January 29, 2010

Preparing Your 2009 Form 20-F

This memorandum highlights some considerations for the preparation of your 2009 annual report on Form 20-F. Although the changes to Form 20-F itself are relatively minor this year, in light of the difficult economic and financial market conditions during 2009, companies will likely need to devote considerable time and effort to their Form 20-F to explain the impact of these conditions on the company's full year financial results and offer insight into the company's business prospects.

Form 20-F Due Date

As in prior years, the 2009 Form 20-F is due six months after the fiscal year-end (June 30, 2010 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 in 2009 Form 20-F

Changes to Form 20-F. In September 2008, the SEC adopted final amendments to certain Form 20-F reporting requirements, to be phased in over a five-year period. Of those amendments, the following are applicable to 2009 Form 20-Fs:

*Disclosure of American Depositary Receipt (**ADR**) Fees and Payments*. Companies are now required to disclose, on a per payment basis, all fees and charges that a holder of ADRs may have to pay, either directly or indirectly. This disclosure must indicate the type of service, the amount of the fees or charges and to whom the fees or charges are paid. This includes fees or charges in connection with:

- depositing or substituting the underlying shares;
- receiving or distributing dividends;
- selling or exercising rights;
- withdrawing an underlying security;
- transferring, splitting or grouping receipts; and
- general depositary services, particularly those charged on an annual basis.

Companies must also provide information about the depositary's right, if any, to collect fees and charges by offsetting them against dividends received and deposited securities. Lastly, companies must describe all fees and other direct and indirect payments made by the depositary to the issuer of the deposited securities.

Disclosure of Changes in Registrant's Certifying Accountant. Form 20-F now contains a new item, Item 16F, which requires foreign private issuers (**FPIs**) to report in their registration statements and annual reports any changes in or disagreements with their certifying accountant. Among other things, Item 16F requires disclosure of the following:

- whether an independent accountant that was previously engaged as the principal accountant for auditing the company's financial statements, or those of a significant subsidiary on which the accountant expressed reliance in its report, has resigned, declined to stand for re-election, or was dismissed;
- any disagreements or reportable events that occurred within the company's latest two fiscal years and any interim period preceding the change of accountant; and

- whether, during the fiscal year in which the change of accountants took place or during the subsequent year, the company had similar material transactions to those which led to the disagreements with the former accountants and whether such transactions were accounted for or disclosed in a manner different from that which the former accountants would have concluded was required. If the former accountants would have required a different method, the company must disclose the effect the application of such method would have had on the financial statements.

The new item also requires the company to provide a copy of the disclosures that it is making to the former accountant along with a request that the former accountant furnish the company with a letter stating whether it agrees with the statements made by the company and, if not, why not. The company is required to file the accountant's letter as an exhibit to the Form 20-F. If the change in accountant occurred fewer than 30 days prior to the filing of the Form 20-F, additional time is allowed for the filing of the accountant's letter.

Amendments to Item 17 (Financial Statements) of Form 20-F to Require Segment Data from US GAAP filers. All FPIs reporting in US GAAP are now required to provide segment data in their financial statements and an unqualified US GAAP audit report. Item 17 of Form 20-F no longer includes the accommodation that previously allowed FPIs filing in US GAAP to omit segment data from their financial statements and to have a qualified US GAAP audit report as a result of this omission. International Financial Reporting Standards (**IFRS**) as issued by the International Accounting Standards Board (**IASB**) also require the inclusion of segment information.

XBRL Data for Largest US GAAP Filers. In December 2008, the SEC adopted final rules that require companies filing financial statements prepared in accordance with US GAAP or IFRS to provide financial information to the SEC in an interactive data format using eXtensible Business Reporting Language (**XBRL**). FPIs that file financial statements in accordance with their home country GAAP are not subject to the XBRL requirement. The XBRL requirement is being phased-in over a three-year period, with only the largest companies (*i.e.* reporting companies with over $5 billion in public market capitalization) that file US GAAP financial statements being required to file the XBRL financial statements in this year's Form 20-F. For a description of the XBRL filing requirements, see the Davis Polk Newsflash entitled: *SEC Issues Rules Outlining Mandatory XBRL Requirement.*

New Oil and Gas Reporting Requirements. In December 2008, the SEC adopted final rules aimed at modernizing its oil and gas company reporting requirements. The new rules apply to annual reports on Form 20-F for fiscal years ending on or after December 31, 2009. For a discussion of the new 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.*

U.S. GAAP Reconciliation—IAS 39 Carve-Out Transition Period Expires. The transition period, which allowed the omission of the US GAAP reconciliation by FPIs filing IFRS financial statements prepared in accordance with IFRS as approved by the European Union expired with 20-Fs filed for the 2008 fiscal year. Accordingly, FPIs with a calendar year-end must now file IFRS financial statements prepared in full compliance with IFRS as issued by the IASB or provide a full reconciliation to US GAAP.

Disclosure Focus Areas

Aside from the new reporting requirements discussed above, companies should keep the following SEC staff "focus" areas in mind when preparing their 2009 Form 20-F:

Risk Disclosures. Meredith Cross, Director of the Division of Corporation Finance, has suggested that she would like companies to be more communicative about the risks they face and how they are monitoring and addressing such risks. While the staff has expressed a preference for succinct risk factors that deal with a single risk without engaging in extraneous discussions, companies should consider

adding additional discussion about their risk management in their Management's Discussion and Analysis (**MD&A**) or in their market risk management section in response to Item 11 of Form 20-F.

*MD&A Disclosure***.** The SEC staff 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. The staff has highlighted the following in connection with disclosure of Liquidity and Capital Resources:

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; and
- discuss the company's:
  - credit ratings, including factors that may materially influence credit ratings, implications of potential changes in ratings and management's expectations; and
  - covenant compliance, including the implications of a breach of financial or other covenants and the company's capacity for additional borrowing under its covenants.

Material Known Trends and Uncertainties. Companies should also plan to put considerable thought and effort into 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." In light of events over the past 18 months, companies should carefully consider this guidance.

Disclosures by Financial Institutions. The SEC staff continues to focus on a number of important disclosure issues particularly with respect to financial institutions, including fair value measurement, loan loss provisions and other disclosures specific to financial institutions. Over the past year, the staff has issued guidance in these areas in the form of Staff Accounting Bulletin 111, a Sample Letter Sent to Public Companies CFOs on MD&A Disclosure Regarding Provisions and Allowances for Loan Losses and through a recent staff speech entitled Areas of Frequent Comment—Financial Institutions.

Early Discussion of Possible Goodwill Impairment. The SEC staff has also repeatedly requested that companies more clearly explain the steps taken to review a company's goodwill for impairment, including the methods and assumptions used in testing goodwill for impairment. According to the staff, if a company has taken an impairment charge, the company should discuss why the charge was taken, why the charge was not taken sooner and the business reason for and impact of the charge. If the company has not taken a goodwill impairment charge, the company should discuss why not. The staff also believes that companies should address goodwill impairment in their critical accounting policies and provide the market an early warning that the company's goodwill may be impaired. The staff in many

cases has focused on goodwill impairment where market capitalization has fallen below the company's net book value.

Non-GAAP Measures. The SEC staff has exhibited a renewed interest in the use of non-GAAP measures in SEC filings and in company press releases and websites. As discussed in the Davis Polk memorandum *SEC Removes Roadblocks to the Use of Certain Non-GAAP Measures*, the staff recently published Compliance & Disclosure Interpretations (**C&DIs**) providing updated guidance on the use of non-GAAP measures. FPIs may be particularly interested in:

- C&DI 104.06 which allows companies with operations in various foreign countries to present financial information in constant currency and satisfy the non-GAAP reconciliation requirements by describing the process for calculating the constant currency amounts and the basis of presentation.
- C&DI 106.01 defining when a measure otherwise prohibited by Item 10(e)(1)(ii) of Regulation S-K may be used by a FPI. Item 10(e)(1)(ii) prohibits the use in SEC filings of certain non-GAAP measures but an exception exists for non-GAAP measures that are required or "expressly permitted" by the standard setter responsible for establishing the GAAP used in the company's primary financial statements filed with the SEC. The SEC has expanded the definition of "expressly permitted" to also include measures that are explicitly accepted by the primary securities regulator in the FPI's home country jurisdiction or market. This explicit acceptance can be demonstrated by (1) the published views of the regulator or members of the regulators staff or (2) a letter from the regulator or its staff to the FPI indicating the acceptance of the presentation—which would be provided to the SEC staff upon request.

Climate Change Disclosure. The SEC recently approved an interpretive release focusing on disclosure of climate change issues in public filings. Although the release itself has not yet been published, the SEC has made it clear that all companies need to review and analyze their public disclosure now to ensure full compliance with existing SEC rules and regulations in light of climate change risks. The release does not change or add to any existing SEC disclosure obligations, which already mandate disclosure of any risks that are material to a company, but is, according to SEC Chairman Mary Schapiro, "merely intended to provide clarity and enhance consistency." For further discussion of this release see the Davis Polk Newsflash entitled: *SEC Speaks on Climate Change Disclosure Obligations*.

Dealings with State Sponsors of Terrorism. 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 actors 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.

NYSE Corporate Governance Amendments

The NYSE recently amended its corporate governance rules, largely in order to conform them to the SEC's corporate governance disclosure requirements. While most of the amended rules are inapplicable to FPIs, the following amendments do apply:

Notification of "any" noncompliance. NYSE rules now require the CEO of a listed company to notify the NYSE in writing after any executive officer of the listed company becomes aware of "any" noncompliance with the NYSE corporate governance requirements in Section 303A. Previously, such notification was required only in the event of "any material noncompliance."

Transition period for companies losing FPI status. The amended NYSE rules also take into account SEC rule changes that allow companies to test their FPI status annually at the end of their second fiscal quarter. NYSE-listed companies that no longer qualify as FPIs at the end of their second fiscal quarter will now have until the end of such fiscal year to meet the NYSE domestic company board and committee

independence requirements. These companies will also be granted a limited transition period to align their equity compensation plans with the NYSE's shareholder approval rules for domestic companies.

Statement of Difference Disclosure in Form 20-F. Consistent with SEC requirements, the NYSE now requires Form 20-F filers to disclose in their Form 20-F the differences between their corporate governance practices and those mandated by the NYSE for US companies. Previously, the NYSE allowed companies the choice of disclosing this information on their website or in their Form 20-F.

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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