Client Alert | Capital Markets

Reminders for Foreign Private Issuers for the 2017 Annual Reporting Season

January 2017

Authors: Colin Diamond, David Johansen, John Vetterli, Irina Yevmenenko

Executive Summary

This memorandum outlines certain considerations for foreign private issuers (FPIs) in preparation for the 2017 annual reporting season. Part I of this memorandum discusses new developments and practical action items for the 2017 reporting season and Part II includes a discussion of expected regulatory developments and pending rulemaking initiatives.

Part I. New Considerations and Action Items for the 2017 Reporting Season

While there have not been any changes in the Form 20-F requirements this year, below are certain disclosure considerations, technical updates and interpretive guidance relevant to FPIs in connection with the upcoming annual report filing obligations.

1. Disclosure Considerations

Presentation of Non-GAAP Financial Information

It has become commonplace for companies to use non-GAAP financial measures in their annual reports. New and revised guidance from the Division of Corporation Finance (Corp Fin)[1] clarifies the SEC's position on complying with a number of key aspects of Regulation G and Item 10(e) of Regulation S-K relating to the use of non-GAAP financial information.

Subject to limited exemptions,[2] FPIs are required to comply with Regulation G with respect to any public announcements of material information that contain non-GAAP financial measures and are subject to the

1 See Non-GAAP Financial Measures Compliance and Disclosure Interpretations (C&DIs) Questions 100.01-100.04, 102.01-102.03, 102.05, 102.07, 102.10, 102.11 and 103.02.

2 Item 10(e) permits FPIs to use a non-GAAP financial measure that it is otherwise prohibited under Item 10(e) if: (1) the non-GAAP financial measure relates to the GAAP used in the FPI's primary financial statements included in its filing with the SEC; (2) the non-GAAP financial measure is required or expressly permitted by the standard-setter that is responsible for establishing the GAAP used in such financial statements; and (3) the non-GAAP financial measure is included in the annual report prepared by the FPI for use in the home jurisdiction or for distribution to its security holders. Regulation G does not apply to a disclosure of a non-GAAP financial measure that is made by or on behalf of an FPI if the following conditions are satisfied: (1) the securities of the FPI are listed or quoted on a securities exchange or inter-dealer quotation system outside the US ; (2) the non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with US GAAP; and (3) the disclosure is made by or on behalf of the FPI outside the US , or is included in a written communication that is released by or on behalf of the FPI outside the US. The exemption applies notwithstanding the existence of one or more of the following: (1) a written

requirements of Item 10(e) of Regulation S-K with respect to any filings under the Securities Act of 1933 (Securities Act), such as registration statements on Form F-1 or F-3, and the Securities Exchange Act of 1934 (Exchange Act), such as annual reports on Form 20-F. Because reports of foreign private issuers on a Form 6-K are generally "furnished" rather than "filed" with the SEC, unless a Form 6-K is expressly designated as being "filed" or is incorporated by reference into a Securities Act registration statement or an annual report on Form 20-F, Form 6-Ks are not subject to the Item 10(e) "equal prominence" requirements or the related SEC guidance thereon.

Subject to the foregoing, the SEC guidance generally applies to FPIs, including those that report their results of operations using International Financial Reporting Standards (IFRS) or local GAAP. In addition, where not explicitly required, FPIs would generally be advised to follow the guidance as a matter of best practice.

The recent guidance makes it clear that non-GAAP financial information cannot be presented more prominently than GAAP information or in a way that makes the relevant disclosure misleading. The guidance outlined specific instances where non-GAAP measures may be deemed misleading, such as:

- Certain adjustments, such as presenting a performance measure that excludes normal, recurring cash operating expenses necessary to operate a registrant's business.
- A non-GAAP measure presented inconsistently between periods, such as a non-GAAP measure that adjusts a particular charge or gain in the current period but for which other, similar charges or gains were not adjusted in prior periods.
- A non-GAAP measure that excludes charges, but does not exclude gains, such as a non-GAAP measure that is adjusted only for non-recurring charges when there were non-recurring gains that occurred during the same period.
- Non-GAAP measures that accelerate revenue are prohibited in all circumstances. Non-GAAP revenue measures that substitute individually tailored recognition and measurement methods for those of GAAP are considered misleading under Rule 100(b) and are prohibited in documents filed with or furnished to the SEC and elsewhere, such as on company websites. Non-GAAP measures that substitute individually tailored recognition and measurement methods for other financial statement line items may also violate Rule 100(b).

Other key takeaways from Corp Fin's guidance include:

- Only non-GAAP performance measures, not liquidity measures, should be presented on a per-share basis, and neither EBIT nor EBITDA may be presented on a per-share basis.
- When non-GAAP measures are used, the comparable GAAP measure must be displayed with *equal or greater prominence*.
- Item 10(e) prohibits the labeling of items used to adjust a non-GAAP measure as "non-recurring, infrequent or unusual" if the nature of the charge or gain is such that it is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years.

Since this guidance was released, the SEC has issued more than 150 comment letters on non-GAAP measures directed at companies with improper disclosure. Companies should expect the SEC to focus on non-GAAP financial measures when reviewing annual reports for the 2017 reporting season and should evaluate their use and presentation of non-GAAP financial measures in light of the new guidance. Companies should also include robust explanations about the reasons why management believes that presentation of any non-GAAP financial measures provides useful information to investors.

---

communication is released in the US as well as outside the US, so long as the communication is released in the US contemporaneously with or after the release outside the US and is not otherwise targeted at persons located in the US ; (2) foreign journalists, US journalists or other third parties have access to the information; (3) the information appears on one or more websites maintained by the FPI, so long as the websites, taken together, are not available exclusively to, or targeted at, persons located in the US ; or (4) following the disclosure or release of the information outside the US , the information is included in a submission by the FPI to the SEC made under cover of a Form 6-K.

Nasdaq's "Golden Leash" Rule

On July 31, 2016, Nasdaq's new Rule 5250(b)(3) became effective. The new rule requires Nasdaq-listed companies to publicly disclose any arrangements or agreements relating to compensation provided by a third party to the company's directors or director nominees in connection with their candidacy or board service.

FPIs are permitted to follow home country practice in lieu of the requirements of the rule, as long as such FPI:

- submits 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 annual filings with the SEC (e.g., on Form 20-F or Form 40-F) (or, in certain circumstances, on its website) that it does not follow the rule's requirements and briefly describes the home country practice it follows in lieu of these requirements.

FPIs that have not opted out of the rule by electing to follow home country practices must comply on or before the date that the FPI files its next Form 20-F or Form 40-F.[3]

In light of the new rule, and with respect to corporate governance best practices generally, even companies that elect to follow home country practice should consider the following:

- Update of D&O Questionnaires: Companies should review their D&O questionnaires to ensure they adequately capture any golden leash arrangements disclosable under the new rules. Further, while the NYSE has not indicated a current intention to adopt a similar rule, it is expected that some NYSE-listed companies may choose to begin voluntarily collecting pertinent information and including additional disclosures regarding compensation provided by third parties to the company's directors or nominees, to the extent such arrangements are not already disclosed under existing rules.
- Location of Disclosures: To the extent new disclosure is required, we expect most companies will augment existing disclosures in their annual reports, rather than include such additional disclosure on their websites.

Nasdaq is considering whether to propose additional requirements relating to directors and nominees that receive third-party payments, including whether such directors should be prohibited from being considered independent or from serving on the board altogether.

Possible Updates to Risk Factor Disclosures

When reviewing risk factors for this reporting season, Companies should consider:

- Brexit: While the UK's withdrawal from the EU will not take effect for several years, approximately 400 US public companies included Brexit-related risk factors in their quarterly reports following the June 2016 referendum. Brexit has been mentioned in risk factors on currency exchange-rate risks, international operations risks and global economic conditions, and has been discussed as a stand-alone risk factor. Forward-looking statement legends may need to reference Brexit as one of the factors that could materially impact projections.
- Sustainability/Climate Change: There has been increasing attention to issues regarding sustainability and climate change disclosure. In the SEC's recent concept release[4] on Regulation S-K (see below), the SEC is considering whether to require specific line-item environmental and social policy disclosure in a company's periodic reports, which would represent a shift in the SEC's approach to environmental, social and governance matters disclosure. While some companies object to such a change, an increasing number are voluntarily providing sustainability reporting outside of SEC filings.

[3] Companies must make any required disclosure either on their website (or through a hyperlink to another, "continuously-accessible," website) or in their next annual report on Form 20-F or Form 40-F. Disclosure must be made at least annually, until the earlier of the resignation of the director or one year following the termination of the compensation agreement or arrangement. New agreements or arrangements do not need to be disclosed at the time they are entered into, so long as disclosure is made for the next annual report.

[4] The concept release can be found at https://www.sec.gov/rules/concept/2016/33-10064.pdf.

- Cybersecurity: There has been growing recognition that cybersecurity poses both economic and security threats (see below). SEC guidance[5] notes that material cybersecurity risks to companies must be disclosed to avoid potentially incomplete or misleading disclosures and companies should carefully analyze whether they need new, revised or expanded cybersecurity disclosure.

Cybersecurity: Risk Management and Related Disclosures

Board Engagement and Cyber-Breach Response Plans

Given the increasing frequency of cyber-attacks, ensuring the adequacy of a company's cybersecurity measures is a critical part of a board's risk oversight responsibilities. In addition to the threat of significant business disruptions, substantial response costs, negative publicity and reputational harm, there is also the threat of litigation and potential liability for failing to implement adequate measures to protect the company from cyber-threats. Recently, there have been a series of derivative lawsuits brought against companies and their officers and directors relating to data breaches resulting from cyber-attacks. According to a September 2016 BDO survey[6] of 160 directors of public company boards, boards are becoming more engaged on cybersecurity issues, investments to defend against cyber-attacks are increasing and more companies are putting cyber-breach response plans in place.

To aid companies in determining "best practices" in cybersecurity management, the SEC, DOJ, Financial Industry Regulatory Authority and the National Institute of Standards and Technology of the US Department of Commerce have all issued recent guidance which generally directs companies to proactively establish processes to combat potential cyber-attacks that allow them to (i) identify and assess sensitive data, (ii) develop information security policies and procedures and (iii) keep the key parties, including the board of directors and appropriate committees, apprised of compliance efforts and risks.

Disclosure Considerations

The SEC made it clear in its 2011 Disclosure Guidance Topic No. 2[7] that cybersecurity disclosures may be required in risk factors, management's discussion and analysis, business and legal proceedings sections and in the notes to the financial statements. In December 2015, the US Congress introduced a bill to require the SEC to issue rules mandating public company disclosure of the cybersecurity expertise or experience of each director, or what other cybersecurity considerations were evaluated in the nomination of directors. While no formal rulemaking initiatives have been undertaken, the SEC has been active in recent years in commenting on public company periodic reports regarding cybersecurity issues, including requiring companies to disclose whether they have experienced cyber-attacks, requesting a separate discussion of risks posed by cyber-attacks and seeking disclosure of expenditures for cybersecurity protection measures.

Companies are required to disclose the role of the board in risk oversight in their proxy statements and consideration should be given to whether cybersecurity risk management should be separately addressed. Companies should also consider whether cybersecurity risks warrant their own risk factor.

Audit Committee Disclosures

In 2015, the SEC issued a concept release[8] soliciting comments on possible revisions to existing disclosure requirements with respect to an audit committee's responsibilities for the oversight of independent auditors.[9] Although no further action has been taken by the SEC, given the continued interest in audit committee disclosures and the SEC's recent focus on this topic, companies should consider possible improvements to audit committee communications and possible expansion of current disclosures in that area. According to an analysis by Ernst & Young LLP[10] of the 2016 proxy statements of 78 Fortune 100 companies, voluntary audit-related disclosures continued to trend upward in a number of areas: 50% of companies disclosed factors

5 SEC's Disclosure Topic 2 is available at https://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm.

6 The survey was conducted by the Corporate Governance Practice of BDO USA and is available at https://www.bdo.com/insights/assurance/client-advisories/2016-board-survey.

7 Available at https://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm.

8 The concept release can be found at https://www.sec.gov/rules/concept/2015/33-9862.pdf.

9 One of the questions posed by the SEC was whether any required disclosures should impact only those companies subject to the proxy rules, or if they should be required for foreign private issuers as well.

10 The E&Y report can be found at http://www.ey.com/gl/en/issues/governance-and-reporting/ey-audit-committee-reporting-to-shareholders-in-2016#Summary.

considered by the audit committee when assessing the qualifications and work quality of the external auditor (up from 42% in 2015 and 17% in 2012); 73% stated that the audit committee believed that the choice of external auditor was in the best interests of the company and/or the shareholders (up from 63% in 2015 and 3% in 2012); 82% explicitly stated that the audit committee is responsible for the appointment, compensation and oversight of the external auditor (up from 42% in 2012) and 31% provided information about the reasons for changes in fees paid to the external auditor (up from 21% in 2015 and 9% in 2012) (under current SEC rules, companies are required to disclose fees paid to the external auditor, but are not required to discuss the reasons for any changes in fees).

XBRL Updates

- Continued Relief for IFRS Filers – Consistent with prior years, until a taxonomy is specified by the SEC, FPIs that prepare financial statements in accordance with IFRS will not be required to provide financial information in XBRL format, as the SEC has not yet specified the XBRL taxonomy.

- Inline XBRL – Public reporting companies can now voluntarily file their structured financial statement data in a format known as Inline XBRL, a change that will allow filers to integrate XBRL[11] data directly into their HTML filings, rather than providing it as separate exhibits.[12] Companies can use Inline XBRL through March 2020, after which time the SEC hopes that user feedback can be used to develop tools to facilitate the use of Inline XBRL and to inform any future rulemaking in this area.

"Tandy Letter" Representations No Longer Required

On October 5, 2016, Corp Fin announced[13] that, effective immediately, it would no longer require companies to include "Tandy letter" representations (in which a company represents that it will not raise the SEC's comment process as a defense in securities litigation) in their responses to Staff comments or acceleration requests noting that while companies remain responsible for the accuracy and adequacy of the disclosure in their filings, the affirmative representations are not necessary.

NYSE Rule 203.03 Requiring FPIs to Provide Semi-Annual Unaudited Financial Information

Effective as of February 2016, the NYSE 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. Because most NYSE-listed FPIs already provide this information, the new rules will not impact most issuers.

2. Regulatory Guidance

New SEC Guidance Relating to FPI status and Certain Filing and Exchange Act Registration Requirements

In December 2016, Corp Fin issued new compliance and disclosure interpretations (C&DIs) relating to FPIs which provide certainty regarding how to qualify as an FPI and address specific questions relating to filing requirements and the termination of Exchange Act registration. The new guidance is summarized below.

Definition of FPI

The new C&DIs expand on the definition of FPI in Securities Act Rule 405 and Exchange Act Rule 3b-4(c),[14] clarifying how to evaluate the conditions that would preclude a foreign company from qualifying as an FPI:

---

[11] FPIs that use local GAAP or non-IASB IFRS are exempt from the requirement to furnish to the SEC, and post to their corporate websites, if any, their financial statements in XBRL format. FPIs that prepare their financial statements in accordance with US GAAP must comply with the XBRL data tagging rules.

[12] The SEC's order can be found at https://www.sec.gov/rules/exorders/2016/34-78041.pdf.

[13] The SEC's announcement can be found at https://www.sec.gov/corpfin/announcement/cf-announcement---no-more-tandy-language.html.

[14] The rules define an FPI as a corporation or other organization incorporated or organized under the laws of any foreign country, unless the issuer meets the following conditions as of the last business day of its most recently completed second fiscal quarter: (i) more than 50 percent of the issuer's outstanding voting securities are directly or indirectly owned of record by US residents; and (ii) one or more of the following is true: (a) the majority of the executive officers or directors are US citizens or residents; (b) more than 50 percent of the issuer's assets are located in the United States; or (c) the business of the issuer is administered principally in the US

- *Ownership of Voting Securities* – For companies that have multiple classes of voting stock with different voting rights, to determine whether more than 50% of such company's voting securities are owned of record by US residents the company can either: (1) evaluate whether more than 50% of the voting power of the classes on a combined basis is owned by US residents, or (2) make the determination based on the number of voting securities. The company must use such determination methodology on a consistent basis.

- *Status of an Individual as a US Resident* – The status of an individual as a "US resident" for purposes of this determination is informed by a number of factors. The guidance makes clear that a person who has permanent resident status in the US is presumptively a US resident; however, individuals without permanent resident status may still be considered US residents for purposes of the ownership prong. A company must decide what criteria it will use on a consistent basis to determine residency for such individuals, such as tax residency, nationality, mailing address, physical presence, location of a significant portion of their financial and legal relationships or immigration status.

- *Citizenship/Residency of Executive Officers and Directors* – In determining whether the majority of the executive officers or directors are US citizens or residents, a company must make this determination separately for each group, rather than treating the executive officers and directors as a single group. Essentially, the company must assess (i) the citizenship of the executive officers, (ii) the residency of the executive officers, (iii) the citizenship of the directors and (iv) the residency of the directors. Furthermore, for companies with two boards of directors, the determination should be made with respect to the board that performs functions most parallel to those handled by a US -style board of directors. If the functions are divided among the two boards, the company may aggregate the members of both boards for purposes of determining the majority of US citizens or residents.

- *Location of Assets* – In determining whether more than 50% of the company's assets are located in the US , a company may use the geographic segment information determined in the preparation of its financial statements, or any other reasonable methodology used on a consistent basis in evaluating the location and amount of its assets.

- *Administration of Business* – In evaluating whether business is administered principally in the US , there is no single factor or group of factors. The company must assess on a consolidated basis the location from which its officers, partners or managers primarily direct, control and coordinate the company's activities. Holding an annual or special meeting of shareholders or occasional meetings of the board of directors in the US would not alone result in a determination that the business is administered principally in the US

- *Location of Board Meetings* – The C&DIs clarify that, for purposes of the FPI definition, holding an annual or special meeting of shareholders or *occasional* meetings of the company's board of directors in the US would not, absent other factors, result in a determination that the company's business is administered principally in the US

FPIs and Offerings of Guaranteed Securities

The new C&DIs clarify issues surrounding the filing requirements for offerings or reporting obligations involving a parent FPI and its subsidiary that does not qualify as an FPI. If an FPI either (i) guarantees securities of a subsidiary that is not an FPI or (ii) issues securities that are guaranteed or co-issued by one or more subsidiaries that do not qualify as FPIs, both the parent and the subsidiary *may* use an F-series registration statement to register an offering of securities and a Form 20-F to for any SEC reporting obligations, *if* the parent and issuer are eligible to present condensed consolidated financial information in the parent company's filings (under Rules 3-10(b) through 3-10(d) of Regulation S-X) or if the parent and subsidiaries are eligible to present narrative disclosure in lieu of condensed consolidating financial information (under Rule 3-10 of Regulation S-X).

Termination of Securities Registration – Meaning of "Primary Trading Market"

For purposes of applying the primary trading market definition under Rule 12h-6(f)(5)[15] of the Exchange Act, a company may consider all securities trading markets in countries that are part of the European Union as a single foreign jurisdiction.

Additional C&DIs addressed:

- *Due Date for Form 20-Fs* – The due date is four months after the last day of the company's fiscal year. When the last day of the company's fiscal year is other than the end of a month, the Form 20-F is due on the same day four months ahead (e.g., a February 20 fiscal year end results in a due date of June 20).

- *Reduced 20-F Disclosure for Wholly-Owned Subsidiaries of an FPI* – A wholly-owned subsidiary of an FPI can omit certain information from its Form 20-F if it meets the requirements set forth in General Instruction I(1)(a) and (b) to Form 10-K. The registrant must include a prominent statement on the cover page of the Form 20-F that it meets the required conditions and is therefore filing the form with the reduced disclosure format. If so, the registrant may omit comparable information enumerated in General Instruction I(2) that would apply to an FPI filing on Form 20-F.

- *Incorporation by Reference into Form 20-F* – An FPI may incorporate by reference into a Form 20-F annual report information that has previously been filed with the Commission, for example, on a Form 6-K. Companies must identify with specificity the information that is being incorporated by reference.

NYSE Section 203.01 Guidance for Listed FPIs

In April 2016, the NYSE issued guidance[16] to assist FPIs in complying with NYSE Listed Company Manual (LCM) Section 203.01.[17] The guidance clarifies what NYSE-listed FPIs that do not provide audited financial statements to shareholders in a manner consistent with the delivery requirements for annual reports under US proxy rules must do to satisfy the press release requirements of Section 203.01.

The guidance makes clear that to fully comply with the press release requirements, a company must issue a broadly disseminated press release, as required pursuant to Section 202.06 of the LCM, to the major news wire services, including, at a minimum, Dow Jones & Company, Inc., Reuters Economic Services and Bloomberg Business News. The company should also receive a confirmation from these respective news wire services that the release has been broadly disseminated in the US

The guidance notes that the following are not sufficient to fulfill the requirement:

- Sending a press release only into the NYSE's Market Watch group via the Timely Alerts System

- Posting the press release solely onto the Company's website

---

15 Rule 12h-6 allows an FPI to terminate registration of a class of its securities subject to certain conditions. One condition is that the issuer has maintained a listing of this particular class of securities for at least 12 months prior to the proposed termination on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of securities in another foreign jurisdiction, constitutes the primary trading market for those securities. Primary trading market means that at least 55% of the trading in the particular class of securities took place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during a recent 12-month period.

16 The guidance can be found at https://www.nyse.com/publicdocs/nyse/regulation/nyse/Section_203_01_Guidance_for_FPIs_20160422.pdf.

17 NYSE Section 203.01 requires a listed FPI to make its Form 10-K, 20-F or 40-F available on or through its website simultaneously with its filing with the SEC. In addition, any NYSE-listed FPI that does not provide its audited financial statements (as included in its annual report filed with the SEC) 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 US proxy rules must also: (a) 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) issue a press release which: (i) states that the annual report has been filed with the SEC; (ii) includes the company's website address; and (iii) indicates that shareholders have the ability to receive a hard copy of the complete audited financial statements free of charge upon request.

- Filing a Form 6-K with this news announcement[18]
- Sending a press release to one or more of the major news wire services that is ultimately not broadly disseminated in the US

3. ISS and Glass Lewis Proxy Voting Guidelines

Proxy advisory firms, such as Institutional Shareholder Services, Inc. (ISS) and Glass Lewis, can have a significant impact on the proxy voting process, since the voting recommendations of these firms often determine or influence shareholder votes. As a result, it is important for publicly traded companies to evaluate their corporate governance practices against the proxy voting policies and guidelines established by these firms. Both ISS and Glass Lewis provide country- or region-specific guidance,[19] which companies should carefully review and consider as they prepare for their 2017 shareholder meetings.

Part II. Future Rulemaking, Looking Ahead

1. Dodd-Frank Compensation Clawback Rule[20]

In 2015, the SEC proposed new Rule 10D-1, which would require any company with securities listed on the NYSE, Nasdaq or other national securities exchanges, to have a policy to "claw back" incentive-based compensation paid to current and former executives in the event of a financial restatement to correct a material error.[21] The proposal also specifies disclosure requirements relating to clawback policies and actual clawbacks. Although the comment period has closed, the SEC has not issued a final clawback rule and it is not clear when it will do so.

FPIs that list only debt or preferred securities would be subject to the clawback listing standards to the extent that they have securities listed on a national securities exchange or association.[22]

Even without a regulatory mandate, there has been a strong trend favoring the adoption of clawback policies. In 2015, approximately three-quarters of S&P 500 companies (including 90% of the top 250 such companies) disclosed a clawback policy covering one or more named executive officers, with most of these policies addressing both cash and equity incentive compensation. Although clawbacks have gained significant attention from a governance perspective, companies may want to consider waiting to amend their clawback policies until the rules are finalized, given the potential for important substantive differences between the proposed and final rules. In the meantime, companies that currently have clawback policies should consider enhancing disclosures related to such policies in their 2017 proxy statements.

It is unclear whether pending Dodd-Frank rulemaking will eventually be implemented or whether portions of Dodd-Frank will be repealed by the "Financial CHOICE Act" or other legislation. The above discussion reflects the current state of pending Dodd-Frank related disclosure requirements.

---

18 Note that while filing a Form 6-K is an accepted method of complying with Regulation FD, it does not satisfy the press release requirements of Section 203.01.

19 ISS' 2017 guidance for Europe, the Middle East and Africa can be found at https://www.issgovernance.com/file/policy/2017-emea-iss-policy-updates.pdf and guidance for Asia Pacific can be found at https://www.issgovernance.com/file/policy/2017-asia-pacific-iss-policy-updates.pdf. Glass Lewis's country-specific guidelines can be found at http://www.glasslewis.com/guidelines/.

20 The proposed rule can be found at https://www.sec.gov/rules/proposed/2015/33-9861.pdf.

21 Clawbacks of any erroneously awarded incentive-based compensation would be required for the three fiscal years prior to a financial restatement and would be "no fault," meaning they would happen regardless of whether an executive was involved in any misconduct or was responsible for the restatement incentive-based compensation is defined as any compensation (including stock options and other equity awards) that is granted, earned or vested based wholly or in part upon the attainment of any financial reporting measure.

22 The proposed rule and rule amendments would not permit the exchanges to exempt FPIs from compliance with Section 10D's disclosure and recovery requirements in favor of following home country practice. It would, however, allow exchanges to permit FPIs to forgo recovery as impracticable if the recovery of erroneously awarded compensation pursuant to Section 10D would violate the home country's laws, so long as certain other conditions are met.

2. Specialized Disclosure

New Disclosure Requirements for Resource Extraction Issuers[23]

In June 2016, the SEC adopted final rules implementing disclosure requirements for resource extraction issuers, as required under Section 13(q) of the Exchange Act. FPIs (other than those that rely on Exchange Act Rule 12g3-2(b)) are subject to the new disclosure requirements.

The rules require the disclosure of payments made to governments by any company that is required to file an annual report with the SEC and is engaged in the commercial development of oil, natural gas or minerals. This includes payments made by a company's subsidiaries or other entities under its control. Under these rules, companies must disclose any relevant payments on Form SD no later than 150 days after the end of their fiscal year. Although compliance is required for fiscal years ending on or after September 30, 2018 (so calendar-year companies will first need to comply by May 30, 2019), companies affected by the rules should begin to prepare for compliance, including by reviewing systems and controls for financial reporting to determine what additional procedures may be needed to ensure payments required to be disclosed are captured, including those by subsidiaries or joint ventures. Training programs and guidance may also need to be developed so that employees are adequately informed of what needs to be reported.

Conflict Minerals Disclosure Rules[24]

FPIs that file reports with the SEC under Section 13(a) or Section 15(d) of the Exchange Act must comply with the SEC's conflict mineral disclosure rules, which require a company to disclose annually whether it uses "conflict minerals" (as defined in the Dodd-Frank Act) that originate from the Democratic Republic of the Congo or adjoining countries which are "necessary to the functionality or production" of a product manufactured or contracted to be manufactured by the company.[25] The rules have been challenged and remain the subject of ongoing litigation at this time.[26] In recent conferences, the SEC staff indicated that there is still no independent private sector audit (IPSA) requirement for any Form SD being filed in spring 2017 with respect to the usage of conflict minerals in 2016 unless a company voluntarily describes any product as "DRC conflict free."

Mining Disclosure Rules[27]

On June 16, 2016, the SEC proposed rules that would revise the property disclosure requirements for mining registrants and the related guidance currently set out in Item 102 of Regulation S-K and Industry Guide 7. The proposal would rescind Industry Guide 7 and include the SEC's disclosure requirements in a new subpart of Regulation S-K. FPIs that use Form 20-F to file their Exchange Act registration statements and annual reports, or that refer to Form 20-F when filing their Securities Act registration statements on Forms F-1 and F-4, are generally not subject to Regulation S-K. However, the proposed rules would amend Form 20-F to instruct registrants to refer to and, if required, provide the disclosure under the new subpart of Regulation S-K.

The proposed rules would require a company to provide disclosure for mining operations that are material to its business or financial condition. If a registrant's mining assets constitute 10% or more of its total assets, there would be a rebuttable presumption that its mining operations are material. Registrants with mining assets below the 10% total asset threshold would be directed to consider whether there are other factors which would render its mining operations material. It could take a year or more before the SEC considers final rules, and the proposing release does not address how much time companies would have to comply with the new regime if it is adopted.

---

23 The final rule can be found at https://www.sec.gov/rules/final/2016/34-78167.pdf.

24 The rule can be found at https://www.sec.gov/rules/final/2012/34-67716.pdf.

25 A company that uses any of the designated minerals is required to conduct a reasonable "country of origin" inquiry into the source of such minerals. If a company is able to conclude that the designated minerals did not originate in the Covered Countries, it must disclose this determination on Form SD. Otherwise, it must file a Conflict Minerals Report as an exhibit to its Form SD.

26 In response to an April 2014 US Court of Appeals for the District of Columbia ruling that the conflict mineral rules violated the First Amendment to the extent that they required certain disclosures, SEC guidance clarified that no company is required to label its products as "DRC conflict free," having "not been found to be 'DRC conflict free,'" or "DRC conflict undeterminable." An IPSA is only required if a company voluntarily elects to describe any of its products as "DRC conflict free."

27 The proposed rules can be found at https://www.sec.gov/rules/proposed/2016/33-10098.pdf.

3. Proposed Changes to Definition of Smaller Reporting Company (SRC)[28]

Proposed changes to the definition of "smaller reporting company" would increase the number of companies that would qualify as SRCs and be eligible for reduced disclosure requirements under Regulations S-X and S-K. The new definition would include companies with less than US$250 million of public float (increased from US$75 million) and companies without a public float and annual revenues less than US$100 million (increased from US$50 million).

White & Case LLP
1155 Avenue of the Americas
New York, New York 10036-2787
United States

T +1 212 819 8200

[28] The proposed rule can be found at https://www.sec.gov/rules/proposed/2016/33-10107.pdf.