DAVIS POLK & WARDWELL

Date: January 19, 2009

To: Interested Persons

Re: Considerations for Preparation of the 2008 Annual Report on Form 20-F and Other Developments for Foreign Private Issuers

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This memorandum highlights some new developments and considerations that may be relevant to the preparation of 2008 annual reports on Form 20-F. While the applicable changes to Form 20-F are minor, the Securities and Exchange Commission (the "**SEC**") during the last year has provided guidance and clarifications in a number of disclosure areas that are worth noting. In particular, in light of the difficult financial market conditions, the SEC has focused and provided guidance on disclosure of fair value and liquidity and capital resources.

Changes to Form 20-F

In September 2008, the SEC adopted final amendments to certain Form 20-F reporting requirements[1]. Only the following reporting change is applicable to 2008 annual reports.

Disclosure About Differences in Corporate Governance Practices. Under new Item 16G of Form 20-F, issuers with fiscal years ending on or after December 15, 2008 and whose securities are listed on a U.S. national securities exchange must include in their annual reports on Form 20-F a summary of the significant ways in which their corporate governance practices differ from those followed by U.S. issuers under the listing standards of that exchange. Foreign private issuers ("**FPIs**") are already required by U.S. securities exchanges to provide comparable disclosure in their Form 20-F or on their website. The SEC expects that the Item 16G disclosure provided in response to this new requirement will be "similar, if not the same" as the disclosure that FPIs already provide under the U.S. exchange rules.

Additional Amendments Not Effective This Reporting Season. In addition, certain other amendments were adopted, none of which are applicable to the preparation of annual reports for the year 2008, including: (i) acceleration of the Form 20-F filing deadline to within four months after the end of an FPI's fiscal year end (applicable to fiscal years ending on or after December 15, 2011); (ii) new disclosure regarding changes in and disagreements with FPIs' certifying accountants (applicable to fiscal years ending on or after December 15, 2009); (iii) elimination of an option to omit segment data from financial statements

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[1] The final rule release is available at http://www.sec.gov/rules/final/2008/33-8959.pdf.

prepared in accordance with U.S. GAAP (applicable to fiscal years ending on or after December 15, 2009); (iv) elimination of a more limited U.S. GAAP reconciliation option that currently exists for FPIs that are only registering a class of securities under Section 12(g) of the U.S. Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), without conducting a public offering, and FPIs that are making certain non-capital raising offerings (applicable to fiscal years ending on or after December 15, 2011) and (v) new disclosure regarding fees and charges relating to an FPIs' ADR program (applicable to fiscal years ending on or after December 15, 2009).

Furthermore, under the amended rules, beginning on December 6, 2008, an issuer needs to assess whether it meets the definition of foreign private issuer (and, therefore, qualifies for the accommodations made under the U.S. securities laws for FPIs) once a year, on the last business day of its second fiscal quarter. Accordingly, a calendar year issuer will next assess its FPI status on the last business day of the second quarter of 2009.[2]

Disclosure Focus Areas

Aside from the minor changes to Form 20-F applicable this reporting season, the SEC Staff has provided guidance on a number of disclosure topics. Companies should pay particular attention to the following.

Risk Factors. Many companies will need to modify and improve their risk factors to reflect new risks they face as a result of the financial market crisis. The SEC Staff has recently emphasized, however, that they do not want to see "boilerplate" disclosures about general economic risks that are not company specific and has cautioned against "kitchen sink" risk factors that distract from the real risks facing a company. As a result, risk factors should focus on the implications of current economic conditions specific to the company. Such risk factors will include, among others, risks associated with a company's business generally due to deteriorating economic conditions as well as risks relating to liquidity, funding and valuation issues.

MD&A Disclosure. The SEC Staff has suggested that companies will need to draft their MD&A disclosures anew this year to reflect the exceptional events of 2008 and the current state of the financial markets and the economy. As part of this effort, the Staff has recommended that companies review the SEC's past MD&A guidance, in particular the 2003 MD&A guidance[3], which the Staff still views as very relevant.

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[2] See Rule 405 of the General Rules and Regulations under the Securities Act of 1933, as amended (the "**Securities Act**").

[3] The 2003 guidance is available at http://www.sec.gov/rules/interp/33-8350.htm. The SEC also issued guidance in 2002 which is available at http://www.sec.gov/rules/other/33-8056.htm and in 1989 which is available at http://www.sec.gov/rules/interp/33-6835.htm.

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Liquidity and Capital Resources. One of the focus points of the 2003 MD&A guidance is disclosure about liquidity and capital resources. This is an area that many companies may find needs significant revisions due to economic conditions and the state of the credit markets. For example, a company may find the need to discuss:

- any material reduction in cash flow from operations and how the company plans to meet its operating and other cash requirements in light of the reduction in cash flow;
- its ability to satisfy the covenants in its existing debt, as well as its ability and/or intent to refinance existing debt or obtain additional financing in light of restrictions in its existing debt instruments;
- any consequences or risks resulting from transactions with Lehman Brothers or its role as a lender, administrative agent or syndication agent in the company's loan facilities;
- any changes in the company's credit ratings;
- any other changes in the company's ability to obtain financing from external sources; and
- any changes in the company's capital expenditure plans.

In connection with preparing their liquidity and capital resources disclosure, companies should also take a careful look at the considerations the Division of Corporation Finance of the SEC published in December 2008[4]. The suggestions focus on:

- providing greater analysis of the sources and uses of liquidity, including discussing material trends and uncertainties;
- evaluating capital expenditures on a discretionary and non-discretionary basis and discussing anticipated funding sources;
- discussing the sufficiency, anticipated circumstances requiring the use, and uncertainties surrounding the availability of short-term credit, and any implications from not being able to access such funds;
- expanding the discussion on credit ratings, including factors that may materially influence credit ratings, potential implications of changes in ratings and management's expectations;
- expanding the discussion of covenant compliance, implications of breach and capacity for additional borrowing; and
- expanding the discussion of the impact of market events on a company's liquidity and capital resources.

[4] The considerations can be found on slides 75-87 of the presentation "Current Developments in the Division of Corporation Finance" at http://www.sec.gov/news/speech/2008/spch120908wc-slides.pdf.

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Known Trends and Uncertainties. Disclosure of any known trends or uncertainties will require significant focus this year and top level management should be involved early in the process. 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 a material effect on the company's liquidity, capital resources or results of operations is not reasonably likely to occur. 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 these requirements, MD&A should provide management's view on how it expects recent events and the current economic climate to impact the company's operations, if material. Any material changes in the company's business plan made to account for the current economic uncertainties should be discussed in the MD&A and appropriate changes should also be made in the Business section.

Fair Value Disclosure. Fair value disclosure has been a focal point in the SEC's review of public company filings in 2008, and we expect the SEC's emphasis on this area to continue. In 2008, the SEC sent two "Dear CFO" letters about fair value disclosures in the MD&A as part of an effort to help focus senior management and audit committees on such disclosures[5]. Companies should review these letters as they prepare Form 20-F disclosures about their fair value measurements, especially with respect to financial instruments that are not currently actively traded. In particular, the SEC Staff is looking for more disclosure about the judgments and assumptions underlying a company's fair value measurements, the sensitivity of the company's measurements to those assumptions and details about the methodology and inputs the company used to help investors better understand its accounting and disclosure.

In September 2008, the SEC and the FASB published certain clarifications, based on the fair value measurement guidance in FASB Statement No. 157, *Fair Value Measurements* ("**FAS 157**"), in the form of five questions and answers on determining the fair value of assets when the market for the assets is not active[6]. The FASB issued further guidance on the application of FAS 157 in the form of final staff position, FSP FAS 157-3, which restates certain principles already contained in FAS 157 and provides an illustrative example of

[5] The September 2008 letter is available at http://www.sec.gov/divisions/corpfin/guidance/fairvalueltr0908.htm and the March 2008 letter is available at http://www.sec.gov/divisions/corpfin/guidance/fairvalueltr0308.htm.

[6] The clarifications are available at http://www.sec.gov/news/press/2008/2008-234.htm.

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how to apply FAS 157 in determining the fair value of instruments with inactive markets[7].

In addition to the "Dear CFO" letters and the FAS 157 guidance, companies should consider the SEC Staff's observations regarding valuation disclosures in first quarter 2008 reports of U.S. domestic companies[8]. The Staff noted that fair value disclosures in the reviewed filings were lacking and failed to include, for example, ranges of estimates of a fair value, any expected recovery in fair value during the expected holding period, the effect of changes in a company's own credit risk on the fair value of derivative liabilities or a quantification of declines in fair value and assumptions used to measure declines in fair value.

Finally, the SEC's Division of Corporation Finance published a "top ten" list of best disclosure practices on fair valuation that the Staff will look for in the upcoming reporting season[9]. In summary, the list includes:

- providing a sensitivity analysis, in particular where there is disclosure that changes in estimates and assumptions may produce materially different values;
- enhancing disclosure surrounding alternative valuation techniques;
- expanding disclosure about the use of and validation procedures performed on broker/pricing services;
- discussing the collateral underlying mortgaged-backed securities, collateralized debt obligations, collateralized loan obligations etc.;
- providing quantitative disclosure of the effects of credit risk on fair values of derivatives;
- disclosing how illiquidity was taken into consideration in the valuation; and
- enhancing disclosure about Level 3 assets/liabilities and transfers of assets/liabilities in and out of Level 3, including quantification of gains and losses, and discussing the key drivers of value of each significant Level 3 asset/liability.

We encourage companies to review the detailed suggestions included in the list in full.

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[7] FSP FAS 157-3 is available at http://www.fasb.org/pdf/fsp_fas157-3.pdf.

[8] The observations, published in the notes from a meeting of the SEC staff with the SEC Regulations Committee of the Center for Audit Quality in July 2008, are available at http://thecaq.org/resources/secregs/pdfs/highlights/2008_0708_highlights.pdf.

[9] The list can be found on slides 39-60 of the presentation "Current Developments in the Division of Corporation Finance" at http://www.sec.gov/news/speech/2008/spch120908wc-slides.pdf.

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The management of companies whose annual reports will include extensive disclosure regarding fair value, such as financial institutions, should also consider whether there have been developments in their policies and procedures that may require disclosure under Item 15 of Form 20-F as changes in internal control over financial reporting that have materially affected, or are reasonably likely to materially affect, the company's internal control over financial reporting.

Disclosure on Dealings with State Sponsors of Terrorism. Even though the SEC has not taken further action on its November 2007 concept release soliciting comments on questions concerning disclosure of business activities in or with State Sponsors of Terrorism (Cuba, Iran, Sudan and Syria)[10], the SEC's Office of Global Security Risk has continued to monitor public company disclosure in this area. Companies with international business dealings should remain focused on the disclosure, even where their activities with such actors may appear financially immaterial. The SEC 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.

Material Weakness Disclosure under Section 404 of the Sarbanes-Oxley Act. While not general in applicability, issuers who will be disclosing a material weakness in internal control over financial reporting should keep in mind recent SEC Staff remarks concerning material weakness disclosures[11]. According to the Staff, the goal underlying material weakness disclosure is to go beyond describing the existence of a material weakness and allow investors to understand the cause of the control deficiency and to assess its potential impact. In light of this, the Staff requests that management consider the following:

- material weakness disclosure should not be a description of the financial statement adjustment but rather the control deficiency that resulted in the material weakness;
- material weakness disclosures should discuss any pervasive impact on internal control over financial reporting rather than being limited to specific areas where the error was discovered;
- when previously issued financial statements are reissued to correct a material misstatement, management is not required to reassess or revise its conclusions related to the effectiveness of internal control over financial reporting. Management should, however, consider whether its original disclosures are still appropriate in light of the restatement. Management should discuss its judgment as to whether

[10] The release can be found at http://www.sec.gov/rules/concept/2007/33-8860.pdf.

[11] The remarks can be found at http://www.sec.gov/news/speech/2008/spch120808mp.htm.

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the material weakness does not exist, existed but has been remedied or still exists as of the current year-end; and

- companies should make sure that the disclosure of a remediation plan is consistent with, and appropriate in light of, the material weakness disclosed.

Updated Financial Reporting Manual

In addition to the specific disclosure focus areas, companies may find it useful to review the recently updated Financial Reporting Manual prepared by the Staff of the Division of the Corporation Finance. The manual is a reference document used by the Staff in reviewing companies' financial disclosures, and can be found at http://www.sec.gov/divisions/corpfin/cffinancialreportingmanual.pdf.

Additional SEC Rulemaking

Companies should be aware of the following final SEC rules that, while not in effect this reporting season, will be applicable to future reporting.

Mandatory XBRL Requirement. In December 2008, the SEC adopted final rules that will require certain non-U.S. companies to provide financial information to the SEC in an interactive data format using eXtensible Business Reporting Language ("**XBRL**")[12]. Subject to a three-year phase-in, XBRL data will be provided as an exhibit to registration statements and annual reports on Form 20-F and Forms 6-K that contain updated or revised financial statements. The XBRL data will supplement, but not replace or change, disclosure using traditional EDGAR filing formats. While the final rules have not yet been published, based on the SEC Staff's oral statements, the rules will apply only to companies that file financial information prepared in accordance with U.S. GAAP or IFRS. FPIs that file financial statements prepared in accordance with their home country GAAP will not, at this time, be required to provide financial information in XBRL.

Large accelerated filers that file U.S. GAAP financial statements and have a worldwide public float above $5 billion will be required to comply with the new rules beginning with fiscal periods ending on or after June 15, 2009. Compliance will be mandatory for fiscal periods ending on or after June 15, 2010 for all other large accelerated filers that file U.S. GAAP financial statements and June 15, 2011 for all remaining issuers that file U.S. GAAP or IFRS financial statements.

Companies will also be required to post the XBRL data on their public websites and retain the data there for 12 months.

[12] The final rule has not yet been published. The press release announcing the rule is available at http://www.sec.gov/news/press/2008/2008-300.htm.

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Modernization of Oil and Gas Reporting Requirements. In December 2008, the SEC adopted final rules aimed at modernizing its oil and gas company reporting requirements[13]. The new disclosure rules will permit the use of new technologies to determine proved reserves if those technologies have been demonstrated empirically to lead to reliable conclusions about reserves volumes. The new rules will also allow companies to disclose their probable and possible reserves and will require the filing of reports when a third party is relied upon to prepare reserves estimates or conducts a reserves audit. Companies will have to report oil and gas reserves using an average price based upon the prior 12-month period. The new rules are scheduled to apply to annual reports on Form 20-F for fiscal years ending on or after December 31, 2009.

U.S. GAAP Reconciliation - IAS 39 Carve-Out Transition. The final rule adopted by the SEC in December 2007 eliminating the U.S. GAAP reconciliation requirement for FPIs' financial statements prepared in accordance with IFRS as issued by the International Accounting Standards Board ("**IASB**") provides for a two-year transition period for IFRS financial statements that apply a carve-out from IAS 39, "Financial Instruments: Recognition and Measurement" with respect to hedge accounting for certain financial instruments.[14] The carve-out is permitted by IFRS as adopted by the European Union, but is incompatible with the SEC's reporting alternative of IFRS as issued by the IASB. Despite this, such financial statements do not need to include U.S. GAAP reconciliation for the issuer's first two fiscal years that end after November 15, 2007, provided that the financial statements otherwise comply with IFRS as issued by the IASB and contain a reconciliation to IFRS as issued by the IASB. Companies whose fiscal years end after November 15 and that rely on this transitional relief should be mindful that fiscal year 2008 was the last year for this accommodation and that, beginning with the next 20-F reporting season, their financial statements will need to be in full compliance with IFRS as issued by the IASB or will need to include a U.S. GAAP reconciliation.

WKSI Status Loss

Due to recent declines in equity valuations, many companies are at risk of losing the ability to issue securities off of an automatic shelf registration statement. A company's filing of a Form 20-F triggers a new determination date for its well-known seasoned issuer ("**WKSI**") status. To remain eligible to use an existing WKSI shelf, a company's worldwide equity float (excluding shares held by affiliates) must equal or exceed $700 million at a point during the 60 days preceding the date of the company's Form 20-F filing. After discussions with the SEC Staff, the Staff provided us with guidance on the steps to be taken by a company that loses its WKSI status in order for such a company to preserve its

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[13] The final rule release is available at http://www.sec.gov/rules/final/2008/33-8995.pdf.

[14] The final rule release is available at http://www.sec.gov/rules/final/2007/33-8879.pdf.

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ability to access the U.S. public capital markets. The steps include the filing of a post-effective amendment to the company's automatic shelf, which conforms the automatic shelf in all respects to the requirements of a non-automatic shelf registration statement filed by a seasoned issuer that is not a WKSI. The full process is described in our Client Newsflash available at http://www.dpw.com/1485409/newsflashes/01.09.09.WKSI.Shelf.Issue.html.

Paper on the SEC's Filing Review Process

In June 2008, the Division of Corporation Finance published a paper on the SEC's process of review of filings under the Securities Act and the Exchange Act. The paper can be found at http://www.sec.gov/divisions/corpfin/cffilingreview.htm.

New York Stock Exchange Rule Changes

In December 2008, the New York Stock Exchange (the "**NYSE**") revised, with immediate effect, NYSE Rule 203.01 (Annual Financial Statements) to modify the requirement that a company must issue a press release announcing the filing of its annual report. The amendment is consistent with the NYSE's past practice which, despite the rule's former wording, did not require the issuance of such a press release. A NYSE-listed FPI can comply with the rule by:

- posting the Form 20-F on its website upon filing, issuing a press release announcing the filing of the Form 20-F and providing an undertaking to provide hard copies upon request and free of charge; or
- complying with the physical or electronic delivery requirements applicable to annual reports of U.S. domestic companies under Rules 14a-3 and 14a-16 under the Exchange Act.

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If you have any questions regarding the issues raised in this memorandum or would like more information, please call your regular Davis Polk contact.

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