Form 20-F for Fiscal Year 2019: What Foreign Private Issuers Should Keep in Mind

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If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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There have been significant recent developments in U.S. Securities and Exchange Commission (SEC) regulation of foreign private issuers, (FPIs) including changes that impact the annual report on Form 20-F for fiscal year 2019. Below we discuss some of the recent highlights, as well as recent rulemaking activity by the SEC, the New York Stock Exchange (NYSE) and the Nasdaq Stock Market (Nasdaq) that is relevant to FPIs.

Critical Audit Matters (CAMs)

The requirements for auditors to disclose CAMs in the auditor's report,[1] based on Public Company Accounting Oversight Board's (PCAOB) new standard, AS 3101, *The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion*, will take effect for audits of fiscal years ending on or after (i) June 30, 2019, for large accelerated filers; and (ii) December 15, 2020 for other issuers.[2] Audit reports of "emerging growth companies" are not required to include CAM disclosures.

A CAM is any matter arising from the audit of the financial statements that was communicated or required to be communicated to the audit committee and that (i) relates to accounts or disclosures that are material to the financial statements and (ii) involves especially challenging, subjective, or complex auditor judgment. The standard was adopted to inform investors and other financial statement users about challenging matters in the audit and how they were resolved. Some factors to consider in assessing the auditor's judgment include: the risk of material misstatement, the degree of auditor judgment related to areas that involved significant judgment or estimation by management, whether the transaction is significant and/or unusual, the degree of auditor subjectivity in applying audit procedures, the nature and extent of audit effort required to address the matter, whether specialized skill or knowledge is needed and the nature of audit evidence obtained.

The following must be included in the audit report where a CAM has been identified: (i) identification of the CAM, (ii) a description of the principal considerations that led the auditor to determine the matter is a CAM, (iii) a description of how the CAM was addressed in the audit and (iv) a reference to the relevant financial statement accounts of disclosures.

Current Areas of SEC Focus for Disclosure

SEC Chairman Jay Clayton has indicated publicly that the SEC will closely monitor risk disclosures concerning cybersecurity, the LIBOR transition and Brexit.[3] Sustainability and trade risk disclosures also have been discussed as areas of focus for the commission. FPIs should consider the impacts on their disclosures, taking into account the "Risk Factors" and "Operating and Financial Review and Prospects" sections of Form 20-F.

[1] *See* our June 7, 2017, client alert, "Accounting Oversight Board Adopts New Model for Auditor Reports."

[2] *See* "The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion and Related Amendments to PCAOB Standards," PCAOB Release No. 2017-001, June 1, 2017).

[3] Jay Clayton, chairman, SEC, "SEC Rulemaking Over the Past Year, the Road Ahead and Challenges Posed by Brexit, LIBOR Transition and Cybersecurity Risks," Dec. 6, 2018.

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Cybersecurity[4]

Companies should continue to be mindful of their disclosure obligations in light of cybersecurity risks and incidents, in accordance with the SEC's February 2018 Interpretive Release,[5] evaluating whether to disclose any cybersecurity risks and/or incidents in the MD&A (Item 5 of Form 20-F) as events or uncertainties reasonably likely to have a material effect on the company's results of operations, liquidity or financial condition or cause reported financial information not to be necessarily indicative of future results. In addition, companies' risk factor disclosures should describe material risks relating to cybersecurity, which should be specifically tailored to each company. Importantly, if a material cybersecurity event has occurred, it would not be sufficient for registrants to just disclose that such an incident "may" occur. The SEC also reminded issuers of their obligations under applicable stock exchange rules (*e.g.*, Nasdaq and NYSE), which generally require prompt disclosure of material events and developments.

LIBOR

LIBOR, a measure of the average interest rate of inter-bank borrowing used widely as a benchmark for commercial and financial contracts, is expected to be phased out by 2021.[6] The SEC has encouraged issuers to take a proactive approach to disclosures related to the discontinuation of LIBOR. For instance, companies should consider disclosing in their annual report material risks under Risk Factors, and known trends, demands, commitments, events or uncertainties that will or are reasonably likely to result in a material change in liquidity, results of operation or financial condition relating to the discontinuation of LIBOR.

Brexit

SEC Chairman Jay Clayton discussed the potential effects of the U.K.'s exit from the EU (Brexit) on U.S. investors and expressed concern that the negative effects of Brexit are not fully understood, some of the effects of Brexit are beyond EU and U.S. authorities' control, Brexit will have an international impact, Brexit effects will manifest before a deal is implemented and the effects largely will depend on the ability of the U.K. and EU to agree on a Brexit path.[7] The chairman has directed SEC staff (staff) to focus on Brexit-related disclosures and has urged companies to disclose how management is dealing with Brexit's impact on the company and its operations.

In a speech delivered on March 15, 2019, the director of the SEC's Division of Corporation Finance, William Hinman, urged companies to include tailored, rather than generic, Brexit disclosures in their annual reports.[8] According to Director Hinman, "[g]iven the differences across industries and companies, there is no one specific data point or prescriptive piece of information that all companies could provide to disclose material information relating to their Brexit-related risks." He suggested that of particular usefulness is how management is dealing with Brexit risks, including new regulatory risks given the uncertainty on the legal framework that will apply to each industry, supply chain risks due to potential trade disruptions, the risk of losing customers and revenue, exposure to exchange rate risks and contractual risks.

Sustainability

In the same March 2019 speech, Director Hinman stressed that sustainability disclosure is significant to investors and suggested that the variety of issues that fall under the sustainability umbrella "illustrates the importance of a flexible disclosure regime designed to elicit material, decision-useful information on a company-specific basis." He explained that the SEC is

[4] *See* our Feb. 23, 2018, client alert "SEC Issues Interpretive Guidance on Cybersecurity Disclosures."

[5] *See* also "Commission Statement and Guidance on Public Company Cybersecurity Disclosures, Securities Act Release No. 10,459," Exchange Act Release No. 82,746, 83 Fed. Reg. 8166 (Feb. 2, 2018). In this release, the SEC also stressed the importance of maintaining comprehensive policies relating to cybersecurity risks and incidents, including those related to disclosure controls and procedures, so that material cybersecurity incidents are reported to decision-makers on disclosure on a timely basis. The SEC also discussed insider trading liability, noting that insiders may not trade following a material cybersecurity event which has not yet been disclosed.

The SEC also has investigated whether companies that have been victims of cyberfraud may have violated U.S. federal securities laws by having insufficient systems of internal accounting controls. Such frauds have cost upwards of $5 billion since 2013. Though no enforcement action has been taken, the SEC issued a Report of Investigation pursuant to Section 21(a) of the Securities Exchange Act to warn companies that cybersecurity threats ought to be considered in systems of internal accounting controls as required by U.S. federal securities laws and Section 13(b)(2)(B) of the Exchange Act. The provisions require certain issuers to reasonably assure through internal accounting controls that transactions are executed and access to company assets is permitted with the specific or general authorization of management. *See* "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding Certain Cyber-Related Frauds Perpetrated Against Public Companies and Related Internal Accounting Controls Requirements, Exchange Act Release No. 84,429," Oct. 16, 2018.

[6] Division of Corp. Finance, Division of Investment Management, Division of Trading and Markets, and Office of Chief Accountant, SEC, "Staff Statement on LIBOR Transition," July 12, 2019.

[7] Clayton, *supra*, note 3.

[8] William Hinman, director, Division of Corporation Finance, "Applying a Principles-Based Approach to Disclosing Complex, Uncertain and Evolving Risks," Remarks at the 18th Annual Institute on Securities Regulation in Europe, Mar. 15. 2019.

receiving divergent opinions regarding whether disclosure in this area should be principles-based or prescriptive and whether there should be specific reporting standards to allow for comparability between sustainability disclosures. Director Hinman favors the current market experimentation in sustainability disclosures, cautioning against adopting regulation early in this process because requiring disclosure requirements that fail to provide benefits to investors could make the U.S. markets less competitive. Director Hinman noted the importance of allowing investors to see the company through the eyes of management and encouraged companies to consider disclosure on all emerging issues, including risks that may affect their long-term sustainability and plans to mitigate these risks. In terms of climate-related disclosures, companies should consult the SEC's 2010 interpretive release on the topic.[9]

Trade War and Tariff Escalation Concerns

The tariff escalation between the U.S. and China has prompted disclosure by firms that are facing an actual or potential impact on their operations, financial statements and stock trading. For instance, to date in 2019, approximately one-fifth of S&P 500 companies mention the tariff escalation between the U.S. and China in the risk factor section of their annual and/or quarterly reports.

In light of the ongoing trade discussions between the U.S. and China, the Trump administration and National Economic Council reportedly have considered a number of aggressive measures affecting U.S. and Chinese investments. For example, as part of a continued regulatory focus in the U.S. on access to auditand other information currently protected by national law, in particular by China, in June 2019, a bipartisan group of lawmakers introduced bills in both houses of the U.S. Congress that would require the SEC to maintain a list of issuers for which the PCAOB is not able to inspect the working papers of an audit report issued by a foreign public accounting firm, even if it is affiliated with a Big Four accounting firm. Enactment of this proposed legislation or other efforts to increase U.S. regulatory access to audit information could cause investor uncertainty for affected issuers and cause trading volatility. A number of China-based issuers have reflected enhanced disclosure on the related risks in their annual reports and public disclosure documents.

[9] "Commission Guidance Regarding Disclosure Related to Climate Change," Release No. 9106, Exchange Act Release No. 61469, 75 Fed. Reg. 6290, Feb. 8, 2010.

SEC Modernizes and Simplifies Disclosure and Compliance Requirements

On March 20, 2019, based on the FAST Act, the SEC adopted rule changes[10] to modernize and simplify the disclosure and compliance obligations of SEC reporting companies.[11] The final rules became effective May 2, 2019. Some of the more meaningful changes are outlined below.

Exhibits

Redaction of Contract Terms Without a Confidential Treatment Request

The amendments have significantly changed — and simplified — the process that companies must follow to redact commercially sensitive terms from agreements filed as exhibits to SEC filings.[12] The SEC has eliminated the requirement that companies redacting information from an exhibit filing submit to the SEC a formal letter, known as a confidential treatment request, outlining their legal and factual support for the redacted contract terms. Companies may now omit or redact confidential information from filed copies of agreements without a confidential treatment request. The substantive requirements as to what information can be redacted have not changed — information may be redacted from exhibits only if it (i) is not material and (ii) would likely cause competitive harm to the company if publicly disclosed. When filing a redacted exhibit, companies now must:

- include in the first page of the redacted exhibit a prominent statement that certain information has been excluded from the exhibit because it is not material and would likely cause competitive harm to the company if publicly disclosed;
- mark the exhibit with brackets (*e.g.*, [***]) where the information has been omitted; and
- indicate in the exhibit index that portions of the exhibit have been omitted.

The staff is expected to monitor redactions and, in some instances, may request that a copy of the unredacted agreement be submitted to the staff on a supplemental basis and that a written analysis supporting the redactions, akin to the more

[10] *See* our Mar. 26, 2019, client alert "SEC Modernizes and Simplifies Disclosure and Compliance Requirements."

[11] "FAST Act Modernization and Simplification of Regulation S-K," Securities Act Release No. 10,618, Exchange Act Release No. 85,381, Investment Company Act Release No. 33,426, 84 Fed. Reg. 12,674, Apr. 2, 2019.

[12] *See* our May 17, 2019, client alert "A Guide to Redacting Commercially Sensitive Information From Exhibits Filed with the SEC."

customary confidential treatment request, also be submitted.[13] The staff can require companies to amend their filings to refile agreements with amended redactions if the staff disagrees with the scope of redactions.

CTR Extensions

A confidential treatment request granted by the staff under the old framework had an expiration date. Registrants that previously have obtained a confidential treatment order needed to file extension applications — with a detailed discussion as to why such extension was required and permitted under SEC Freedom of Information Act (FOIA) regulations — with the staff to extend the period of confidential treatment to protect the confidential information from public release pursuant to a FOIA request after the original order expires.[14] Alternatively, a company instead may submit a new short form application to facilitate the process of filing an application[15] to extend the time period of the confidential treatment.

Omission of Schedules and Other Attachments to Exhibits

Omitting schedules and other attachments to exhibits to SEC filings, previously available only to agreements regarding significant acquisitions and dispositions, is now permitted for any exhibit filings (including material contracts), if they do not contain material information and that information is not otherwise disclosed in the exhibit or the disclosure document. Companies must file with the exhibit a list briefly identifying the contents of the omitted schedules, unless the omitted information already is included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments (*e.g.*, an agreement's table of contents). Companies will be required to provide a copy of the omitted contents to the SEC upon request.

Two-Year Lookback for Material Contracts Limited to Newly Public Companies

Previously, all registrants were required to file material contracts as exhibits to SEC filings if the contract (i) was to be performed in whole or in part after the filing date or (ii) was entered into within two years prior to the filing date. Under the new rules, only newly reporting companies are subject to the two year lookback. All companies will still be required to file as exhibits material contracts that remain to be performed after the filing date.

[13] Division of Corporate Finance, "New Rules and Procedures for Exhibits Containing Immaterial, Competitively Harmful Information," Apr. 1, 2019.

[14] U.S. Securities and Exchange Commission, "New Streamlined Procedure for Confidential Treatment Extensions," Apr. 16, 2019.

[15] U.S. Securities and Exchange Commission, "Short Form to Extend Time for Which Confidential Treatment Previously Has Been Granted."

Operating and Financial Review and Prospects (Item 5 of Form 20-F, also known as MD&A)

Omission of Earliest Year

Under the prior rules, companies were required to provide in their MD&A two comparative year-to-year discussions covering all three fiscal years presented in the financial statements. The rule changes now permit companies to omit the discussion of the oldest of the three years, so long as the company previously has filed the omitted discussion (*e.g.*, in the prior year's Form 20-F or other SEC filing). Companies electing to omit a discussion of the earliest year must include a statement identifying the location in the prior filing where the omitted discussion may be found.

Exchange Act Form Cover Page Changes

The cover pages of Forms 20–F and 40–F will require disclosure of the company's trading symbol(s).

Inline eXtensible Business Reporting Language (XBRL)

In July 2018, the SEC adopted XBRL updates effective in September 2018 that require the use of the Inline XBRL format to submit certain operating company financial statement information.[16] Inline XBRL is a format that allows filers to embed XBRL data directly into a Hypertext Markup Language (HTML) document so that filers need only prepare one Inline XBRL document, rather than generate an HTML document of their financial statement information or risk/return summary information and then tag a copy of the data to create a separate XBRL exhibit.

FPIs will be required to comply with the Inline XBRL requirements based on their filer status and basis of accounting. For an FPI that prepares its financial statements in accordance with U.S. GAAP, the phase-in of the Inline XBRL requirements is determined based on its filer status: (i) large accelerated filers will be required to comply with Inline XBRL for fiscal periods ending on or after June 15, 2019, and (ii) accelerated filers will be required to comply with Inline XBRL for fiscal periods ending on or after June 15, 2020. All other filers, including FPIs that prepare their financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS-IASB), will be required to comply with Inline XBRL for fiscal periods ending on or after June 15, 2021.

[16] "Inline XBRL Filing of Tagged Data," Securities Act Release No. 10,514, Exchange Act Release No. 83,551, Investment Company Release Act No. 33,139, 83 Fed. Reg. 40,846, Aug. 16, 2018.

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NYSE and Nasdaq Revise Exceptions to Shareholder Approval Rules

NYSE

In March 2019, the SEC approved an amendment[17] to the NYSE requirement that listed companies must obtain shareholder approval for certain share issuances.[18]

NYSE Section 312.03(b) requires shareholder approval for certain related party transactions involving issuances of common stock, or securities convertible or exercisable into common stock, if the issuance exceeds 1% of the number of shares of common stock outstanding or 1% of the voting power outstanding before the related party issuance. In addition, Section 312.03(c) requires shareholder approval prior to the issuance of common stock, or securities convertible or exercisable into common stock, if the number of shares of common stock to be issued will equal or exceed 20% of the number of shares of common stock outstanding or 20% of the voting power outstanding before the 20% issuance. Previously, both of these shareholder approval requirements included exceptions for issuances that relate to the sale of common stock (or the sale of securities convertible into or exercisable for shares) for cash at a price (or a conversion or exercise price) at least as great as each of the book value and market value of the company's common stock to be issued.

The amendment removes from the pricing condition the reference to "book value" and replaces the concept of "market value" with that of a "minimum price," being the lower of the (i) official closing price reported on the NYSE immediately prior to the signing of a binding agreement to issue the securities or (ii) average official closing price for the five trading days immediately prior to the signing of the binding agreement.

Nasdaq

In September 2018, the SEC approved similar changes to Nasdaq 5635(d), which requires shareholder approval of securities issuances in private placements, where the amount of securities to be issued represents 20% or more of the outstanding common stock or voting power prior to the issuance.

Nasdaq 5615(a)(3) provides that an FPI may follow home-country practice in lieu of these standards, provided the company properly notifies Nasdaq and discloses in its annual report on Form 20-F that it follows its home country practice and describes such home country practice and otherwise complies with Nasdaq's listing requirements. Although there is no comparable NYSE exception, practice suggests that following consultation with the NYSE on the particular facts, the NYSE may not object to an FPI following home-country practice in lieu of the applicable NYSE standard, provided it discloses the relevant home-country practice and describes the significant differences between home-country practice and the applicable NYSE standard in its SEC filings.

SEC Proposed Rule Changes

SEC Proposal to Change Financial Disclosure Requirements for Acquisitions and Dispositions

On May 3, 2019, the SEC proposed extensive changes[19] to the financial disclosure requirements for business acquisitions and dispositions[20] aimed to reduce the complexity and costs associated with preparing historical financial statements and pro forma financial information by amending Rule 3–05 and Article 11 of Regulation S–X. Among the more prominent changes, the proposed amendments:

- update the "investment test" and "income test" used to determine the significance of an acquisition or disposition, conform the significance threshold and tests for a disposed business, and expand the use of pro forma financial information in measuring significance;
- would require, under the new "investment test," market value to be determined as of the last business day of the registrant's most recently completed fiscal year prior to closing the acquisition. The revised "income test" would add a new revenue component, which would compare the target's revenue to the registrant's revenue. The revised "income test" also would change the net income calculation to use income or loss from continuing operations after taxes;
- reduce the number of audited and interim periods for which historical financial statements must be presented if an acquisition is determined to be significant;
- permit abbreviated financial statements of a target business carved out of a broader entity that did not maintain separate financial statements of the target business;

[17] *See* our April 2, 2019, client alert "NYSE Revises Exceptions to Shareholder Approval Rules."

[18] "Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval of a Proposed Rule Change Amending Sections 312.03 and 312.04," Exchange Act Release No. 85,374, 84 Fed. Reg. 11,354, Mar. 26, 2019.

[19] *See* our May 13, 2019, client alert "SEC Proposes Changes to Financial Disclosure Requirements for Acquisitions and Dispositions."

[20] "Amendments to Financial Disclosures about Acquired and Disposed Businesses," Securities Act Release No. 10,635, Exchange Act Release No. 85,765, Investment Company Act Release No. 33,465, 84 Fed. Reg. 24,600, May 28, 2019.

- no longer require separate financial statements for any acquired business once it has been included in the registrant's post-acquisition financial statements for a complete fiscal year;
- expand the use of, or reconciliation to, IFRS-IASB;
- ease the requirement to provide financial statements and pro forma financial information for "individually insignificant acquisitions;" and
- modify the form and content of pro forma financial information by replacing the current restrictive criteria imposed on pro forma adjustments with two new categories of adjustments to be presented as separate columns: (i) "transaction accounting adjustments" that would reflect the estimated purchase accounting under U.S. GAAP or IFRS–IASB, and (ii) "management adjustments" that would include reasonably estimable synergies and other transaction effects that have occurred or are reasonably expected to occur.

The proposed amendments would not apply to target company financial statements required to be included in a proxy statement or registration statement on Form S–4 or Form F–4 but would apply to the pro forma information provided therein pursuant to Article 11 and any financial information for other acquisitions and dispositions that would be required to be disclosed in the registration statement pursuant to Rule 3–05 or Rule 3–14.

Proposal to Ease Disclosures Required by Rules 3–10 and 3–16 of Regulation S–X in Certain Registered Debt Offerings

On July 24, 2018, the SEC proposed rule amendments that would simplify the financial disclosure requirements applicable to registered debt offerings for guarantors and issuers of guaranteed securities, as well as for affiliates whose securities collateralize a registrant's securities.[21] The proposals aim to ease disclosure and capital formation burdens for public companies while ensuring investor access to material information.[22]

Comment Solicitation on Modernizing the Rules and Forms for Stock-Based Compensation

On July 18, 2018, the SEC issued a concept release soliciting public comment on ways to modernize Rule 701 and Form S–8 under the Securities Act of 1933, as amended (Securities Act) to account for the evolving employer-employee relationships of the so-called gig economy.[23]

As relevant to SEC reporting companies, the concept release solicited public comment on whether and how to ease the requirements of Form S–8 and reduce the related compliance complexities and costs.[24] The range of potential reforms includes:

- whether to reconsider the requirement to register a fixed number of shares, including as a means to avoid inadvertent violations of SEC registration requirements when plan sales exceed the number of shares registered;
- whether to permit an issuer to register on a single form the offers and sales pursuant to all its employee benefit plans;
- whether to permit issuers to add securities to an effective Form S–8 via an automatically effective post-effective amendment; and
- whether to permit issuers to pay filing fees using a "pay-as-you-go" fee structure pursuant to which all issuers eligible to use Form S–8 could, at their option, pay filing fees on Form S–8 on an as-needed basis rather than when the form is initially filed.

The concept release also solicited public comment on more fundamental and comprehensive changes to the structure of compensatory-related securities offerings, including whether to extend the "Rule 701 exemption" (which is an exemption from SEC registration requirements for issuances of securities as employee compensation, subject to limits, by companies that are not registered with the SEC) to SEC-reporting companies and in turn eliminate Form S–8.

Proposal to Modernize Disclosures of Business, Legal Proceedings and Risk Factors Under Regulation S-K[25]

On August 8, 2019, the SEC proposed amendments to modernize provisions of Regulation S-K generally applicable to U.S. domestic reporting companies requiring description of business, legal proceeding and risk factor disclosures. The proposed amendments are intended to improve the readability of disclosures for investors and simplify compliance requirements for companies, as well as eliminate certain prescriptive requirements to reflect a more principles-based approach to disclosures relating to the description

[21] "Financial Disclosures About Guarantors and Issuers of Guaranteed Securities and Affiliates Whose Securities Collateralize a Registrant's Securities," Securities Act Release No. 10,526, Exchange Act Release No. 83,701, Oct. 2, 2018.

[22] *See* our August 8, 2018, client alert "SEC Proposes to Ease Disclosures Required by Rules 3-10 and 3-16 of Regulation S-X in Certain Registered Debt Offerings."

[23] Brent J. Fields, secretary, SEC, "Concept Release on Compensatory Securities Offerings and Sales," July 18, 2018.

[24] *See* our August 2, 2018, client alert "SEC Solicits Comment on Modernizing the Rules and Forms for Stock-Based Compensation."

[25] *See* our August 14, 2019, client alert "SEC Proposes to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K."

of business and risk factors, by focusing on information that is material to an investor's understanding of a company's business and avoiding redundant disclosures.

Although the proposal contemplates potentially incorporating parallel changes across all forms filed by FPIs, including annual reports on Form 20-F, the proposed changes regarding risk factors would apply to FPIs filing registration statements on Forms F-1, F-3 and F-4.

Other Developments

SEC Adopts New Mining Property Disclosure Rules

On October 31, 2018, the SEC adopted final rules in new Subpart 1300 of Regulation S-K to modernize property disclosure requirements for registrants with material mining operations, applicable to registration statements and annual reports under the Securities Act and the Exchange Act. The final rules apply to FPIs and also are intended to more closely align disclosure with current industry practice under the Committee for Mineral Reserves International Reporting Standards (CRIRSCO).

As part of aligning disclosure requirements with the CRIRSCO standards, the rules require registrants with material mining operations to disclose, among other things, (i) information concerning mineral resources (the definition of which tracks CRIRSCO standards more closely and excludes oil and gas resources resulting from oil and gas producing activities, gases and water), which was previously only permitted in limited circumstances, (ii) material exploration results and related exploration activity and (iii) summary information concerning properties in the aggregate as well as more detailed information about individually material properties.[26] Furthermore, under the new rules, registrants' disclosure of exploration results, mineral resources or mineral reserves must be substantiated with supporting documentation prepared by a "qualified person."[27] The new rules also require registrants to obtain a technical report summary prepared by the qualified person, summarizing their review and conclusions about mineral resources or reserves on each material property. Such report must be filed as an exhibit to a relevant SEC filing when mineral reserves or resources are disclosed for the first time or when there is a material change in the disclosure.

Under the final rules, affected registrants are required to begin complying with the new rules in their first fiscal year beginning on or after January 1, 2021. However, the SEC staff has stated that early voluntary compliance is permitted so long as a registrant satisfies all the provisions under Subpart 1300 of Regulation S-K and any required technical report is filed as an exhibit that meets existing EDGAR technical specification requirements.[28] Industry Guide 7 will remain effective until all registrants are required to comply with the rules, at which time Industry Guide 7 will be rescinded. Registrants that do not voluntarily comply early with the new rules should use Industry Guide 7 for their mining property disclosures until compliance with the new rules is required.

SEC Periodic Disclosures

On December 18, 2018, the SEC requested public comment on how to improve periodic disclosures and reduce the burden on public companies regarding quarterly reporting while maintaining or enhancing investor protection.[29] On July 18, 2019, the SEC's Division of Corporation Finance held a roundtable panel with market participations to discuss the issue of short-termism in capital markets and whether SEC reporting should be altered to address the issue.[30]

Direct Listings

On February 2, 2018, the SEC approved the NYSE's proposal to permit qualifying private companies to use "direct listings" to list their shares on the NYSE and become publicly traded without conducting an initial public offering so long as the direct listing is accompanied by a concurrent Securities Act resale registration statement.[31] On February 14, 2019, the Nasdaq Stock Market LLC filed a notice with the SEC to "amend and clarify certain aspects of the listing process for Direct Listings."[32] The Nasdaq rule is substantially similar to the NYSE rule. Thus far in 2019, a few high-profile direct listings have been completed under these new rules.

[26] "Modernization of Property Disclosures for Mining Registrants," Securities Act Release No. 33,10570, Exchange Act Release No. 34,8509, 83 Fed. Reg. 66,344, Oct. 31, 2018.

[27] A "qualified person" under the new rules is an individual who is a "mineral industry professional with at least five years of relevant experience in the type of mineralization and type of deposit under consideration and in the specific type of activity that person is undertaking on behalf of the registrant" and "an eligible member or licensee in good standing of a recognized professional organization at the time the technical report is prepared." *Ibid.*

[28] Division of Corporate Finance, "Voluntary Compliance with the New Mining Property Disclosure Rules Prior to Completion of EDGAR Reprogramming," May 7, 2019.

[29] Eduardo A. Aleman, deputy secretary, SEC, "Request for Comment on Earnings Releases and Quarterly Reports," Dec. 18, 2018.

[30] U.S. SEC, "Short- and Long-Term Management of Public Companies Examined at the SEC."

[31] *See* our Feb, 18, 2018, client alert "SEC Approves NYSE Rules to Facilitate Direct Listings."

[32] "Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change," Securities Exchange Act Release No. 85,156, 84 Fed. Reg. 5787 Feb. 22, 2019.

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