

## Considerations for Preparing the 2010 Annual Report on Form 20-F

While there are no new changes to Form 20-F that apply to the fiscal year ended December 31, 2010,<sup>1</sup> recent significant regulatory developments, particularly the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act)<sup>2</sup> and related rules, as well as guidance recently issued by the Securities and Exchange Commission (SEC), will affect the preparation by foreign private issuers of their 2010 Form 20-Fs.

### Impact of the Dodd-Frank Act on Form 20-F Disclosure

#### USE OF CREDIT RATINGS

The Dodd-Frank Act repealed Rule 436(g) of the Securities Act of 1933, as amended (the Securities Act), which permitted issuers to include credit ratings in their registration statements without the consent of the credit rating agencies. Consequently, foreign private issuers are now required to obtain the consent of the credit rating agencies to include credit ratings in their registration statements. Credit rating agencies that consent will have exposure, as experts under Section 11 of the Securities Act, to liability for material misstatements or omissions with respect to such included ratings.

To date, all of the credit rating agencies have indicated that they will not consent to the inclusion of their ratings in documents filed with the SEC, including registration statements, prospectuses and Form 20-Fs (which are often

incorporated by reference into registration statements). As a result, foreign private issuers should generally not include ratings disclosure setting forth specific credit ratings in their Form 20-Fs. However, the SEC has issued guidance stating that certain types of credit rating disclosures, such as those relating to changes to a credit rating, the issuer's liquidity or cost of funds or the terms of agreements that refer to credit ratings, do not trigger the consent requirement.

#### NEW DISCLOSURE RELATING TO CONFLICT MINERALS AND MINING

On December 15, 2010, the SEC proposed new disclosure rules mandated by the Dodd-Frank Act for conflict minerals, mine safety and payments by resource extraction issuers.<sup>3</sup>

- **Conflict Minerals.** Section 1502 of the Dodd-Frank Act requires new disclosure relating to the use of columbite-tantalite (coltan), cassiterite, gold, wolframite or their derivatives, or any other mineral or its derivatives determined by the US Secretary of State to be financing conflict in the Democratic Republic of the Congo (DRC) or an adjoining country. The Dodd-Frank Act requires issuers to make the required disclosures after the issuer's first full fiscal year following enactment of final rules. Assuming the final rules are issued in April 2011, as required by the Dodd-Frank Act, a December 31 fiscal year-end 20-F filer would first be

required to include the disclosures as part of its 2012 Form 20-F.

- **Mining Safety.** Section 1503 of the Dodd-Frank Act requires the SEC to adopt rules requiring issuers that operate coal or other mines, directly or through subsidiaries, to disclose in their Form 20-Fs detailed information regarding violations of health or safety standards. These regulations only cover foreign private issuers that are regulated pursuant to the US Federal Mine Safety and Health Act of 1977, but all foreign private issuers that operate a coal or other mine must disclose in their Form 20-Fs the total number of mining-related fatalities that have occurred in mines operated by them or their subsidiaries for the time period covered by such report. The Section 1503 disclosures required by the Dodd-Frank Act are currently in effect, although the corresponding SEC rules, which help to clarify and provide insight into the SEC's current interpretation of the disclosure requirements, are still in the proposal stage.
- **Natural Resource Extraction Issuers.** Section 1504 of the Dodd-Frank Act requires the SEC to enact rules requiring issuers that engage in the commercial development of oil, natural gas or minerals and that are SEC registrants to issue an annual report disclosing any payments made by the issuer to a foreign government or the US government for the purpose of commercial development of such resources. The Dodd-Frank Act requires issuers to make the required disclosures after the issuer's first full fiscal year following enactment of final rules. Assuming the final rules are issued in April 2011, as required by the Dodd-Frank Act, a December 31 fiscal year-end 20-F filer would first be required to include the disclosures as part of its 2012 Form 20-F.

## FUTURE DODD-FRANK RULEMAKING

While certain provisions in the Dodd-Frank Act became effective immediately, the majority become effective over time, following the adoption of rules and regulations by various US regulatory agencies, including the SEC. As such, over the next year we can expect to see a significant volume of rules and regulations that interpret the Dodd-Frank Act, which may impact Form 20-F disclosure in the future.<sup>4</sup>

## Additional Disclosure Considerations for the 2010 Annual Report on Form 20-F

### ENHANCED LIQUIDITY AND CAPITAL RESOURCES DISCLOSURE

In September 2010, the SEC issued Release Nos. 33-9144; 34-62934, titled "Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management's Discussion and Analysis." The Release provides interpretive guidance on the presentation of the issuer's liquidity, leverage ratios and contractual obligations disclosures in management's discussion and analysis of financial condition and results of operations (MD&A). This interpretive guidance is currently in effect and should be considered when drafting MD&As for 2010 Form 20-Fs:<sup>5</sup>

- **Liquidity Disclosure.** The SEC's interpretative guidance highlights the following trends or uncertainties impacting liquidity that could require disclosure in the MD&A: difficulties accessing 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 counterparty risk.
  - **Intra-Period Variations.** If financial statements do not adequately convey the issuer's financing arrangements during the period covered by the MD&A, or the impact

of those arrangements on liquidity, the SEC has indicated that additional narrative disclosure may be required to facilitate an understanding of the amounts depicted in the financial statements.

- **Repurchase Agreements.** If a repurchase, securities lending or any other transaction involving the transfer of financial assets with an obligation to repurchase will, or is reasonably likely to, result in a material increase or decrease in the issuer’s liquidity or is reasonably likely to result in the use of a material amount of cash or other liquid assets, disclosure of the transaction may be required in the MD&A, especially if the information is not contained in the issuer’s off-balance sheet discussion or contractual obligations table.
- **Cash Management and Risk Management Policies.** To the extent that an issuer’s cash management or risk management policies are relevant to an assessment of its financial condition, issuers should consider describing such policies in the MD&A.
- **Leverage Ratio Disclosures.** If an issuer includes capital or leverage ratio disclosure in its filings with the SEC and there are no regulatory requirements prescribing the calculation of that ratio, or, where an issuer includes capital or leverage ratios that are calculated using a methodology that is modified from its prescribed form, issuers are reminded to follow SEC rules governing the use of financial and non-financial measures in MD&As. In addition, any ratio or measure included in a filing should be accompanied by a clear explanation of the calculation methodology. Issuers must also include disclosure clearly stating why the measure is useful to understanding their financial condition.
- **Contractual Obligations Table Disclosures.** The SEC reminds issuers that the contractual obligations table should be prepared with the goal of presenting a meaningful snapshot of

cash requirements arising from contractual payment obligations and to provide context for investors to assess the relative role of off-balance sheet arrangements. Consistent with this objective, issuers should include footnotes and additional narrative discussion where necessary.

#### PROPOSED NEW QUALITATIVE & QUANTITATIVE SHORT-TERM BORROWINGS DISCLOSURE

At the same time that the SEC issued its interpretive guidance on liquidity and capital resources disclosures, it proposed new short-term borrowings disclosure rules. If adopted, these rules would require a new, separately captioned subsection of the MD&A providing detailed quantitative and qualitative information about an issuer’s short-term borrowings arrangements. The proposed amendments would highlight short-term financing practices throughout a period, rather than providing only a period-end snapshot.<sup>6</sup>

For each specified category of short-term borrowings, issuers would be required to provide the following quantitative disclosure in tabular format:

- The amount outstanding at the end of the reporting period and the weighted average interest rate on those borrowings;
- The average amount outstanding during the reporting period and the weighted average interest rate on those borrowings; and
- The maximum amount outstanding during the reporting period.

To provide context for the quantitative disclosure, issuers would also be required to provide the following qualitative disclosure in narrative format:

- A general description of the short-term borrowing arrangements included in each category and the business purpose of those arrangements;
- The importance of short-term borrowing arrangements to liquidity, capital resources,

- market-risk support, credit-risk support or other benefits;
- The reasons for the maximum reported level for the reporting period; and
- The reasons for any material differences between average short-term borrowings for the reporting period and period-end short-term borrowings.

## Disclosure Relating to Climate Change

In February 2010, the SEC issued Release Nos. 33-9106; 34-61469, titled “Commission Guidance Regarding Disclosure Related to Climate Change,” intended to assist issuers in satisfying their disclosure obligations relating to climate change matters under US federal securities laws and regulations.<sup>7</sup> Because the climate change guidance applies to existing rules, issuers should assess whether they should add or expand climate change disclosure in their 2010 Form 20-F. The following provisions of Form 20-F may require a foreign private issuer to provide disclosure concerning climate change matters that are material to its business:

- Item 3.D, which requires a foreign private issuer to disclose its material risks;
- Item 4.B.8, which requires a foreign private issuer to describe the material effects of government regulation on its business and to identify the particular regulatory body;
- Item 4.D, which requires a foreign private issuer to describe any environmental issues that may affect the issuer’s utilization of its assets;
- Item 5, which requires management’s explanation of factors that have affected the issuer’s financial condition and results of operations for the historical periods covered by the financial statements, and management’s assessment of factors and trends that are anticipated to have a material effect on the issuer’s financial condition and results of operations in future periods; and

- Item 8.A.7, which requires a foreign private issuer to provide information on any legal or arbitration proceedings, including governmental proceedings, which may have, or have had in the recent past, significant effects on the issuer’s financial position or profitability.

## Endnotes

<sup>1</sup> In September 2008, the SEC adopted certain changes to Form 20-F’s reporting obligations that are being phased in over a five-year period. See US Securities and Exchange Commission Release No. 33-8959; 34-58620; International Series Release No.,1310, titled “Foreign Issuer Reporting Enhancements” available at <http://www.sec.gov/rules/final/2008/33-8959.pdf>. The final set of amendments to Form 20-F that were adopted by the SEC in September 2008 will apply to foreign private issuers’ Form 20-Fs beginning with the first fiscal year ending on or after December 15, 2011 (*i.e.*, the 2011 Form 20-F for calendar year-end issuers). These include acceleration of the filing deadline for Form 20-Fs and the elimination of the limited US GAAP reconciliation in Item 17 of Form 20-F. For a discussion of these changes, please see our Securities Update, “The 2009 Annual Report on Form 20-F—Considerations and Recent Changes” available at <http://www.mayerbrown.com/publications/article.asp?id=8826&nid=6>.

<sup>2</sup> For more information about the Dodd-Frank Act, see our Legal Update, “Understanding the New Financial Reform Legislation” available at <http://www.mayerbrown.com/publications/article.asp?id=9307&nid=6>.

<sup>3</sup> For more information on this topic, please see our Legal Update, “US Securities and Exchange Commission Proposes New Disclosure Rules for Conflict Minerals, Mine Safety and Payments by Resource Extraction Issuers” available at <http://www.mayerbrown.com/publications/article.asp?id=10215&nid=6>.

<sup>4</sup> See our Legal Update, “Corporate Governance and Disclosure Implications of the Dodd-Frank Wall Street Reform and Consumer Protection Act” available at <http://www.mayerbrown.com/securities/article.asp?id=9371&nid=10707> for additional information regarding the Dodd-Frank Act.

- <sup>5</sup> For a more detailed discussion of the SEC's interpretive guidance, see our Legal Update, "US Securities and Exchange Commission Issues MD&A Interpretive Guidance" available at <http://www.mayerbrown.com/publications/article.asp?id=9684&nid=6>.
- <sup>6</sup> For more information on the SEC's proposed amendments on short-term borrowings, see our Legal Update, "US Securities and Exchange Commission Proposes New Short-Term Borrowings Disclosure" available at <http://www.mayerbrown.com/publications/article.asp?id=9747&nid=6>.
- <sup>7</sup> For more information on this topic, see our Legal Update, "U. S. Securities and Exchange Commission Provides Guidance on Climate Change Disclosure" available at <http://www.mayerbrown.com/publications/article.asp?id=8535&nid=6>.

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