April 12, 2011

Checklist for Form 20-F Filers

This memorandum summarizes new U.S. disclosure requirements and considerations for non-U.S. SEC-reporting companies, and is intended to serve as a checklist, as companies prepare their annual reports on Form 20-F for fiscal 2010. Most of these requirements and considerations stem from the recent global financial and economic crisis, including regulatory actions mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), which was signed into law by President Obama on July 21, 2010. For a discussion of the most relevant provisions of the Dodd-Frank Act to foreign private issuers, see http://www.paulweiss.com/files/upload/30Jul10SEC.pdf.

Limitations on Disclosure of Credit Ratings

The Dodd-Frank Act nullified Rule 436(g) under the U.S. Securities Act of 1933, as amended (the "Securities Act"). Rule 436(g) provided that credit rating agencies were exempt from being treated as "experts" for purposes of liability under the securities laws with respect to information contained in registration statements. Before the nullification of Rule 436(g), credit ratings agencies were not required to provide written consent to the inclusion of their ratings in registration statements, and were not subject to liability under Section 11 of the Securities Act for material misstatements or omissions with respect to such ratings. As a result of the nullification, companies must now either obtain consent of the relevant rating agencies or remove ratings information from their registration statements or reports (including annual reports Form 20-F) or other documents included or incorporated by reference into such registration statements, except in specific circumstances identified by the SEC (e.g., risk factor disclosure about the consequences of failure to maintain a rating, a general discussion of liquidity and funding cost, a description of agreements that refer to credit ratings). For more information on the use of credit ratings, see http://www.paulweiss.com/files/upload/26Jul10SEC.pdf and http://www.paulweiss.com/files/upload/1Mar11_F9.pdf.

Internal Control Over Financial Reporting for Non-Accelerated Filers

As directed by the Dodd-Frank Act, in September 2010, the SEC amended its rules and forms to provide that an audit report prepared for an SEC-reporting company that is neither an "accelerated filer" nor a "large accelerated filer" need not include an attestation report by an independent auditor on management's assessment of internal controls over financial reporting. Form 20-F has been revised to reflect this change. The SEC's rule adopting release is available at http://www.sec.gov/rules/final/2010/33-9142.pdf.

MD&A Disclosure

Form 20-F filers should be reminded that MD&A disclosure continues to be closely scrutinized for trends and uncertainties that have the potential to impact their results, liquidity and financial condition, and prospects. These and other considerations for Form 20-F filers in preparing the MD&A section in their annual reports are summarized in our previous memorandum titled *Disclosure Practices for 20-F Filers*

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and Other Non-US Companies (October 2010).

Liquidity disclosure: The SEC's MD&A rules and interpretations require companies to provide investors with disclosure that facilitates an appreciation of the known trends and uncertainties that have impacted historical results or are reasonably likely to shape future periods, in each case from the perspectives of management. In the context of liquidity, companies should disclose known trends or any known demands, commitments, events or uncertainties that will result in, or that are reasonably likely to result in, their liquidity increasing or decreasing in any material way.

- *Important trends and uncertainties*. In the new guidance, the SEC provided additional examples of important trends and uncertainties relating to liquidity that must be addressed. These include difficulties accessing the debt markets, reliance on commercial paper or other short-term financing arrangements, maturity mismatches between borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral and general counterparty risk.
- *Intra-period debt amounts*. The SEC has clarified that if a company's financial statements do not adequately convey the company's financing arrangements during the reporting period, or the impact of those arrangements on liquidity, the company may be required to add narrative disclosure to enable an understanding of the amounts depicted in the financial statements. For example, depending on the company's circumstances, if borrowings during the reporting period are materially different than the period-end amounts recorded in the financial statements, disclosure about the intra-period variations is required under the current rules to facilitate investor understanding of the company's liquidity position. (Thus, even in the absence of new rules on short-term borrowings, the SEC is on record as requiring companies to address intra-period movements in their levels of debt, if the maximum amounts are materially different from the amounts at period-end.)
- *Repurchase transactions*. If a company's transactions, such as repurchase, securities lending or any other transactions involving the transfer of financial assets with an obligation to repurchase the financial assets that has been accounted for as a sale, are reasonably likely to result in the use of a material amount of cash or other liquid assets, then the company must disclose such transactions, particularly where the company does not otherwise include such information in its discussion of off-balance sheet arrangements or in its contractual obligations table.
- *Cash management and risk management policies*. Companies also need to describe cash management and risk management policies that are relevant to an assessment of their financial condition. Companies that maintain or have access to a portfolio of cash and other instruments that are a material source of liquidity should consider providing information about the nature and composition of that portfolio, including a description of the assets held and any related market risk, settlement risk or other risk exposure, which could include information about the nature of any limits or restrictions on the company's ability to use or access those assets to fund its operations.

Leverage ratio disclosure: If a company chooses to include capital or leverage ratios in its MD&A, such ratios need to be accompanied by a clear explanation of the calculation methodology. Companies are also reminded that capital or leverage ratios that are presented in the absence of regulatory requirements prescribing a methodology or in a form that differs from the prescribed form will need to consider whether the measure is a financial measure or a nonfinancial measure, and then apply the relevant guidance. Presentation of ratios in the context of discussions of debt instruments and covenant compliance should also conform to prior guidance.

Contractual obligations table disclosure: The contractual obligations table in the MD&A is meant to provide aggregated information about contractual obligations and contingent liabilities and commitments in a single location to improve transparency of short-term and long-tem liquidity and capital resources. Companies are encouraged to develop a presentation methodology that is clear, understandable and appropriately reflects the categories of obligations that are meaningful in light of their capital structure and business. Footnotes or even additional narrative disclosure should be used where appropriate and may be necessary to explain what the table does and does not include.

For more information on the proposed rules and guidance, see http://www.paulweiss.com/files/upload/22Sep10SEC.pdf.

Disclosure Relating to Climate Change

The SEC, in February 2010, issued interpretive guidance relating to climate change-related disclosure by SEC reporting companies. Companies should, if material, disclose in their risk factors, description of business, MD&A and description of legal proceedings, the actual and potential impacts and risks relating to:

- existing and pending climate change legislation or regulation,
- climate change-related international accords or treaties,
- business trends associated with climate change, and
- physical effects of climate change, such as effects on the severity of weather, sea levels, the arability of farmland and water availability and quality.

For more information on the guidance, see http://www.paulweiss.com/files/upload/PW_9Feb10_SEC.pdf.

Updated Financial Reporting Manual

On April 1, 2011, the SEC's Division of Corporation Finance published an updated Financial Reporting Manual, which is available at http://www.sec.gov/divisions/corpfin/cffinancialreportingmanual.pdf.

Additional Guidance on eXtensible Business Reporting Language (XBRL)

In September 2010, the SEC updated its compliance and disclosure interpretations related to financial statement information in an interactive data format based on XBRL. The interpretations provide additional guidance on how a filer should determine when it is required to submit interactive data and to detail tag financial statement footnotes and schedules. The SEC guidance is available at http://www.sec.gov/divisions/corpfin/guidance/interactivedatainterp.htm.

Disclosure by Oil and Gas Companies

In December 2008, the SEC adopted revisions to its oil and gas disclosure rules designed to modernize disclosures by oil and gas companies. The revised rules apply to annual reports on Form 20-F for fiscal periods ended on or ending after December 31, 2009. For a further discussion on this topic, see http://www.sec.gov/rules/final/2008/33-8995.pdf.

Disclosure Relating to Activities in or with Iran

In July 2010, the Comprehensive Iran Sanctions, Accountability and Divestment Act became effective, providing for additional sanctions on the Islamic Republic of Iran and companies and individuals doing business with Iran. The SEC's Office of Global Security Risk may comment or raise questions relating to disclosures in annual reports on Form 20-F describing business activities in or with Iran and other countries designated by the U.S. Department of State as State Sponsors of Terrorism.

Form 20-F and XBRL Filing Deadlines

As a reminder, beginning with annual reports on Form 20-F for fiscal years ending on or after December 15, 2011, the filing deadline will be shortened to four months after the fiscal year end. The filing deadline for annual reports on Form 20-F for fiscal 2010 is six months.

Unless required to file their annual reports on Form 20-F in XBRL format earlier, all foreign private issuers, regardless of whether their financial statements are prepared in accordance with U.S. GAAP or IFRS as issued by the IASB, must include interactive data in their annual reports on Form 20-F for fiscal periods ending on or after June 15, 2011. The data needs to be included in the form of an additional exhibit containing "interactive data," tagged in XBRL format.

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During 2010 and 2011, the SEC has proposed several new disclosure rules that have not yet been adopted. Although disclosure under the proposed rules may not be required for annual reports on Form 20-F for fiscal 2010, SEC-reporting companies should consider the proposed disclosure items and include any disclosure item that may be material. The following is a summary of some of the proposed disclosure rules to be considered in preparing annual reports on Form 20-F for fiscal 2010.

Proposed Short-Term Borrowings Disclosure

In September 2010, the SEC proposed new disclosure rules relating to short-term borrowings. The aim of the proposed SEC rulemaking is to address, in the words of the SEC Chairman, "balance sheet window dressing," whereby levels of short-term borrowings are reduced at quarter end, so as to present healthier balance sheets that capture only a snapshot at quarter end of a company's liquidity. Concurrently, the SEC issued new interpretive MD&A guidance, which is intended to improve investors' overall understanding of the potential liquidity and funding risks faced by companies.

The proposed disclosure rules on short-term borrowings would apply disclosure requirements similar to those in SEC Industry Guide 3, Statistical Disclosure by Bank Holding Companies ("Guide 3") guidance on short-term borrowings, currently applicable only to bank holding companies, with certain changes, to all financial and non-financial SEC reporting companies. SEC-reporting companies would need to provide, under a new subheading in the MD&A, quantitative disclosure regarding short-term borrowings in tabular format by category of borrowings, accompanied by qualitative discussion.

The qualitative (narrative) disclosure of short-term borrowings would have to include:

- a discussion necessary to an understanding of such borrowings and the current or future effect on the company's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditure or capital resources;
- a general description of the short-term borrowings arrangements included in each category (including any key metrics or other factors that could reduce or impair the company's ability to borrow the borrowings under any of its arrangement and whether collateral might be required) and the business purpose of the short-term borrowings;
- the importance to the company of its short-term borrowings to its liquidity, capital resources, market-risk support, credit-risk support or other benefits;
- the reasons for any material differences between average short-term borrowings and end of period short-term borrowings; and
- the reasons for the maximum outstanding amounts in each reporting period, including any non-recurring transactions or events, use of proceeds or other information that provides context for the maximum amount.

This qualitative disclosure is not intended to be repetitive of other disclosure relating to liquidity and capital resources. Instead, the discussion of short-term borrowings should be integrated with disclosures regarding cash requirements in the contractual obligations table, disclosures of off-balance sheet arrangements and other liquidity and capital resources disclosures to present a clear, comprehensive description of the company's liquidity profile.

The quantitative disclosure of short-term borrowings would have to include, by category of short-term borrowings, (1) the amount and weighted average interest rate of short-term borrowings at the end of the reporting period, (2) the average amount and the weighted average interest rate of short-term borrowings during the reporting period, and (3) the maximum amount of short-term borrowings during the reporting period. The amounts of short-term borrowings would have to be disaggregated by currency, interest rates or other meaningful category if the aggregate presentation would be misleading, and footnotes would have to be used to explain the calculations.

In annual reports on Form 20-F, foreign private issuers would need to provide the disclosure only for the most recent three fiscal years.

The proposed rules distinguish between financial companies and non-financial companies for purposes of reporting maximum amounts and average amounts outstanding during a reporting period. Financial companies would have to compile and report data for the maximum daily amounts outstanding (meaning the largest amount outstanding at the end of any day in the reporting period) and the average amounts outstanding during the reporting period computed on a daily average basis (meaning the amount outstanding at the end of each day, averaged over the reporting period). Non-financial companies would have to report the maximum month-end amounts outstanding (meaning the largest amount outstanding at the end of the last day of any month in the reporting period); these companies would not be required to present average outstanding amounts computed on a daily average basis, but the averaging period could not exceed one month.

Proposed Requirements Relating to Compensation Committees

Responding to the requirements of the Dodd-Frank Act, in March 2011, the SEC proposed rules that impose new compensation committee independence and other requirements and new disclosure requirements regarding compensation consultants.

The proposed rules (a) direct the national securities exchanges to adopt certain listing standards related to the compensation committee of a company's board of directors, as well as its compensation advisers, and (b) require new disclosures from companies concerning their use of compensation consultants and conflicts of interest.

The proposed rules require the exchanges to exempt from the compensation committee independence requirements any foreign private issuer that discloses in its annual report the reasons that such issuer does not have an independent compensation committee.

The proposed rules relating to compensation consultants are not applicable to foreign private issuers (because they are not subject to the SEC's proxy rules).

The proposed SEC rules are available at http://sec.gov/rules/proposed/2011/33-9199.pdf.

Proposed Disclosure Requirements Relating to Governmental Payments by Resource Extraction Companies, Conflict Minerals and Mine Safety

In response to the Dodd-Frank Act requirement, in December 2010, the SEC proposed new disclosure rules relating to (i) governmental payments made in connection with oil, natural gas and mineral extraction activities, (ii) the use of "conflict minerals" originating in the Democratic Republic of Congo ("DRC") or adjoining countries, and (iii) mine safety.

Governmental Payments by Resource Extraction Companies: The Dodd-Frank Act requires disclosure of certain payments by SEC-reporting resource extraction companies to U.S. and non-U.S. governments for the commercial development of oil, natural gas and minerals. Specifically, taxes, royalties, fees (including license fees), production entitlements, bonuses and other material benefits must be disclosed. In December 2010, the SEC published proposed rules to implement the relevant Dodd-Frank Act provision. If the SEC adopts rules in April 2011 (per the current deadline), companies will likely be required to include the required disclosure in their annual reports for the fiscal year ending on or after April 15, 2012. For a discussion of the proposed rules, see http://www.paulweiss.com/files/upload/10Jan11Payments.pdf.

Conflict Minerals: The Dodd-Frank Act also requires SEC-reporting companies to disclose annually whether conflict minerals (i.e., coltan, cassiterite, gold, wolframite and their derivatives) that are necessary to the functionality or production of their products originated in the DRC or an adjoining country. If a company determines that conflict minerals used in its products originate in the DRC or an adjoining country, it will need to disclose additional information in an independently audited report, which must also be published on the company's website. In December 2010, the SEC published proposed rules to implement the relevant Dodd-Frank Act provision. If the SEC adopts rules in April 2011 (per the current deadline), companies will likely be required to provide their initial conflict minerals disclosure after their first full fiscal year after the adoption of final rules. For a discussion of the Dodd-Frank Act requirement, see http://www.paulweiss.com/files/upload/27Sep10CM.pdf, and for the SEC proposed rules, see http://www.sec.gov/rules/proposed/2010/34-63547.pdf.

Mine Safety: The Dodd-Frank Act also requires disclosure about mine safety and related information. Rules proposed by the SEC in December 2010 make it clear that such disclosure requirements will apply only to companies who file periodic reports with the SEC and who operate mines in the United States subject to regulation under the Federal Mine Safety and Health Act of 1977. For a discussion of the proposed rules, see http://www.paulweiss.com/files/upload/10Jan11Safety.pdf.

Although the SEC has not yet adopted final rules implementing the mine safety provisions of the Dodd-Frank Act, the disclosure requirements are already in effect, and issuers who are subject to these requirements should ensure that they have the necessary compliance and recordkeeping provisions in place in order to track and accurately report items that must be disclosed as appropriate in a Form 20-F filing.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Any questions concerning the issues addressed in this alert may be directed to Mark S. Bergman (+44-20-7367-1601), Andrew J. Foley (+1-212-373-3078), Edwin S. Maynard (+1-212-373-3024) or Tong Yu (+81-3-3597-6306).

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