continue to consider whether such tabular disclosure as part of an introductory section or overview, including to demonstrate material trends, would be appropriate.

The amendments became effective on February 10, 2021. Companies are required to comply with the rules beginning with the first fiscal year ending on or after August 9, 2021. Please see our client update for more detail on these rule changes.

Confidential treatment

The SEC adopted amendments to Instruction 4(a)(ii) of Instructions as to Exhibits to Form 20-F, changing the standard for the redaction of confidential information from exhibits required to be filed by Form 20-F. The requirement that the redacted information should be not material and likely to cause competitive harm to the registrant if publicly disclosed was replaced with a standard which allows registrants to redact information that they both customarily and actually treat as private or confidential, as long as such information is also not material. The registrant should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the registrant treats as private or confidential. Upon request by the SEC, the registrant may be required to

promptly provide an un-redacted copy of such exhibit as well as its materiality and privacy or confidentiality analysis.

XBRL related changes

As discussed in our Preparing Your 2020 Form 20-F client update, 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 Inline XBRL requirements apply for 20-Fs in respect of fiscal years ending on or after June 15, 2021. For FPIs that are large accelerated filers and prepare their financial statements in accordance with U.S. GAAP, the Inline XBRL requirements already applied for financial statements for fiscal years ending on or after June 15, 2019.

Amended rules relating to financial disclosure requirements for guaranteed or secured registered debt

As discussed in our Preparing Your 2020 Form 20-F client update, on March 2, 2020, the SEC adopted amendments, including changes to Rule 3-10 and a new Rule 13-01, that significantly reduce the financial disclosures required by guarantors and issuers of guaranteed securities and affiliates whose own securities constitute a portion of the collateral for the securities offered, and focus on information that is material to investors. Amongst others, the adopted amendments replace the condition that a registrant 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. These rules became effective on January 4, 2021. For further detail, please refer to our client update.

New rules for financial disclosure requirements for acquisitions and dispositions

As discussed in our Preparing Your 2020 Form 20-F client update, on May 21, 2020, the SEC adopted amendments to its financial disclosure requirements in registration statements relating to acquired and disposed businesses. Amongst others, these rules modify (i) the tests to determine whether a subsidiary or an acquired or disposed business is significant, (ii) the disclosure requirements for financial statements relating to the acquired or disposed business and (iii) the presentation requirements for pro forma financial information relating to acquisitions and dispositions. The amendments became effective on January 1, 2021. We have discussed the changes in detail in our client update.

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, or corruption and human rights abuses. 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, Burma, the Democratic Republic of the Congo, Eritrea and Ethiopia, Nicaragua, Russia, South Sudan, Venezuela and Zimbabwe, individuals and entities engaged in specific acts in or related to 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.

Guide 3 replacement

As discussed in our Preparing Your 2020 Form 20-F client update, 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 update on this topic for a detailed comparison between the existing requirements and the changes.

The revised rules apply to all covered registrants including FPIs and apply in respect of fiscal years ending on or after December 15, 2021. 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 disclosure focus areas: Hot topics to consider when preparing risk factors and other disclosure

Mining property disclosure rules

As discussed in our Preparing Your 2019 Form 20-F, in October 2018 the SEC adopted final rules to modernize the property disclosure requirements for mining registrants.

Significantly, the rules:

- Eliminate the existing general prohibition on disclosing mineral "resources" and instead require that companies disclose both mineral resources and material exploration results in addition to mineral "reserves";
- Require disclosure of exploration results, mineral resources and mineral reserves to be based on supporting documentation prepared by a "qualified person" named in the filing;
- Require the filing of technical report summaries prepared by a qualified person for properties that are individually material, which identify and summarize the information reviewed and conclusions reached by each qualified person about the company's mineral resources or mineral reserves determined to be on each material property; and
- Allow the usage of forward-looking pricing forecasts when determining and disclosing mineral resources and reserves.

Mining registrants are required to comply with these rules, codified in Subpart 1300 of Regulation S-K, as of their first fiscal year beginning on or after January 1, 2021. If a mining registrant is 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. Please also see our client update for further information.

COVID-19

As discussed in our Preparing Your 2020 Form 20-F client update, 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 update covering Disclosure Guidance Topic No. 9 and our client update 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." Comment letters issued by the SEC to companies throughout 2020 and 2021 focus on how companies are disclosing the effects and risks of COVID-19 on their business, financial condition and results of operations and, to the extent material, ask companies to provide detailed, quantifiable discussion of COVID-19 impact on results, operations and liquidity, enhance risk factor disclosures and identify and discuss trends and uncertainties, in line with the SEC's guidance. In recent public statements, the SEC staff has indicated that companies should consider how COVID-related supply chain issues may impact revenues.

SEC guidance on non-GAAP financial measures

In the past, including in our Preparing Your 2020 Form 20-F client update, 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 measures, including in relation to COVID-19 impacts.

Cybersecurity

In our Preparing Your 2020 Form 20-F client update, we discussed the SEC's guidance and emphasis on the importance of cybersecurity disclosure. Cybersecurity remains one of the focus area of both the Division of Corporation Finance and the Division of Examinations.

The SEC recently brought charges for the violation of the requirement that public companies have controls and procedures to ensure that they make required disclosures in SEC filings, highlighting the need for executives responsible for SEC reporting to be informed promptly about cybersecurity risks and incidents, and against firms for failures in their cybersecurity policies and procedures that resulted in email account takeovers exposing the personal information of customers and clients at each firm, in violation of Rule 30(a) of Regulation S-P, also known as the Safeguards Rule, which is designed to protect confidential customer information.

On June 11, 2021, the SEC released its Spring 2021 rulemaking agenda. Among the proposed and final SEC rulemaking areas is disclosure relating to cybersecurity risk. In an October 8, 2021 tweet, SEC Chair Gary Gensler noted his recent exchange with Senator Jack Reed (D-RI) on cybersecurity, which he described as "at the heart of investor protection." In response to Senator Reed's question as to whether the SEC would consider his bill, S.808 - Cybersecurity Disclosure Act of 2021, regarding board cybersecurity expertise, Chair Gensler responded that he had asked staff to consider that bill's provisions, as well as "cyber hygiene" issues and incident reporting, in conjunction with the forthcoming SEC cybersecurity disclosure proposal. The provisions of the bill (which have been introduced in prior sessions of Congress) would require public companies to disclose if they have a cyber expert on their boards and, if not, why not. Although there is currently no explicit disclosure mandate regarding cybersecurity risks and cyber incidents, companies should refer to the SEC's 2018 guidance on cybersecurity disclosure, which discusses cybersecurity disclosure obligations in the context of general disclosure rules.

Resource extraction companies required to disclose payments to foreign governments

After almost a decade of attempting to issue similar rules, on December 16, 2020 the SEC adopted amendments that would require resource extraction companies to disclose payments made to foreign governments or to the U.S. federal government for the commercial development of oil, natural gas, or minerals. By requiring disclosure at the national and major subnational political jurisdiction level, rather than the contract level, this version of the final rules mandates less disclosure than the SEC's previous resource extraction disclosure rules. The rules became effective on March 16, 2021. The initial compliance date for an issuer with a December 31 fiscal year-end is September 30, 2024, which is 270 days after its fiscal year ending December 31, 2023. We have discussed the changes in detail in our client update.

Environmental and climate-related disclosure

On March 4, 2021 the SEC announced the creation of a Climate and ESG Task Force in the Division of Enforcement to develop initiatives to proactively identify ESG-related misconduct. The task force's initial focus is on identifying material gaps or misstatements in climate risk disclosure under existing rules, but it will also analyze disclosure and compliance issues relating to the ESG strategies of investment advisers and funds. The task force will complement the SEC's other initiatives and efforts related to climate risk and ESG. The SEC's Spring 2021 rulemaking agenda included proposed climate change disclosure.

On September 1, 2021, addressing the European Parliament Committee on Economic and Monetary Affairs, SEC Chair Gary Gensler stated that the SEC is moving toward mandating issuers to disclose the negative impact of poor sustainability and what issuers are doing to mitigate that impact. On this and several other instances, Gensler has stated that he has asked SEC staff to develop a proposal for mandatory climate risk disclosure requirements.

On September 22, 2021 the Division of Corporation Finance published a sample comment letter that it may issue to companies regarding their climate-related disclosure or the absence thereof. Among others, the SEC reiterated that a number of its disclosure rules may require disclosure related to climate change-related risks and opportunities in a company's description of business, legal proceedings, risk factors, and management's discussion and analysis of financial condition and results of operations. The SEC stated that it continues to monitor compliance with its 2010 Climate Change Guidance, which among others, requests companies to consider the following in the context of their disclosures:

- the impact of pending or existing climate-change related legislation, regulations, and international accords;
- the indirect consequences of regulation or business trends; and
- the physical impacts of climate change.

The sample comments do not constitute an exhaustive list of the issues that companies should consider. Any comments issued would be tailored to the specific company and industry, and would take into consideration the disclosure that a company has provided in SEC filings.

At the recent National Association of Stock Plan Professionals proxy disclosure conference held in October, Renee Jones, Director of the SEC's Division of Corporation Finance stated that the Division is routinely reviewing company filings and issuing comment letter on the basis of its 2010 Climate Change Guidance. The Division's disclosure and rulemaking focus on climate change was also highlighted at PLI's annual SEC Speaks 2021 conference.

Risks related to LIBOR transitioning and Brexit

In our Preparing Your 2020 Form 20-F client update, 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 on December 7, 2021, the SEC reminded issuers of their disclosure obligations related to the LIBOR transition. 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, MD&A, board risk oversight and financial statements.

The SEC staff pointed out that issuers of registered asset-backed securities also should consider relevant disclosure requirements under Regulation AB, as well as appropriate disclosures regarding the potential impacts of the LIBOR transition on investors in those securities. To provide meaningful insight to investors about the status of their identification and mitigation efforts, including significant matters yet to be addressed, companies should consider providing detailed and specific disclosure, rather than general statements about the progress of the company's transition efforts to date.

The staff also explicitly encouraged companies to refer to the July 2019 Staff Statement as they prepare their disclosures to investors about the LIBOR transition and its potential impact on their businesses.

Enforcement matters

In its fiscal year ending on September 30, 2021, the SEC's Division of Enforcement brought 434 standalone actions in federal court or as administrative proceedings, representing a 7% increase over the prior year. 70% of these stand-alone actions involved at least one individual defendant or respondent.

The SEC also obtained judgments and orders for nearly $2.4 billion in disgorgement and more than $1.4 billion in penalties, which represented a respective 33% decrease and 33% increase over amounts ordered in the prior fiscal year in these categories.

The SEC highlighted noteworthy enforcement actions across new areas, including a number of first-of-their-kind actions involving securities using decentralized finance, or "DeFi," technology, charging securities law violations on the "dark web", enforcing a key rule on the duties of municipal advisors, involving Regulation Crowdfunding, charging an alternative data provider with securities fraud, involving failures to timely file and deliver Forms CRS and against an order and execution management system provider that facilitated electronic trading for failing to register as a broker-dealer.

Other matters that may be of interest to FPIs

SEC enhanced scrutiny of Chinese entities

The SEC has started to issue new disclosure comments to Chinese companies seeking to list in the U.S. as part of a push to boost investor awareness of the risks involved. Some Chinese companies have now started to receive detailed comments from the SEC about greater disclosure of their use of offshore vehicles, known as "variable interest entities" (VIEs) for IPOs, including implications for investors and the risk that Chinese authorities will interfere with company operations. The SEC has also asked Chinese companies for disclosure that "investors may never directly hold equity interests in the Chinese operating company" to include new disclosure requirements. Division of Corporation Finance staff have indicated in public speeches that they will be looking for prominent disclosure regarding potential consequences of the HFCA Act (discussed below).

Earlier this year the SEC said it would suspend any Chinese IPOs until companies improved their risk disclosures and the China Securities Regulatory Commission was reported to look to step up communication with the SEC.

In an interview in August this year, SEC Chair Gary Gensler said that the over 250 Chinese companies that trade in U.S. markets (not just those seeking an IPO) must better inform investors about political and regulatory risks. He also noted that he expects the enhanced disclosures, which should be included in the companies' annual reports starting in early 2022, would probably include information about the corporations' shell-company structures.

Holding Foreign Companies Accountable Act update

On December 18, 2020, the Holding Foreign Companies Accountable Act (HFCA Act), which prohibits the securities of companies from being listed on U.S. securities exchanges if the Public Company Accounting Oversight Board (PCAOB) is not permitted to inspect the company's accounting firm for three consecutive years, was signed into law.

On November 5, 2021, the SEC announced that it approved the PCAOB's Rule 6100, Board Determinations Under the Holding Foreign Companies Accountable Act. PCAOB Rule 6100 establishes the process for the PCAOB's determinations under the HFCA Act; the factors the PCAOB will evaluate and the documents and information the PCAOB will consider when assessing whether a determination is warranted; the form, public availability, effective date, and duration of such determinations; and the process by which the Board will reaffirm, modify, or vacate any such determinations.

On December 2, 2021, the SEC adopted amendments to finalize rules implementing the submission and disclosure requirements in the HFCA Act. These rules apply to issuers that the SEC identifies as having filed an annual report with an audit report issued by a registered public accounting firm that is located in a foreign jurisdiction and that the PCAOB is unable to inspect or investigate.

Under the SEC's new final rules, an SEC-identified issuer must submit documentation to the SEC that establishes that it is not owned or controlled by a governmental entity in its public accounting firm's foreign jurisdiction. In addition, an SEC-identified issuer that is also a "foreign issuer" as defined in Rule 3b-4 under the U.S. Securities and Exchange Act of 1934, as amended, must provide certain additional disclosures in their annual report for itself and its consolidated foreign operating entities, including any variable-interest entity or similar structure that results in additional foreign entities being consolidated in the registrant's financial statements.

The SEC said that it will identify affected issuers for fiscal years beginning after December 18, 2020. Companies will be required to comply with the submission or disclosure requirements in annual report filings covering the fiscal year ending December 31, 2022. For a more detailed analysis, please see our client update.

SEC to permit electronic signatures in filings

As discussed in our Preparing Your 2020 Form 20-F client update, 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 have described these procedures in our client update . These rules are now effective.

SEC updates to auditor independence rules

As discussed in our Preparing Your 2020 Form 20-F client update, the SEC approved amendments to certain auditor independence requirements in Rule 2-01 of Regulation S-X in October 2020.

Relatedly, in January 2021 the SEC issued an order approving the PCAOB proposal to adopt amendments to its interim independence standards and PCAOB rules to align with the SEC's recent adoption of amendments to Rule 2-01 of Regulation S-X.

Both SEC and PCAOB rules became effective on June 9, 2021.

Information relevant to U.S. public securities offerings

SEC amendments to filing fee disclosure and payment methods

The SEC adopted amendments to modernize filing fee disclosure and payment methods. The amendments:

- will move filing fee-related information to a separate exhibit in which companies will also be required to include "all required information for filing fee calculation in a structured format"; and
- add new options for Automated Clearing House (ACH) and debit and credit card payment of filing fees and eliminate infrequently used options for filing fee payment via paper checks and money orders.

The fact sheet on the amendments can be found here. The amendments generally will be effective on January 31, 2022. There are transition periods to allow filers time to comply with the Inline XBRL structuring requirements depending on their filer status. The amendments that will add or eliminate payment options will be effective on May 31, 2022.

As of October 1, 2021, the filing fee to register securities with the SEC decreased to $92.70 per million dollars from $109.10 per million dollars. The SEC makes annual adjustments to the rates for fees and the annual rate changes take effect on the first day of each U.S. government fiscal year, i.e., October 1.

Updating EDGAR filing software and filing requirements

On November 22, 2021, the SEC implemented a change to the EDGAR filing websites (EDGAR Filer Management, Filer Web a/k/a EDGAR Link Online and Ownership Forms) that impacts how some third-party software may communicate with these websites. Specifically, EDGAR created a unique parameter that some third-party software products may need to include with every request that enters/updates information. EDGAR verifies the existence and validity of the parameter in filers' requests, and terminates user sessions if the value of the parameter is missing or mismatched.

In addition, the SEC has proposed a series of amendments to update filing requirements under EDGAR which also apply to FPIs. The proposed amendments would:

- mandate the electronic filing or submission of most of the documents that are currently permitted electronic submissions under Regulation S-T, including all filings on Form 6-K and filings made by multilateral development banks;
- mandate the electronic submission in PDF format of the "glossy" annual report to security holders;
- mandate the electronic filing of the certification made pursuant to the Exchange Act and its rules that a security has been approved by an exchange for listing and registration;
- mandate the use of Inline XBRL for the filing of the financial statements and accompanying notes to the financial statements required by Form 11-K; and
- allow for the electronic submission in PDF format of certain foreign language documents.

There is a brief 30-day comment period, which ends on December 22, 2021, and given the administrative nature of the rule proposal, it is possible these requirements will apply for 20-Fs filed in 2022.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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