ALERT MEMORANDUM

Preparing An Annual Report on Form 20-F – Guide for 2020

November 27, 2019

This alert memorandum summarizes recent developments that will affect the preparation of the annual report of a foreign private issuer ("FPI") on Form 20-F for the year ended December 31, 2019 (the "Annual Report"). We have included additional details and references to sources in the endnotes.

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I. Changes to Form 20-F

The U.S. Securities and Exchange Commission (the "SEC") adopted amendments in March 2019 that modernized and simplified certain requirements of Form 20-F.[1] Unless otherwise noted, the following changes to Form 20-F will apply for the first time to a registrant with a December 31 fiscal year in its 2019 Annual Report, which must be filed by April 30, 2020.

Changes to Cover Page

— *Trading symbol required*. The cover page now includes a field for the trading symbol for each class of securities of the company registered under Section 12 of the Securities Exchange Act of 1934 (the "Exchange Act").

— *Inline XBRL tagging*. A "large accelerated filer"[2] that prepares its financial statements in accordance with U.S. GAAP must tag all information on the cover page in Inline XBRL ("iXBRL"). For an FPI that prepares its financial statements in accordance with IFRS, this requirement takes effect for fiscal periods ending on or after June 15, 2021.[3]

Changes to MD&A (Item 5)

— *Omitting discussion of the earliest of three years*. Item 5 (Operating and Financial Review and Prospects, also known as MD&A) generally requires a discussion of the three-year period covered by the financial statements included in the Annual Report. New instruction 6 to Item 5 allows a company to omit a comparison with the earliest of the three years if that discussion is included in a previous report or prospectus filed on EDGAR. We expect that a number of companies will take advantage of this instruction to present a comparison of 2019 with 2018 and not include a full comparison of 2018 with 2017.[4]

- A company that takes this approach must identify the location in the prior filing where the omitted discussion may be found, but this does not require incorporating the prior filing by reference.
- A company is still required to provide all material information in a manner that best reflects the discussion and analysis of the business as seen through the eyes of management. If a company limits MD&A comparisons to two years, it should assess whether omitting any discussion of earlier periods leaves a gap in information, and adjust MD&A disclosure accordingly.[5]

— *Use of any presentation format that enhances the reader's understanding*. Most companies provide in their MD&A a year-to-year comparison of a number of financial statement line items. New instruction 6 to Item 5 emphasizes that a company may use any presentation that in its judgment enhances the reader's understanding of the company's financial condition, without suggesting that any one mode of presentation is preferable to another. Ideally, this clarification would encourage companies to craft improved MD&A disclosure that highlights material trends and is less mechanical.[6]

Changes to the Exhibits

— *Description of Registered Securities*. New instruction 2(d) under Instructions as to Exhibits requires a description of all the company's securities registered under Section 12 of the Exchange Act. For each security listed, the exhibit must include information comparable to that required by the Description of Securities section in a registration statement.[7]

- Disclosure from prior registration statements may be useful to prepare the new exhibit. However, a company may not satisfy the requirement by incorporating past registration statements by reference.[8]
  - With respect to debt securities, companies may satisfy the exhibit requirement in a variety of ways, including (i) copying the relevant disclosures from a base prospectus and prospectus supplement for each outstanding security and (ii) combining the description of various securities with similar terms into one narrative. Companies that have multiple series of debt securities listed on a U.S. exchange and thus are registered under Section 12 of the Exchange Act should consider whether combining the description of various securities makes sense to avoid a lengthy exhibit.
  - A company with longstanding registered securities may have to draft new disclosure or expand old disclosure if those securities were issued under registration statements that did not include all the disclosure required under the current form.

- Companies can incorporate the new exhibit by reference into future annual reports so long as there has not been any change to the information required in the Description of Securities. The exhibit will need to be updated each year for any changes (including non-material changes) to the terms of the securities or to add any new securities registered under Section 12.

— *Redacting Confidential Information in Material Contract Exhibits*. The amendments substantially simplify the process for redacting confidential information in agreements filed as exhibits to SEC filings. Companies can now redact confidential information from these agreements without submitting a confidential treatment request ("CTR").[9]

- Only information that (i) is not material and (ii) would likely cause competitive harm to the company if publicly disclosed can be redacted from the exhibits without a CTR.[10] The SEC intends to selectively review filings with redactions and may separately request the company provide an unredacted version of the document for the Staff's review.[11]
- When filing a redacted exhibit, the company must (i) mark the exhibit index to indicate that portions of the exhibit have been omitted, (ii) provide a prominent statement on the first page of the redacted exhibit that certain information has been excluded and (iii) indicate by brackets (e.g., "[***]") where the information has been omitted.
- A company that previously obtained a confidential treatment order must continue to file extension applications to protect the confidential information from public release after the original order expires.[12]

— *Redacting Personal Information*. The amendments permit a company to redact personal confidential information if disclosure would constitute "a clearly unwarranted invasion of personal privacy" (e.g., disclosure of bank account numbers, social security numbers, home addresses and similar information). The Staff has informally permitted this for some time. These redactions will not require any further justification regarding materiality or competitive harm.[13]

— *Omitting Schedules from Exhibits*. The amendments permit a company to omit schedules (or similar attachments) from an exhibit to a registration statement or report, unless the schedules contain material information that is not otherwise disclosed in the exhibit or in the registration statement or report.[14]

- A list briefly identifying the contents of all omitted schedules must be included in the exhibit, unless such information is already included in the exhibit. We believe that a typically detailed table of contents will meet this requirement.[15]
- If a company omits schedules or other attachments, it should review them to determine whether they contain information that could be material. A company must provide a copy of any omitted schedule to the SEC upon request.

— *No Look-Back Period for Material Contracts*. Before the amendments, a company was required to file as exhibits all material contracts not made in the ordinary course of business if (i) the contract would be performed at or after the filing of the report or (ii) the contract was entered into less than two years prior to the filing. The amendments eliminate the second condition for a company that is not a "newly reporting registrant."[16]

Incorporation by Reference and Cross References

The Amendment Release included a number of revisions to Regulation S-K, Rule 411 under the Securities Act of 1933 (the "Securities Act") and Rule 12b-23 under the Exchange Act intended to streamline the requirements of incorporation by reference and facilitate investor access to incorporated documents through the use of hyperlinks.[17] These revisions include:

— *Financial statements: Referencing and incorporating by reference outside information is prohibited*. In the financial statements, incorporating by reference, or cross-referencing, information outside the financial statements is generally not permitted.[18]

— *Incorporation by reference of financial information is restricted*. Financial information required to be given in comparative form for two or more periods must not be incorporated by reference unless the information incorporated by reference includes the entire period for which the comparative data is given.[19]

— *Copies of information incorporated by reference no longer required to be filed*. Companies are no longer required to file as an exhibit copies of any information incorporated by reference.[20]

— *Requiring hyperlinks to information that is incorporated by reference if available on EDGAR*. Companies must include active hyperlinks to information incorporated into the Annual Report by reference if the information is publicly available on EDGAR at the time the Annual Report is filed.[21]

II. Other New Requirements

— *Critical Audit Matters ("CAMs")*.

- The U.S. Public Company Accounting Oversight Board ("PCAOB") amended its standards governing audit reports in 2017 to require that an audit report include a discussion of critical auditing matters or CAMs.[22] The requirement will apply to the 2019 Annual Report if the company is a large accelerated filer. For companies other than large accelerated filers, the requirement takes effect for audit years ending on or after December 15, 2020, except for "emerging growth companies," which are exempt from the new CAM requirement.
- 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: (1) relates to accounts or disclosures that are material to the financial statements and (2) involved especially challenging, subjective, or complex auditor judgment." Auditors must include, for each CAM, a description of the principal considerations that led them to determine that the matter was a CAM, a description of how the CAM was addressed in the audit, and reference to the relevant financial statement accounts or disclosures.

— *iXBRL for Financial Information*. Most companies must submit their financial statements in their Annual Reports in iXBRL format according to the following phase-in schedule:[23]

- *Large accelerated filers that prepare their financial statements in accordance with U.S. GAAP*: Fiscal periods ending on or after June 15, 2019.

- *Accelerated filers*[24] *that prepare their financial statements in accordance with U.S. GAAP*: Fiscal periods ending on or after June 15, 2020.
- *All other filers, including all FPIs that prepare their financial statements in accordance with IFRS*: Fiscal periods ending on or after June 15, 2021.[25]

III. Areas of SEC Focus and Disclosure Trends

The following is a list of issues that have drawn the attention of the SEC and that may have to be addressed under several items of the Annual Report, including the risk factors, description of business, MD&A, disclosure of board oversight and financial statements.[26]

— *Cybersecurity*. The Annual Report should include disclosure of material cybersecurity risks and incidents.[27] Companies should avoid generic and boilerplate language—disclosure should focus on specific cybersecurity risks and incidents involving harms to the company, including injury to the company's reputation, financial performance, and customer and vendor relationships, as well as potential litigation or regulatory investigations.[28] Where a company has become aware of a material cybersecurity incident or risk, it will not be sufficient to merely disclose that such an incident "may" occur.

— *LIBOR Transition*. The planned discontinuation of the London Interbank Offered Rate ("LIBOR") could raise significant challenges with risk identification, evaluation and mitigation efforts related to existing or new contracts.[29] In updating its Annual Report, a company should disclose its progress toward risk identification and mitigation, and the anticipated impact of the discontinuation of LIBOR, if material.

— *Brexit*. Although the effects of the U.K.'s exit from the European Union ("Brexit") remain uncertain, a company's Annual Report should describe management's views on the risks posed by Brexit, to the extent material, and any actions the company is taking to address those risks.[30] Disclosure should be such that it would "satisfy the curiosity of a thoughtful, deliberative board member considering the potential impact of Brexit on the company's business, operations and strategic plans."[31] Companies should avoid boilerplate disclosure merely stating that Brexit presents a risk with an uncertain outcome that could materially and adversely impact the business and its operations.

— *Sustainability*. Investors are increasingly interested in how companies address environmental, social, and governance ("ESG") matters. Yet, the SEC disclosure regime (including Form 20-F) does not include—at least for now—specific rules calling for ESG disclosure, and SEC officials continue to encourage a materiality-based approach to such disclosure.[32] MD&A and risk factor requirements could require disclosure of ESG matters if the information is material and the failure to disclose makes the disclosure that has been made misleading.[33]

— *Accounting Changes*. The following changes in accounting standards may trigger disclosure obligations if their impact on the company's financial statements is material.

- *Lease Accounting*: New standards on lease accounting under both IFRS (IFRS 16) and U.S. GAAP (ASC 842) became effective for SEC filers in 2019.[34] Although IFRS 16 and ACS 842 diverge in many key details, both standards generally require a lessee to recognize a new lease asset (representing the right to use the leased item) and a new lease liability (representing the

obligation to pay rentals). The new standards may have a dramatic impact on some balance sheets, income statements, and financial ratios and performance metrics that are used in covenants. The new standards may trigger transition disclosure requirements applicable to accounting changes, which will generally be included in the notes to the financial statements.[35] Companies should assess the impact of the transition to the applicable standard on other sections of the Annual Report.

- *CECL*: The Financial Accounting Standards Board's standard introducing the current expected credit losses ("CECL") methodology is effective for SEC filers in fiscal years beginning after December 15, 2019. The new standard replaces the Allowance for Loan and Lease Losses standard, and focuses on estimating allowances for credit losses over the life of a company's loans. The new standard may impact FPIs that prepare their financial statements under U.S. GAAP.[36] The impact of CECL is likely to be more significant to banks and other financial institutions than to other companies, but FPIs should assess and disclose any material impact that the new standard is expected to have on its credit losses.

— *Modernization of Property Disclosures for Mining Registrants*. Starting with the first fiscal year beginning on or after January 1, 2021, mining companies will need to comply with a new set of rules, contained in subpart 1300 of Regulation S-K, that aim to modernize property disclosure requirements.[37] The amendments more closely align SEC disclosure requirements and policies with current industry and global regulatory practices and standards.[38] A company may start early voluntary compliance with the new standard if it follows all the requirements under Subpart 1300 of Regulation S-K.[39]

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[1] The amendments, which also modified the rules and forms applicable to domestic companies, implement a statutory directive under the 2015 FAST Act, and are part of a broader "disclosure effectiveness" initiative undertaken by Congress and the SEC. FAST Act Modernization and Simplification of Regulation S-K, Release No. 33-10618 (Mar. 20, 2019), available at https://www.sec.gov/rules/final/2019/33-10618.pdf ("Amendment Release"). See Cleary Gottlieb, SEC Simplifies Some Disclosure Requirements for Public Companies, available at https://www.clearygottlieb.com/-/media/files/alert-memos-2019/sec-simplifies-some-disclosure-requirements-for-public-companies.pdf/ ("CGSH FAST Act Memo").

[2] A "large accelerated filer" is a company that (i) had an aggregate worldwide market value of common equity held by non-affiliates of $700 million or more as of the last business day of the most recently completed second fiscal quarter, (ii) has been subject to the requirements of section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months, and (iii) has filed at least one annual report pursuant to section 13(a) or 15(d) of the Exchange Act. 17 CFR § 240.12b-2(2).

[3] The new cover page iXBRL tagging requirement has the same phase-in period as the iXBRL requirement for financial information discussed under "Other New Requirements—iXBRL for Financial Information." See Instruction 104 of the "Instructions as to Exhibits" and Rule 406 of Regulation S-T (17 C.F.R. § 232.406).

[4] A survey by The Corporate Counsel found, however, that of 79 Form 10-K filings by large accelerated filers between May 3 and July 15, 2019, only 17 companies omitted the discussion of the earliest year in their filing. The Corporate Counsel, Early Returns From the Fast Act Rule Changes (July-August 2019). The opportunity to omit the discussion of the earliest year might be especially attractive to dual-listed FPIs that are not required to include that earlier year of financial information in their home country filings.

[5] For example, revisions to the earliest year information as a result of a restatement or the retrospective adoption of a new accounting principle, or evidence of a three-year trend, might be sufficiently material to warrant discussion. See CGSH FAST Act Memo.

[6] See CGSH FAST Act Memo; Amendment Release p. 15.

[7] More precisely, the description must include information comparable to that required by Items 9.A.3, A.5, A.6, and A.7, Items 10.B.3, B.4, B.6, B.7, B.8, B.9, and B.10, and Items 12.A, 12.B, 12.C, and 12.D.1 and 12.D.2 of Form 20-F (collectively, the "Description of Securities").

[8] See Instruction 2(d) in the "Instructions as to Exhibits" and Amendment Release p. 60 (acknowledging that the information in the exhibit will overlap with disclosure in publicly available registration statements, but that providing all the information in one location is better than requiring investors to piece together the information from multiple documents).

[9] See Instruction 4(a) in the "Instructions as to Exhibits." A company may withdraw any pending CTRs and amend their filing to conform to the new rule requirement.

[10] Instruction 4(a) in the "Instructions as to Exhibits" in Form 20-F specifically refers to the materiality and competitive harm prongs.

Subsequent to the adoption of the amendments, the Supreme Court eliminated the competitive harm prong under exemption 4 of the Freedom of Information Act (5 U.S.C. § 552(b)(4)) ("FOIA Exemption 4"). *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356 (2019). As a result, a regular CTR that relies on FOIA Exemption 4 may provide a more lenient legal standard to protect confidential information (but procedurally, it would be substantially more burdensome than the procedures set forth by the amendments).

[11] The SEC staff (the "Staff") has stated that companies should be mindful of how they respond to such requests and only send the unredacted version of the document back to the Staff in the manner requested in the correspondence (*i.e.*, by mail to the address provided). If after reviewing the unredacted version the Staff has questions regarding materiality or competitive harm, the Staff may request the company provide a materiality and competitive harm analysis. The Staff will provide

these requests under a separate chain of comments from the regular comment review process to minimize the risk of inadvertent public disclosure of competitive information. Staff Guidance, New Rules and Procedures for Exhibits Containing Immaterial, Competitively Harmful Information (April 1, 2019), available at https://www.sec.gov/corpfin/announcement/new-rules-and-procedures-exhibits-containing-immaterial.

12 Refiling a redacted exhibit that was covered by a previously approved CTR in the manner specified by the amendments will not provide confidential treatment. SEC, New Streamlined Procedure for Confidential Treatment Extensions (April 16, 2019), available at https://www.sec.gov/corpfin/streamlined-procedure-confidential-treatment-extensions. To facilitate and streamline the CTR extension process, the SEC developed a 1-page extension application (available at https://www.sec.gov/divisions/corpfin/short-form-extension-requests.pdf).

13 See introductory text of the "Instructions as to Exhibits" in Form 20-F.

14 For example, a company that files a joint venture agreement as an exhibit to Form 20-F may omit from the exhibit any form agreements that are included as schedules to the joint venture agreement.

15 See CGSH FAST Act Memo.

16 See Instruction 4(a) in the Instructions as to Exhibits in Form 20-F. A "newly reporting registrant" would include, for example, a company that is filing its first registration statement under the Securities Act or the Exchange Act, or a SPAC that completes an acquisition that causes it to cease being a shell company.

17 Instruction to Item 19 in Form 20-F references Rule 12b-23 regarding incorporation by reference. The amendments rescind Rule 12b-32, which explained the circumstances in which a company may incorporate exhibits by reference (Rule 12b-23(c) now sets forth those circumstances).

18 Rule 12b-23(b). This avoids confusion about which financial information has been audited or reviewed by the independent auditor. Amendment Release at note 86 and accompanying text.

19 Rule 12b-23(b).

20 The amendments rescinded rule 12b-23(a)(3), which contained this requirement.

21 Rule 12b-23(d).

22 "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). Registrants that are also listed on European exchanges have been required to disclose "key audit matters" ("KAMs") on auditor's reports for audits of financial statements for periods ending on or after December 15, 2016. The KAM requirement was adopted by the International Auditing and Assurance Standards Board ("IAASB") in 2014, and it has many similarities with the PCAOB's CAM requirement. Despite the similarities, some commentators have observed that dual-listed companies are expected to discloser fewer CAMs than KAMs due to differing standards and disclosure requirements.

23 See Inline XBRL Filing of Tagged Data, Release No. 33-10514 (June 28, 2018), available at https://www.sec.gov/rules/final/2018/33-10514.pdf.

24 An "accelerated filer" is a company that (i) had an aggregate worldwide market value of common equity held by non-affiliates between $75 million and $700 million as of the last business day of the most recently completed second fiscal quarter, (ii) has been subject to the requirements of section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months, and (iii) has filed at least one annual report pursuant to section 13(a) or 15(d) of the Exchange Act. 17 CFR § 240.12b-2(1).

25 SEC, Interactive Data, Compliance and Disclosure Interpretation , questions 101.08 and .09 (Aug. 20, 2019), available at https://www.sec.gov/corpfin/interactive-data-cdi (describing the phase-in period for compliance with the iXBRL requirement for FPIs).

26 See, e.g., Jay Clayton Speech, SEC Rulemaking Over the Past Year, the Road Ahead and Challenges Posed by Brexit, LIBOR Transition and Cybersecurity Risks (December 6, 2018), available

at https://www.sec.gov/news/speech/speech-clayton-120618.

27 Commission Statement and Guidance on Public Company Cybersecurity Disclosures, Release No. 33-10459 (February 26, 2018), available at https://www.sec.gov/rules/interp/2018/33-10459.pdf ("Cybersecurity Guidance") pp. 9-10.

28 For example, in updating their cybersecurity-related risk factors, companies should consider (i) the occurrence of prior cybersecurity incidents, including their severity and frequency, (ii) the probability of future incidents, (iii) the adequacy of preventative actions taken to reduce cybersecurity risks and the associated costs, (iv) aspects of the company's business that give rise to material cybersecurity risks, (v) the costs associated with maintaining cybersecurity protections, (vi) potential for reputational harm, (vii) laws and regulations that may affect the requirements to which the company is subject relating to cybersecurity (and associated costs of compliance), and (viii) litigation, regulatory action and remediation costs associated with cybersecurity incidents. Cybersecurity Guidance p. 14.

29 Division of Corporation Finance, Division of Investment Management, Division of Trading and Markets, and Office of Chief Accountant, SEC, "Staff Statement on LIBOR Transition" (July 12, 2019), available at https://www.sec.gov/news/public-statement/libor-transition.

For example, a company may have legacy contracts extending past the scheduled discontinuation of LIBOR (2021) with interest rate provisions referencing LIBOR that do not contemplate the permanent discontinuation of LIBOR. There may be disagreement over how these contracts should be interpreted or amended, creating business and market disruption risks.

30 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 (March 15, 2019), available at https://www.sec.gov/news/speech/hinman-applying-principles-based-approach-disclosure-031519.

31 Id. (explaining that "there should not be material gaps between how the board is briefed and how shareholders are informed" with respect to Brexit risks).

32 Director Hinman echoed similar statements by SEC officials generally favoring a materiality-based approach to ESG disclosure ("bright-line requirements can increase the costs associated with being a public company and yet not deliver the relevant and material information that market participants are seeking"). Id. In contrast, a recent study found that investors support legal mandates requiring companies to issue sustainability reports, and want standardized disclosure that would allow them to compare ESG practices among companies. McKinsey & Company, More than values: The value-based sustainability reporting that investors want (July 2019), available at https://www.mckinsey.com/business-functions/sustainability/our-insights/more-than-values-the-value-based-sustainability-reporting-that-investors-want?cid=eml-web.

33 See also Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106 (Feb. 8, 2010), available at https://www.sec.gov/rules/interp/2010/33-9106.pdf, which remains relevant for companies when evaluating their disclosure obligations pertaining to climate change-related issues.

34 IFRS 16, *Leases*, promulgated by the International Accounting Standards Board, became effective for periods beginning on or after January 1, 2019. ASC 842, *Leases*, promulgated by the Financial Accounting Standards Board, became effective for public business entities for fiscal periods beginning after December 15, 2018.

35 IAS 8, *Accounting Policies, Changes in Accounting Estimates and Errors*; ASC 250, *Accounting Changes and Error Correction*.

36 Companies that prepare their financial statements in accordance with IFRS have been using an analogous model for credit impairment under IFRS 9, *Financial Instruments*, which became effective for annual periods beginning on or after January 1, 2018.

37 See Cleary Gottlieb, SEC Adopts New Rules for Mining Disclosures, available at https://www.clearygottlieb.com/-/media/files/alert-

memos-2018/sec-adopts-new-rules-for-mining-disclosure.pdf.

[38] Modernization of Property Disclosures for Mining Registrants, Release No. 33-10570 (October 31, 2018), available at https://www.sec.gov/rules/final/2018/33-10570.pdf.

[39] Division of Corporation Finance, Voluntary Compliance with the New Mining Property Disclosure Rules Prior to Completion of EDGAR Reprogramming (May 7, 2019), available at https://www.sec.gov/corpfin/voluntary-compliance-mining-property-rules.