

THE REVIEW OF
**SECURITIES & COMMODITIES
REGULATION**

AN ANALYSIS OF CURRENT LAWS AND REGULATIONS
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 52 No. 14 August 14, 2019

PREPARING 2019 REGISTRATION STATEMENTS AND ANNUAL REPORTS: WHAT FOREIGN PRIVATE ISSUERS AND THEIR COUNSEL NEED TO KNOW

In several releases, the SEC has acted to modernize and simplify disclosure requirements for Form 20-F and for registration statements on forms F-1, F-3, and F-4. The authors review the amendments effected by these releases.

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Since October 2018, there have been a number of changes to the disclosure requirements applicable to foreign private issuers (“FPIs”), including changes to the requirements of Form 20-F, of which FPIs and their counsel should be aware when preparing registration statements and annual reports on Form 20-F.¹ The Securities and Exchange Commission began proposing these amendments in 2016² and 2017³ as part of its efforts to (1) carry out its mandates pursuant to the 2015 Fixing America’s Surface Transportation Act (“FAST” Act) to modernize and simplify Regulation S-K, reduce the costs and burdens of disclosure on companies, improve the readability and navigability of disclosure, and discourage repetition and disclosure of immaterial

information and (2) eliminate redundant and unnecessary disclosure covered by other SEC rules, U.S. GAAP, IFRS, or other changes in the information available to investors.

DISCLOSURE UPDATE AND SIMPLIFICATION

In the SEC’s October 2018 Disclosure Update and Simplification adopting release (“Disclosure Simplification Release”),⁴ the SEC adopted amendments to Form 20-F that eliminate requirements that have become redundant, duplicative, overlapping, outdated, or superseded, in light of other SEC disclosure requirements, U.S. GAAP, and IFRS rules. Effective November 5, 2018, the following amendments to Form 20-F went into effect:

Elimination of Certain Form 20-F Disclosure Requirements

- ***Exchange Rate Data:*** Item 3 of Form 20-F no longer requires issuers to disclose exchange rate data

¹ Because registration statements used by FPIs, including Forms F-1, F-3, and F-4, instruct FPIs to disclose the information called for by Part I of Form 20-F, changes to Form 20-F discussed herein also apply to FPI registration statements. Form 40-F generally permits Canadian issuers to use Canadian disclosure documents to satisfy registration and disclosure requirements. Except where noted, the changes discussed herein do not apply to the Annual Report on Form 40-F.

² Rel. No. 33-10110 (2016).

³ Rel. No. 33-10425 (2017).

⁴ Release No. 33-10532 (2018).

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when financial statements are prepared in a currency other than the U.S. dollar, as was previously required by Item 3.A.3 of Form 20-F, because the information is readily available to investors online.

- **EPS Calculation:** Instruction 6 of the “Instructions as to Exhibits” of Form 20-F no longer requires issuers to file a calculation of earnings per share as an exhibit because it is duplicative of the rules for calculating and presenting earnings per share under IFRS.
- **Ratio of Earnings to Fixed Charges:** Instruction 6 of the “Instructions as to Exhibits” of Form 20-F no longer requires (1) disclosure of historical and pro forma ratios of earnings to fixed charges, or combined fixed charges and preference dividends to earnings and (2) filing the computation of the ratio of earnings to fixed charges as an exhibit because the components of the calculations can generally be found in the financial statements.
- **Market Price of Securities:** Item 9 of Form 20-F no longer requires disclosure of historical high and low trading prices for securities since historical trading prices are readily available to investors online.
- **Research and Development (R&D) Disclosure Eliminated:** Item 5 of Form 20-F no longer requires FPIs to disclose the amount spent on company-sponsored R&D activities, as this information is already required to be disclosed in the notes to the financial statements under both U.S. GAAP and IFRS.
- **Dividend Restrictions:** Items 10 and 14 of Form 20-F no longer require disclosure of dividend restrictions and limitations on the payment of dividends because the disclosure is already required to be included in the notes to the financial statements, and disclosure of restrictions on a subsidiary’s ability to pay dividends to its parent company is already required by Item 2 of Form 20-F.

- **Selected Financial Data for First Time IFRS Adopters:** To simplify compliance efforts, General Instruction G of Form 20-F has been amended to eliminate the requirement to present selected financial data in accordance with U.S. GAAP, and explicitly provides that issuers relying on the accommodation for first-time application of IFRS need only present selected financial data for the same two-year period covered by the FPI’s financial statements.

New Form 20-F Disclosure Requirements

- **Trading Symbol Required:** Item 9 of Form 20-F now requires identification of the U.S. and principal market(s) for the issuer’s common stock and the corresponding trading symbol.
- **References to the SEC Website Required:** Form 20-F now requires a statement that electronic filings are available on, and a reference to, the SEC’s website.
- **References to the Issuer’s Website Required:** All FPI forms, including Form 20-F and registration statements on Forms F-1, F-3, and F-4, now require disclosure of the issuer’s website, if they have one.

Modernization of Property Disclosures for Mining Registrants

On October 31, 2018, in a separate release, the SEC adopted rules to consolidate its mining disclosure requirements and bring them more in line with global industry standards and practices by eliminating Industry Guide 7 and replacing it with a more comprehensive subpart 1300 of Regulation S-K.⁵ The SEC made corresponding amendments to the instructions to Item 4 of Form 20-F, which required FPIs engaged in mining operations to furnish the information about their properties called for by the industry guides in Regulation S-K, including Industry Guide 7. FPIs will be required to comply with the new rules for the first fiscal year beginning on or after January 1, 2021.

⁵ Rel. No. 33-10570 (2018).

FAST ACT MODERNIZATION AND SIMPLIFICATION OF REGULATION S-K

The most recent amendments to Form 20-F were adopted in the SEC's March 20, 2019 FAST Act Modernization and Simplification of Regulation S-K adopting release.⁶ In that release, the SEC adopted several material amendments to Regulation S-K and made conforming changes to Form 20-F, where applicable, so that the amendments would apply to both U.S. and non-U.S. issuers. Although the majority of changes involve exhibit filing and incorporation by reference, the most significant are the amendments to the presentation of Operating and Financial Review and Prospects, the Form 20-F equivalent of MD&A. These changes became effective on May 2, 2019, except where noted:

- *Operating and Financial Review and Prospects – Periods Discussed:* Prior to the FAST Act amendments, Item 5 of Form 20-F required a discussion of the results of operations for the three-year period presented in the financial statements, using either a year-to-year comparison or any other format that would enhance a reader's understanding. Item 5 has now been amended to add new Instruction 6, permitting FPIs to omit a discussion of the results of operations for the earliest year of the three-year period presented in the financial statements, so long as the disclosure was included in the FPI's prior Form 20-F, or any other EDGAR filing in which the discussion was required to be included in compliance with Item 5 of Form 20-F or Item 303 of Regulation S-K. Where the discussion of the earliest year is omitted from Item 5 disclosure, there must be a cross-reference to the prior filing in which the discussion may be found. Of course, this change will not affect FPI registration statements for initial public offerings, as there would be no prior disclosure to reference.
- *Operating and Financial Review and Prospects – Presentation:* In addition, the instructions to Item 5 of Form 20-F have been amended to emphasize that the SEC does not consider a year-over-year comparison of the recently completed fiscal year to the prior fiscal year to be the preferred presentation, and that issuers may use any presentation of the information called for by Item 5 that the FPI believes will enhance investor understanding.

- *Exhibits – Confidential Treatment Request Relief:*⁷ Paragraph 4 of the Form 20-F "Instructions as to Exhibits" has been amended to provide that FPIs may file redacted material contracts without submitting a confidential treatment request if the redacted information is (1) not material and (2) would likely cause competitive harm if publicly disclosed. This relief is especially relevant for FPIs in the technology and life sciences industries seeking to register their securities in the U.S., as it reduces the cost of registration by eliminating the need to seek confidential treatment for their numerous material contracts. Redacted exhibits remain subject to SEC review and must:

- be marked on the exhibit index to indicate that portions of the exhibit have been omitted;
- include a prominent statement on the first page that certain identified information has been excluded from the exhibit because it is both (1) not material and (2) would likely cause competitive harm if publicly disclosed; and
- include brackets indicating where the information has been omitted from the filed version of the exhibit.

- *Exhibits – Filing Requirements:*⁸ The Form 20-F "Instructions as to Exhibits" have also been amended to provide for the following new and revised exhibit filing requirements:
 - A brief description of the issuer's registered capital stock, debt securities, warrants, rights, ADRs, and other securities, as described in Item 202 of Regulation S-K, must now be filed with Form 20-F. FPIs may incorporate the required descriptions by reference to other hyperlinked filings.
 - As previously permitted only for domestic filers pursuant to Item 601(b)(2) of Regulation S-K, FPIs may now exclude exhibits, schedules, appendices, and other attachments to any

⁷ This change became effective upon publication in the Federal Register on April 2, 2019. In addition, this amendment to the Form 20-F exhibit instructions conforms to an identical amendment to Item 601 of Regulation S-K applicable to registration statements on Forms F-1, F-3, and F-4.

⁸ This amendment to the Form 20-F exhibit instructions conforms to an identical amendment to Item 601 of Regulation S-K applicable to registration statements on Forms F-1, F-3, and F-4.

⁶ Rel. No. 33-10618 (2019).

exhibits filed with Form 20-F, provided that (1) the excluded attachments may not contain material information that is not otherwise disclosed in the exhibit and (2) the body of the document must contain a list identifying each excluded attachment and its contents.

- Personal identifiable information is now explicitly permitted to be redacted from exhibits without submitting a confidential treatment request.
- For established reporting companies, material contracts that have been fully performed at the time of filing of the Form 20-F need not be filed as exhibits. The two-year lookback for material contracts has been eliminated for all issuers except “newly reporting registrants.”⁹
- *Financial Statements – Cross-Referencing/Incorporating by Reference to Outside Information Prohibited:* Exchange Act Rule 12b-23, referenced in Instruction 19 to Form 20-F, now clarifies that information from outside the financial statements may not be cross-referenced or incorporated by reference in the financial statements, except when specifically permitted or required by SEC, U.S. GAAP, or IFRS rules. This change is intended to reduce any confusion about which financial information has and has not been audited or reviewed by the auditor.
- *Incorporation of other Filed Documents by Reference:* Item 10(d) of Regulation S-K which permits incorporation by reference of documents previously filed with the SEC, and Exchange Act Rules 12b-23 and 12b-32, which allow for incorporation by reference in Exchange Act registration statements, reports, and exhibits, have been amended to eliminate (1) the prohibition on incorporating documents by reference that have been on file with the SEC for more than five years and (2) the requirement to file copies of information incorporated by reference into a registration statement or report as an exhibit to that statement or report.

- *Form 20-F and Form 40-F Cover Page Changes:* FPIs are now required to disclose the trading symbol of each class of its securities on the cover page of Forms 20-F and 40-F. In addition, when using Forms 20-F or 40-F to file an annual report, new paragraph 104 to “Instructions as to Exhibits” of Form 20-F and new Instruction 17 to “Information To Be Filed on this Form” of Form 40-F require all cover page data to be tagged in Inline XBRL.

INLINE XBRL FILING OF TAGGED DATA¹⁰

In July 2018, the SEC adopted another amendment impacting FPI disclosure.¹¹ Effective September 2018, FPIs are no longer required to post interactive data files on their websites, and the corresponding checkbox on the cover page of Form 20-F was eliminated. FPIs, including those that prepare their financial statements in accordance with IFRS, will be required to comply with Inline XBRL for financial statements for fiscal periods ending on or after June 15, 2021.

AMENDMENTS AFFECTING ONLY REGISTRATION STATEMENTS

A number of the FAST Act Release amendments and the Disclosure Simplification Release amendments to Regulation S-K do not apply to Form 20-F, but do apply to FPI registration statements on Forms F-1, F-3, and F-4. These amendments include:

- *Elimination of Prospectus Cover Page Disclosure of the Offering Price Calculation:* Item 501(b)(3) of Regulation S-K was amended to clarify that when it is not practical to provide an offering price and the prospectus contains an explanation of the method for determining the offering price, the method does not have to be explained on the prospectus cover page. Instead, the cover page may be simplified to include only a statement that the method for determining the offering price is fully explained in the prospectus.
- *Cover Page Disclosure of Exchanges and Markets for the Securities Offered:* Item 501(b) of Regulation S-K now requires disclosure of any national securities exchange where the securities are

⁹ An FPI is a “newly reporting registrant” if it (1) is not an Exchange Act Section 13(a) or 15(d) reporting company, (2) has not filed an annual report since the revival of a previously suspended reporting obligation, or (3) is a former shell company that has not filed a Form 20-F since the completion of the transaction that caused it to cease being a shell company.

¹⁰ Beginning December 15, 2017, FPIs filing in the IFRS Taxonomy were required to begin filing quarterly and annual financial statements with XBRL tagging and post interactive data files to their websites.

¹¹ Inline XBRL Filing of Tagged Data, Release No. 33-10514 (Jun. 28, 2018) [83 FR 40846 (Aug. 16, 2018)].

being offered or listed, or, if not listed, the principal U.S. market(s) for the securities being offered and the corresponding trading symbols.

- *Tailoring the Preliminary Prospectus Legend:* Item 510(b)(10) of Regulation S-K has been amended to exclude the portion of the legend referring to state law for offerings that are not prohibited by state blue-sky laws. The SEC expects that the amendment will permit a more tailored prospectus cover page.
- *Risk Factor Clarity:* The SEC amended Item 503(c) of Regulation S-K to eliminate the list of specific examples of risk factors, which encouraged boilerplate disclosure and was inconsistent with the SEC’s position that registrants should only disclose those risk factors that are tailored to their unique circumstances. In addition, because the inclusion of the risk factor disclosure rules in Item 503 of Regulation S-K misleadingly indicates that the disclosure is applicable only in the offering context, the risk factor disclosure rules have been moved to a new Item 105 of Regulation S-K, and all references to risk factor disclosure in registration statement forms have been updated accordingly.
- *Elimination of Certain Undertakings:* The undertakings required by Item 512(c)¹² of Regulation S-K have been eliminated because they are unnecessary, and the undertakings required by Items 512(d),¹³ (e),¹⁴ and (f)¹⁵ of Regulation S-K have been eliminated because they are obsolete.
- *Elimination of References to the SEC’s Public Reference Room:* Item 101 of Regulation S-K was amended so that FPIs are no longer required to identify the SEC’s Public Reference Room or

disclose its physical address and phone number in registration statements.

SMALLER REPORTING COMPANIES

FPIs that report their financial statements in accordance with U.S. GAAP, use domestic company registration statements (the “S” series of registration statements) and forms (Forms 10-K, 10-Q, and 8-K), and that qualify as a “smaller reporting company” can take advantage of the scaled disclosure afforded to smaller reporting companies under Article 8 of Regulation S-X and under Regulation S-K. Effective September 10, 2018, the SEC amended the definition of “smaller reporting company,” raising the public float threshold from less than \$75 million to less than \$250 million, and the revenue threshold from less than \$50 million and no public float to less than \$100 million and either no public float or public float of less than \$700 million.¹⁶ The amendments increase the number of smaller FPIs that are eligible to take advantage of the smaller reporting company scaled disclosure.¹⁷

CONCLUSION

This is an era of rapid change as the SEC continues advancing its disclosure effectiveness initiatives. There have been a number of proposed rule changes in recent weeks that would affect FPIs if adopted, including the proposed changes to the “accelerated filer” and “large accelerated filer” definitions,¹⁸ and proposed changes to financial disclosures of acquired and disposed businesses.¹⁹ It is important that FPIs have informed counsel to not only ensure that they comply with the recent changes discussed in this article, but also anticipate and prepare for rule and form changes being contemplated and proposed by the SEC to be adopted in the future. ■

¹² Undertakings with respect to warrant and rights offerings to existing security holders where unsold securities are reoffered to the public.

¹³ Undertakings with respect to competitive bids.

¹⁴ Undertakings to deliver annual and quarterly reports with the prospectus.

¹⁵ Undertaking of non-reporting registrants to provide underwriters with stock certificates.

¹⁶ Rel. No. 33-10513 (2018).

¹⁷ In order to be eligible to take advantage of smaller reporting company scaled financial disclosure requirements, FPIs must prepare financial statements in accordance with U.S. GAAP.

¹⁸ Rel. No. 34-85814 (2019).

¹⁹ Rel. No. 33-10635 (2019).