Preparing Your 2016 Form 20-F

December 8, 2016

This memorandum highlights some considerations for the preparation of your 2016 annual report on Form 20-F. As in previous years, we discuss both disclosure developments as well as continued areas of focus for the U.S. Securities and Exchange Commission (**SEC**). In addition, we highlight certain U.S.-related regulatory actions and other developments of interest to foreign private issuers (**FPIs**).

Disclosure Developments for 2016 Form 20-F

While there has been no change in the actual Form 20-F requirements this year, below are selected disclosure developments worth highlighting for FPIs.

SEC Guidance on Non-GAAP Financial Measures

On May 17, 2016, the staff of the SEC's Division of Corporation Finance released new and revised **Compliance and Disclosure Interpretations** (**C&DIs**) on the use of non-GAAP financial measures. The new guidance clarifies – and in some cases changes – the rules for using non-GAAP financial measures under Regulation G, which applies to all public disclosures by SEC registrants (with certain exceptions for foreign private issuers), and Item 10(e) of Regulation S-K, which applies to SEC filings, including annual reports on Form 20-F and Form 6-Ks that are incorporated by reference into registration statements.

The new guidance is not officially a rule change, though some of it expands on the text of Regulation G and may lead to changes in common practice. Non-GAAP financial measures are widely used by companies, investors and analysts to monitor performance, incentivize management and facilitate intercompany and interperiod comparisons. The SEC C&DIs, together with the European Securities and Market Authority Guidelines on Alternative Performance Measures effective for certain FPIs from July 2016, has resulted in increased focus on non-GAAP measures. In our **SEC Releases Guidance on Non-GAAP Financial Measures Client Memorandum**, we indicate which presentations are prohibited under the new guidance and discuss the new guidance around equal prominence, forward-looking measures and per-share measures. While the guidance may herald a formal move by the SEC towards adopting a different view, we do not believe it is time for companies to stop using non-GAAP financial measures, provided the guidance is adhered to. Since the May 2016 guidance, the SEC's Division of Corporation Finance has issued more than 200 comment letters to companies questioning whether their non-GAAP disclosures comply with the guidance. We expect the SEC staff to assess the comment letter responses and future earnings releases prior to deciding whether further rulemaking or even enforcement actions are warranted.

Conflict Minerals Rules

As discussed in our **Preparing Your 2015 Form 20-F** memorandum, on August 18, 2015, the D.C. Circuit Court of Appeals issued an opinion upholding its April 2014 finding that a key aspect of the conflict minerals rule violates constitutional free-speech guarantees, and on November 9, 2015, the D.C. Circuit denied the SEC's request for rehearing without comment or discussion. In April 2016, U.S. Attorney General Loretta E. Lynch advised that the Department of Justice had decided, in consultation with the SEC, not to file a petition for writ of certiorari seeking review by the U.S. Supreme Court of the U.S. Court of Appeals for the District of Columbia Circuit's decision on the SEC's conflict minerals rule.

Therefore, the current conflict minerals rule, as modified by the SEC's April 2014 guidance, remains in effect. The rule, as modified by the guidance, provides that:

- No company is required to describe its products as ""DRC conflict free," having "not been found to be 'DRC conflict free'" or "DRC conflict undeterminable"; and
- An independent private sector audit will not be required unless a company voluntarily elects to describe a product as "DRC conflict free" in its Conflict Minerals Report.

Companies that use conflict minerals in their products are still, however, required to conduct supply chain inquiries and file a Form SD and a Conflict Minerals Report that contains the other disclosures contemplated by the rule.

Resource Extraction Payment Rules

On June 27, 2016, the SEC adopted **final rules for resource extraction issuers**, which will first apply to Form SD filings in 2019.

The final rules, like those originally adopted in 2012 and then reproposed in 2015, continue to require public disclosure (rather than confidential submission) of covered payments (i.e., payments made by a covered company (or an entity under its control) to a foreign government or to the U.S. federal government to further the commercial development of oil, natural gas or minerals) and do not provide a blanket exemption for disclosures prohibited under applicable law – grounds on which the original rules were challenged. Instead, the final rules allow companies to apply for exemptive relief on a case-by-case basis, tailored to their individual facts and circumstances.

A covered company, including any company required to file an annual report on Form 20-F, that is engaged in the "commercial development" (as defined in the final rules) of oil, natural gas or minerals is required to comply with the rules starting with its fiscal year ending on or after September 30, 2018. Barring another successful challenge to the rules, a calendar-year company will be required to make its initial filing on Form SD disclosing 2018 resource extraction payments no later than May 30, 2019 (oddly, a day earlier than the conflict minerals Form SD due date). For further details, please see our **Client Memorandum**.

We note that should the Financial CHOICE Act (described below) be adopted in its current form, all conflict minerals and resource extraction disclosure requirements will fall away.

Iran Sanctions and State Sponsors of Terrorism

Under the Joint Comprehensive Plan of Action (**JCPOA**), which was agreed to on July 14, 2015 by Iran, the United States and the other permanent members of the UN Security Council, plus Germany, and the High Representative of the European Union for Foreign Affairs and Security Policy, Iran is to be provided with phased sanctions relief in exchange for its implementation of certain nuclear-related commitments. On January 16, 2016 (**Implementation Day** under the JCPOA), the United States and the European Union implemented certain sanctions relief regarding Iran. Among other things, the United States lifted its nuclear-related secondary sanctions targeting non-U.S. persons for certain activities relating to Iran undertaken outside the United States. In addition, on Implementation Day, the U.S. Department of the Treasury's Office of Foreign Assets Control removed certain parties from its Specially Designated Nationals and Blocked Persons List (the **SDN List**). U.S. "direct" sanctions on Iran, which broadly prohibit U.S. persons from undertaking most transactions with Iran or the Government of Iran, were not lifted, and remain in effect. Other secondary sanctions relating to Iran – for example, sanctions based on support for terrorism or proliferation of weapons of mass destruction (**WMD**) – also remain in effect.

The JCPOA and Implementation Day did not result in the revocation or amendment of Section 219 of the Iran Threat Reduction and Syria Human Rights Act of 2012 (**ITRA**) and accordingly, issuers' disclosure obligations thereunder remain in effect. We discussed these obligations in our **Preparing Your 2012 Form 20-F** and **Preparing Your 2013 Form 20-F** memoranda. Section 219 of ITRA requires that public companies include explanatory disclosure and make an IRANNOTICE filing on EDGAR if they or their affiliates knowingly engaged during the period covered by the annual or quarterly report in certain Iran-related activities or certain transactions with persons on the SDN List who were designated for their support of terrorism or WMD proliferation. However, as referenced above, on Implementation Day, a number of entities were removed from the SDN List. Accordingly, if post-Implementation Day an issuer or its affiliates engaged in transactions with any party that, at the time of the transactions, was no longer included on the SDN List for WMD or terrorism reasons, the issuer would not be required to disclose such transactions in its Form 20-F, unless these parties are part of the Government of Iran or the activities were otherwise specified in ITRA Section 219 (including, but not limited to, investments in the Iranian petroleum and petrochemical sector, certain transactions relating to Iranian crude oil or Iranian refined petroleum, or the transfer of goods, technologies or services likely to be used by the Government of Iran to commit serious human rights abuses against the people of Iran). If, however, an issuer or one of its affiliates conducted a transaction during the 2016 reporting period with a party designated for WMD or terrorism reasons prior to its removal from the SDN List, such transaction would be disclosable.

Additionally, the SEC has continued to focus on issuers' contacts with other countries besides Iran that have been identified as State Sponsors of Terrorism. FPIs should consider relevant risk factor disclosure as well as other disclosure denoting the nature and materiality of contacts with countries identified as State Sponsors of Terrorism (currently Iran, Sudan and Syria).

Continued SEC Disclosure Focus Areas

SEC Progresses Its Disclosure Effectiveness Initiative

In 2016, the SEC continued progress on its "disclosure effectiveness initiative," which it launched in 2013 and in which it articulated the overarching goal of improving the public company disclosure requirements for the benefit of both investors and companies. Similarly, the SEC also made progress on its efforts to comply with the mandates set forth in the JOBS Act of 2012 and the FAST Act of 2015, both of which instructed the SEC to analyze Regulation S-K to determine how its disclosure requirements could be modernized and simplified, and to propose revisions to these requirements. This progress has resulted in the following from the SEC, none of which will be applicable to 2016 Form 20-F reporting:

- In September 2015, the SEC published a **request for comment** on the financial disclosure requirements in Regulation S-X for certain entities other than the registrant.
- In April 2016, the SEC published a **concept release** seeking public comment on modernizing the disclosure requirements of Regulation S-K, the central source of non-financial statement disclosure requirements for U.S. public companies (our client memorandum is available **here** and our summary is available **here**). Portions of Regulation S-K are incorporated in the disclosure requirements of Form 20-F and a change to Regulation S-K could result in a change to the disclosures required under Form 20-F.
- In June 2016, the SEC published proposed rules to modernize mining disclosures (our client memorandum is available **here**).
- In June 2016, the SEC proposed **amendments** that would increase the financial thresholds in the "smaller reporting company" definition. Smaller reporting companies qualify for certain scaled disclosures provided in Regulation S-K and Regulation S-X.
- In July 2016, the SEC published a proposal aimed at eliminating or updating duplicative, overlapping and obsolete disclosure requirements in Regulation S-K and Regulation S-X (our client memorandum is available **here**).
- In August 2016, the SEC published **proposed rules** that would require companies, including FPIs, to include hyperlinks to exhibits filed with periodic and current reports and registration statements (our blog post is available **here**).

- In November 2016, the SEC issued a **report** to Congress detailing specific rulemaking recommendations regarding the modernization and simplification of the disclosure requirements in Regulation S-K, as required by the FAST Act. The report's recommendations included revisions to MD&A disclosure to reduce repetition, the omission of schedules to exhibits that are immaterial or otherwise disclosed elsewhere, expanded use of hyperlinks and incorporation by reference of documents that have been on file with the SEC for more than five years. The FAST Act requires the report to be followed within 360 days by proposed rules to implement the recommendations made in the report.

It is still too early to assess the impact the disclosure initiative reform will have on how companies prepare disclosure documents going forward. However, if certain of the above principles are adopted, it may also impact disclosures included in an FPI's annual report on Form 20-F.

Risk Factors

We have seen an increase in specific and robust risk factor disclosure related to recent global political developments. For example, over 500 SEC-registered companies disclosed Brexit-related risk factors in quarterly and annual reports in the months following the June 23 referendum vote. Companies are encouraged to actively review and maintain their risk factor disclosure in light of the current political, economic and regulatory environment.

Audit Committees

As discussed in our **Preparing Your 2015 Form 20-F** memorandum, on July 1, 2015, the SEC issued a **Concept Release** seeking public comment on whether to expand disclosure requirements regarding audit committees. The primary focus of the concept release was on the audit committee's responsibilities for oversight of the independent auditor. The public comment period for this release ended on September 8, 2015 and Davis Polk's comment letter is available **here**. The SEC has not yet proposed any related rulemaking or taken any subsequent actions following the end of the public comment period.

Cybersecurity

As discussed in our **Preparing Your 2015 Form 20-F** memorandum, the SEC and U.S. lawmakers continue to focus on cybersecurity as a topic for disclosure and related rulemaking. For example, at SEC Speaks 2016 in February, the SEC Enforcement Division indicated that it is interested in investigating public companies' failure to disclose cyber breaches. Cybersecurity-related legislation pending in the United States includes the **Cybersecurity Disclosure Act of 2015**, which was introduced in the Senate in December 2015, and the **Cybersecurity Systems and Risks Reporting Act**, which was introduced in the House of Representatives in April 2016. Both bills are still pending in their respective chambers. The proposed Cybersecurity Disclosure Act of 2015 would require publicly traded companies, including FPIs, to disclose cybersecurity expertise that is represented on its board of directors or to disclose what other steps the company has taken to identify or evaluate nominees for this board-level cybersecurity position. The proposed Cybersecurity Systems and Risks Reporting Act would (i) extend SOX 302 officer certifications to include designated corporate cybersecurity system officers, (ii) extend SOX 402 internal controls requirements to include cybersecurity structures and procedures and (iii) require publicly traded companies to disclose whether their audit committees have cybersecurity systems experts and, if not, why.

Implementation of New Revenue Recognition Standards

Throughout 2016, members of the SEC's Office of the Chief Accountant gave speeches focusing on new accounting standards for revenue recognition that are to take mandatory effect for public companies under U.S. GAAP and IFRS on December 15, 2017. In May 2014, the Financial Accounting Standards Board and the International Accounting Standards Board issued a converged standard on recognizing revenue (ASU Topic 606 and IFRS 15, respectively). With only one year left to implement this new accounting standard, the OCA urged companies to reassess the disclosure in their SEC filings regarding the impact of the new guidance, consistent with **Staff Accounting Bulletin 74 (SAB Topic 11M)**. The OCA also urged companies to design and implement internal controls to evaluate the application of the new standard and encouraged audit committees to assess the quality and status of plans for implementation. Because one of the goals for the revised revenue standards was to improve comparability and consistency across U.S. GAAP and IFRS reporting companies, the OCA noted an expectation that there would be largely consistent reporting outcomes for identical transactions across domestic and foreign private issuers. The OCA indicated that review of a registrant's implementation of the new revenue recognition standard for both U.S. GAAP and IFRS would also be informed by the discussions of the FASB's Transition Resource Group and urged companies to consult with OCA staff if they intended to implement an accounting policy that was inconsistent with those discussions.

Enforcement Matters

Foreign Corrupt Practices Act

Foreign Corrupt Practices Act (**FCPA**) enforcement continues to be a high priority for the U.S. Department of Justice and the SEC. On November 30, 2016, Andrew Ceresney, Director of the SEC's Division of Enforcement, gave a **speech** on the SEC's FCPA program and indicated that 2016 was a record year for enforcement, with 21 FCPA actions brought against entities and individuals, two non-prosecution agreements, a deferred prosecution agreement and hundreds of millions of dollars in financial remedies. Ceresney emphasized the importance of self-reporting, indicating that parties that self-report and cooperate can benefit from reduced charges, including deferred prosecution or non-prosecution agreements and, in certain instances when the violations are minimal, no charges. In contrast, companies that discovered misconduct but made the decision not to report to the SEC and did not provide meaningful cooperation have not received any reduction in penalties or other benefits and, in some cases, have paid higher penalties. In discussing several of the more significant FCPA cases brought in the last year, Ceresney highlighted the SEC's commitment to holding individuals accountable for misconduct. He also indicated that the SEC is scrutinizing hiring practices (including the employment of individuals referred by government officials) as part of an industry-wide sweep in the Asia-Pacific region. Ceresney highlighted the increase in international cooperation among regulators and law enforcement on FCPA matters, noting several recent significant global settlements.

SEC's Whistleblower Program

The SEC's whistleblower program, which was adopted in August 2011 and rewards individuals who provide the SEC with high-quality tips that lead to successful enforcement actions, has had a historic year according to the SEC's **2016 Annual Report on the Dodd-Frank Whistleblower Program**. In August 2016, the SEC announced that it has awarded more than $111 million to 34 whistleblowers whose information and cooperation assisted the agency in bringing multiple successful SEC enforcement actions and related actions since the beginning of the program. Furthermore, in 2016 alone, the agency issued awards totaling over $57 million – higher than all award amounts issued in previous years combined. The ten highest awards issued by the SEC to whistleblowers have each totaled more than $1 million, with the largest exceeding more than $30 million, and six of the ten highest whistleblower awards were made in 2016. In 2016, the SEC brought a number of enforcement actions against companies under the Dodd-Frank whistleblower rules on the basis that confidentiality provisions in company documents had a chilling effect on an employee's ability to communicate with the SEC about potential securities law violations. According to the SEC's report, "assessing confidentiality, severance, and other kinds of agreements that may stifle a would-be whistleblower from reporting his or her information to the agency and that strip away the very incentives Congress intended for the program will continue to be top priority for the SEC's Office of the Whistleblower."

Other Matters That May Be of Interest to FPIs

NYSE

NYSE Rule 203.03 (Semi-Annual Unaudited Financial Information)
Effective as of February 2016, the NYSE has amended its **rules** to require NYSE-listed FPIs to submit a Form 6-K to the SEC containing semi-annual unaudited financial information no later than six months following the end of the company's second fiscal quarter. The NYSE indicated that as almost all NYSE-listed FPIs already provide this information, the new rules will have no impact on most issuers.

Section 203.01 Guidance for Listed FPIs
The NYSE has issued **guidance** to assist listed FPIs in complying with **NYSE Listed Company Manual Section 203.01**, which requires (1) an FPI to make its Form 20-F with audited financial statements available on or through its website simultaneously with its filing with the SEC and (2) if the FPI does not provide its audited financial statements to beneficial shareholders in a manner that is consistent with the physical or electronic delivery requirements applicable to annual reports set forth in Rules 14a-3 and 14a-16 of the U.S. proxy rules, (a) to post a prominent undertaking on its website to provide all holders the ability, upon request, to receive a hard copy of the complete audited financial statements free of charge and (b) to simultaneously issue a press release, which states that the annual report has been filed with the SEC, includes the company's website address and indicates that shareholders have the ability to receive a hard copy of the company's complete audited financial statements free of charge upon request. The new NYSE guidance principally relates to the requirement that the press release announcing a 20-F's filing be broadly disseminated.

NASDAQ

NASDAQ Rule 5250(b)(2) Disclosure of Payments by Directors to Third Parties
As discussed in our **blog post**, effective August 1, 2016, NASDAQ-listed companies must disclose the material terms of all third-party compensatory agreements or arrangements for nominees and directors in their next Form 20-Fs under new **NASDAQ Rule 5250(b)(2)**. For FPIs, this rule is included among the provisions where such an issuer would be permitted to follow home country practice in lieu of this requirement so long as the issuer submits to NASDAQ a written statement from an independent counsel in its home country certifying that the company's practices are not prohibited by the home country's laws, and discloses in its Form 20-F filing that it does not follow these NASDAQ rules and states the home country practices that it follows instead.

Tandy Language No Longer Required

Effective as of October 5, 2016, the SEC Division of Corporation Finance **announced** that it will no longer request companies to include Tandy language (affirmative representations that a company will not use the SEC's comment process or acceleration of effectiveness as a defense in proceedings under the securities laws) in responding to review comment letters.

Continued XBRL Relief for IFRS Filers

Consistent with prior years, until a taxonomy is specified by the SEC, FPIs that prepare financial statements in accordance with International Financial Reporting Standards (**IFRS**) as issued by the International Accounting Standards Board (**IASB**) will not be required to provide financial information in an interactive data format using eXtensible Business Reporting Language (**XBRL**) as the SEC has not yet specified the XBRL taxonomy. FPIs that are not providing XBRL information should not check the box on the cover page of Form 20-F relating to compliance with the interactive data file submission requirements.

Information Relevant to U.S. Public Securities Offerings

SEC Filing Fee Increase

As of October 1, 2016, the **filing fee** to register securities with the SEC increased to $115.90 per million dollars from $100.70 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.

NYSE to Increase Certain Listing Fee Provisions for 2017 Calendar Year

On November 23, 2016, the NYSE filed a **proposed rule change** with the SEC to amend the **NYSE Listed Company Manual** to increase certain NYSE listing fee provisions to take effect in the 2017 calendar year. The proposed fee increases include: (i) the fee per share in connection with the initial listing of a new class of equity securities; (ii) the minimum and maximum initial listing fees in connection with a new class of equity securities; (iii) the annual fee for certain categories of securities; (iv) the minimum annual fee applicable to the primary class of common shares or primary class of preferred stock; (v) the minimum annual fee applicable to certain structured products and short-term securities; (vi) the initial and annual listing fees for listed debt for companies other than NYSE equity issuers and affiliated companies; and (vii) the initial and annual listing fees for securities (including short-term securities) that list under the debt standard in Section 703.19 of the Listed Company Manual and trade on NYSE Bonds. The specific proposed fee increases can be found **here**.

SEC Proposes T+2 Settlement Cycle

On September 28, 2016, in a long-anticipated move, the SEC **proposed** to shorten the standard settlement cycle for most broker-dealer transactions to two business days after the trade date (T+2) from the current three business day cycle (T+3). The proposed T+2 settlement cycle aims to reduce credit, margins and liquidity risk arising from unsettled securities trades and would bring the U.S. standard settlement cycle in closer alignment with non-U.S. markets (such as those in the European Union). Importantly, the proposal is aimed at the secondary market and if adopted as proposed would not affect the current ability in most firm commitment underwritten transactions to use a longer settlement cycle. For further details, please see our **Client Memorandum**.

The Financial CHOICE Act

President-Elect Trump's transition website promises to "dismantle the Dodd-Frank Act and replace it with new policies to encourage economic growth and job creation." For those who wonder what that might mean in more detail, we believe that Rep. Jeb Hensarling's (R-TX) Financial CHOICE Act, introduced earlier this year, is a starting point that signals a potential general direction of travel for financial reform. It is not the end, however, as we expect that the Republican Congress and Administration will have more ambitious plans for a significant reorientation of the regulatory framework (for instance, Rep. Hensarling has stated that he will work towards Financial CHOICE Act 2.0 soon), and complex negotiations both within the Republican Party and with Democrats will further shape the ultimate result.

The Financial CHOICE Act is not a blanket repeal of the Dodd-Frank Act. Its 512 pages would make intricate changes to the regulatory landscape introduced by the Dodd-Frank Act, repealing some elements, modifying others in complex ways and leaving others untouched. Notably, the Financial Choice Act proposes to repeal all conflict minerals and resource extraction disclosure requirements.

For further details, please see our **Client Memorandum** and our blog **FinRegReform.com**.

Davis Polk

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.

John Banes	**+44 20 7418 1317**	**john.banes@davispolk.com**
William F. Barron	**+852 2533 3303**	**william.barron@davispolk.com**
Maurice Blanco	**+55 11 4871 8402** **+1 212 450 4086**	**maurice.blanco@davispolk.com**
Bruce K. Dallas	**+1 650 752 2022**	**bruce.dallas@davispolk.com**
Jon Gray	**+81 3 5574 2667**	**jon.gray@davispolk.com**
Eugene C. Gregor	**+1 650 752 2058** **+81 3 5574 2631**	**eugene.gregor@davispolk.com**
Michael Kaplan	**+1 212 450 4111**	**michael.kaplan@davispolk.com**
Nicholas A. Kronfeld	**+1 212 450 4950**	**nicholas.kronfeld@davispolk.com**
Michael J. Willisch	**+34 91 768 9610**	**michael.willisch@davispolk.com**
Connie I. Milonakis	**+44 20 7418 1327**	**connie.milonakis@davispolk.com**