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Matters to Consider for the Form 20-F Due by April 30, 2012

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As companies that are required to comply with the U.S. Securities and Exchange Commission's (SEC) reporting obligations that apply to foreign private issuers gear up for the 2012 reporting season, we have prepared an overview of the corporate governance and disclosure matters that these companies should consider as they prepare this season's disclosure materials. Some of these matters are requirements of the new SEC rules and others are based on lessons gleaned from the 2011 reporting season. The items included in the checklist below will not apply equally to all companies. Whether a particular item applies and how a company should address it will depend on, among other things, the company's operating segments, investments and operations.[1]

❑ **Note new filing deadline for Form 20-F.** Foreign private issuers should note that beginning with the filing of the Form 20-F for a fiscal year ending after December 15, 2011, the forms must be filed within four months after the end of the fiscal year covered by the Form 20-F (*e.g.*, April 30, 2012, for calendar year companies). The deadline was shortened by 60 days. When the SEC was considering this change a number of constituents voiced concern about the ability of their companies to comply with the new deadlines. Foreign private issuers should consider their reporting schedules carefully to accommodate the timing requirements and ensure that simultaneous filings in other jurisdictions are not materially inconsistent with their Form 20-F. The filing deadline for companies that file their annual report on Form 40-F has not changed. Those companies must continue to file the Form 40-F on the same date that filing is required in Canada.

❑ **Determine impact of SEC staff disclosure initiatives.** The staff of the SEC's Division of Corporation Finance has been focused on a number of initiatives related to periodic reports over the last few years. These initiatives should be considered when preparing disclosures in the company's financial statements and annual reports on Form 20-F. The disclosure initiatives include:

Cybersecurity risks. On October 13, 2011, the Division of Corporation Finance issued disclosure guidance on cybersecurity risks.[2] The guidance is intended to assist companies in assessing what disclosure should be provided with respect to cybersecurity risks and cyber incidents and how cybersecurity risks and their impact should be described in SEC filings. Although there is no disclosure requirement explicitly referring to cybersecurity risks and cyber incidents, the guidance notes that a number of existing disclosure requirements may impose an obligation to disclose such matters. Examples include:

Risk Factors – The risk of cyber incidents should be discussed if such risk is among the most significant risk factors that make an investment in the company speculative or risky. In evaluating the risk, companies should consider prior cyber incidents, the severity and

[1] Although the focus of this checklist is on preparing the 2011 Form 20-F, the guidance in this checklist may also apply to the preparation of the Form 40-F.

[2] See the CF Disclosure Guidance: Topic 2 (cybersecurity).

frequency of such incidents, the probability and magnitude of such incidents (including potential costs and consequences resulting from misappropriation of assets or sensitive information, corruption of data or operational disruption) and the adequacy of preventative actions to reduce cybersecurity risks. Appropriate disclosures may also include a discussion of the company's business or operations that give rise to material cybersecurity risks (including outsourced functions), a description of material cyber incidents experienced, a discussion of risks related to cyber incidents that may remain undetected for an extended period and a description of relevant insurance coverage. In some circumstances, it also may be appropriate to discuss specific attacks experienced in order to make investors aware of the potential impact on the company. Companies should provide disclosure tailored specifically to their circumstances and avoid generic risk disclosures.

Operating and Financial Overview and Prospects – Cybersecurity risks and cyber incidents should be addressed in the operating and financial overview and prospects sections of the Form 20-F if costs or consequences associated with known incidents or risk of potential incidents present a material event, trend or uncertainty reasonably likely to have a material effect on the company's results of operations, liquidity or financial condition or would cause reported financials not to be necessarily indicative of future operating results or financial condition. The guidance notes that companies that are victims of successful cyber attacks may incur substantial costs and suffer negative consequences, such as remediation costs (*e.g.*, liability for stolen assets or information, repairing system damage and offering customer incentives), increased cybersecurity protection costs, lost revenues, litigation and reputational damage.

Additional Examples – Depending on the circumstances, cybersecurity risks and cyber incidents also may require companies to include disclosure in their "description of business," "legal proceedings" or financial statements.

The Division of Corporation Finance, addressing potential concerns that detailed disclosures might compromise cybersecurity efforts by providing a "roadmap" of a company's network security, emphasized that "disclosures of that nature are not required under federal securities laws" and that "registrants should provide sufficient disclosure to allow investors to appreciate the nature of the risks faced by the particular registrant in a manner that would not have that consequence."

Exposures to European sovereign debt. On January 6, 2012, the Division of Corporation Finance issued the fourth installment in its new Disclosure Guidance Topic series.[3] Topic No. 4 focuses on the exposures of companies to the debt of certain European countries. The staff specifically highlighted its concern about "the risks to financial institutions that are SEC registrants from direct and indirect exposures to" European sovereign debt.

The goal of this new guidance is to expand and enhance the disclosures that companies provide related to material sovereign debt exposures, to ensure that investors have transparent and comparable information about the uncertainties of these exposures. This information generally is included in companies' disclosures about risk factors, qualitative and quantitative market risks, and management's discussion and analysis. Bank holding companies and other companies engaging in similar lending and deposit activities also are required to make the disclosures required by the SEC's Industry Guide 3 (Statistical Disclosure by Banking Holding Companies).

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[3] See the CF Disclosure Guidance: Topic 4 (European sovereign debt exposures).

The staff is requesting enhanced disclosures on a country-by-country basis of the following information, when it is material:

- gross sovereign, financial institutions and nonfinancial corporations' exposure;
- quantified disclosure explaining how gross exposures are hedged; and
- a discussion of the circumstances under which losses may not be covered by purchased credit protection.

In determining which countries companies should consider covering in their disclosures, the staff stated that the focus should be on countries "experiencing significant economic, fiscal and/or political strains such that the likelihood of default would be higher than would be anticipated when such factors do not exist." The staff acknowledged that the countries covered in the disclosures will change over time. Companies are encouraged to disclose the basis for why particular countries are covered.

The guidance in the new disclosure topic includes a list of detailed factors that companies should consider when determining the country-by-country disclosure above and any additional information that should be disclosed regarding their exposures to sovereign debt, including the gross funded and unfunded exposures, total gross exposures, effects of credit default protection, other risk management considerations and post-reporting date developments.

Loss contingency disclosures. The accounting staff of the SEC's Division of Corporation Finance has recently been very focused on disclosures regarding loss contingencies. Based on public staff statements and comment letters, the SEC staff is focused on disclosures about reasonably possible losses and estimates of such losses. The staff has scrutinized, and viewed skeptically, disclosure that the company is unable to disclose an estimate of a range of reasonably possible losses related to contingencies because such a range cannot be estimated with certainty or with confidence. The staff has stated that it is receptive to having a dialogue with companies with respect to issues related to privileged information — for instance, when requesting that a range of possible losses be disclosed, the staff will accept an aggregate number for all such lawsuits, rather than a dollar disclosure on a case-by-case basis.

Notwithstanding the staff's focus, the accounting provisions do not require that an estimate of a range of reasonably possible losses be disclosed when it cannot be made. The intent of this focus seems to be to ensure that companies make a "strong, diligent effort" to provide the estimate. Companies should consider whether an estimate can be provided and discuss the conclusion with the disclosure team, including the independent auditors and legal advisors.

The staff's focus on this topic coincides with the Financial Accounting Standards Board's (FASB) consideration of changes to the requirements of Accounting Standards Codification Topic 450 (formerly Statement of Financial Accounting Standards No. 5; "Disclosure of Certain Loss Contingencies"). In October 2010, FASB announced a delay in the timing for approval of any amendments to Topic 450 (originally planned to be effective for the 2010 calendar year-end reporting period). FASB originally announced that it intended to begin its deliberations of the amendments in the second half of 2011, but now it appears that its consideration of these amendments has been postponed.

Short-term borrowings. In September 2010, the SEC issued an interpretative release entitled "Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management's Discussion and Analysis." The interpretative release was issued in connection with proposed rule amendments that the SEC said it was considering to "enhance the disclosure that registrants present about short-term borrowings."

Those proposed rule amendments would have required companies to provide, among other things, a new subsection in the company's MD&A that included comprehensive information about its short-term borrowings. The comment period on the new proposed rules closed on November 29, 2010, and the SEC has not adopted final rules. It is possible that the SEC may not take action on these rules. Nevertheless, companies should consider the guidance in the interpretative release — which is a helpful resource — when preparing and reviewing the liquidity and capital resources section of the MD&A.

Non-GAAP financial measures. The disclosure of non-GAAP financial measures remains a focus of SEC staff comments on company disclosure documents. The staff is particularly concerned with tabular non-GAAP presentations that could be viewed as a full non-GAAP income statement.[4] When considering the disclosure of non-GAAP financial measures, companies should:

- ensure the heading/title of the non-GAAP presentation is not confusingly similar to the title used for a GAAP presentation (*e.g.*, by avoiding using the title "Non-GAAP Statement of Income");
- reduce the number of financial statement line items presented in the table;
- reconcile the non-GAAP measures to the most directly comparable GAAP measure within the tabular presentation (rather than by footnote or in a separate tabular presentation); and
- clarify that the detailed tabular presentation is useful to investors by providing investors with context as to how the adjustments impact the company's GAAP financial statements.

In addition, financial institutions that disclose metrics resulting from Basel III and/or other new regulatory requirements not yet implemented may be required to identify these metrics as non-GAAP financial measures.

Reliance on key contractual arrangements. The SEC staff has been focused on the use of key contractual arrangements by certain Chinese foreign private issuers. In particular, the staff has requested that companies that use a variable interest entity (VIE) structure provide additional disclosures about, among other things:

- whether the equity pledge agreements used in the VIE structure have been registered with the relevant governmental authorities;
- the VIE's financial results (*i.e.*, revenues, assets, etc.) on an unconsolidated basis; and
- the risks and uncertainties of doing business through the VIE structure.

The staff also has requested additional disclosures regarding the accounting consolidation policies of companies using a VIE structure. The staff has requested this additional

[4] Question No. 102.10 in the staff's Non-GAAP C&DIs.

information to be included in the liquidity and capital resources and risk factor disclosures, among others, of the Form 20-F.

Companies that may be subject to these staff comments should consider whether their disclosures appropriately address the concerns that may be raised by a staff review of the Form 20-F.

Assessment of internal controls and financial reporting. The SEC staff has increased its focus on the disclosures foreign private issuers have provided in response to Item 15 (Controls and Procedures) of the Form 20-F. Without a request to specifically identify people by name, the staff has asked certain foreign private issuers for detailed information in response letters to the staff about the background of the people at the company who are primarily responsible for preparing and supervising the preparation of the company's financial statements and evaluating the effectiveness of the company's internal controls over financial reporting, and about their knowledge of U.S. GAAP and SEC rules and regulations. Specifically, the staff has asked for the following information for each such person:

- what role he or she takes in preparing financial statements and evaluating the effectiveness of internal controls;
- what relevant education and ongoing training he or she has had relating to U.S. GAAP;
- the nature of his or her contractual or other relationship to the company;
- whether he or she holds and maintains any professional designations such as Certified Public Accountant (U.S.) or Certified Management Accountant; and
- about his or her professional experience, including experience in preparing and/or auditing financial statements prepared in accordance with U.S. GAAP and evaluating effectiveness of internal control over financial reporting.

As part of the assessment of internal controls, foreign private issuers should consider the individuals they have on staff to handle the SEC reporting function. Although no additional disclosures are required on this point in the Form 20-F, companies should be prepared to respond to these comments from the staff if their Form 20-F is selected for review.

Asset and goodwill impairment. Companies should expect that the SEC staff will continue to monitor disclosures related to asset and goodwill valuation. Even if the requirements for impairment testing are not triggered, companies should consider the need to provide an early warning of any risk of failing the impairment tests applicable to their assets or reporting units that could result in material charges to their assets and goodwill. This early warning disclosure would include, among other things, the difference (in percentage) between the fair value and the carrying value used in the latest impairment testing date and a detailed description of the judgments, estimates and assumptions, as well as the uncertainty associated thereto, used in calculating the impairment.

❑ **Comply with the XBRL filing requirements.** The final stage of the SEC's three-year phase-in period for its rules requiring registrants to provide financial information using XBRL was reached in July 2011. As a result, all foreign private issuers that prepare their financial statements in accordance with U.S. GAAP are now required to comply with the XBRL filing requirements and post such XBRL financial information on their websites. In addition, all foreign private issuers that prepare their financial statements in accordance with International Financial Reporting Standards (IFRS) as issued by the International Accounting

Standards Board (IASB) are required to comply with the XBRL filing requirements in connection with annual reports on Form 20-F for fiscal periods ending on or after June 15, 2011. At this time, however, foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB have been provided relief from the XBRL requirements by the staff of the SEC's Division of Corporation Finance until an SEC-approved XBRL taxonomy for their financial statements is available. This relief is expected to remain in effect for the 2012 reporting season. Foreign private issuers that prepare their financial statements in accordance with local GAAP are not required to comply with XBRL filing requirements.

❑ **Provide reconciliation of financial statements pursuant to Item 18 of Form 20-F.** The SEC eliminated the option of foreign private issuers to provide financial statements in accordance with Item 17 of Form 20-F for fiscal years ending on or after December 15, 2011.

Pursuant to Item 17 of Form 20-F, a foreign private issuer that prepares its financial statements and schedules in accordance with a basis of accounting other than U.S. GAAP or IFRS, as approved by the IASB, was required to include a reconciliation to U.S. GAAP in any registration statement or annual report filed with the SEC. Item 17 allowed, however, an issuer to exclude certain information normally provided in footnote disclosure under U.S. GAAP, including disclosures related to pension assets, obligations and assumptions, lease commitments, tax attributes, stock compensation awards, and financial instruments and derivatives.

Item 18 of Form 20-F requires a foreign private issuer to provide all information required by Item 17 and, if its financial statements are not prepared in accordance with U.S. GAAP or IFRS, as approved by the IASB, to provide all other information required by U.S. GAAP and Regulation S-X unless such requirements specifically do not apply to the registrant as a foreign private issuer. Accordingly, the additional disclosures mentioned in the paragraph above and excluded from Item 17 also will need to be presented.

The SEC, however, did not eliminate the availability of Item 17 disclosure for financial statements for Canadian issuers using the Multijurisdictional Disclosure System or for financial statements of nonregistrants required to be included in an issuer's registration statement or annual report, such as financial statements of recently acquired significant businesses.

❑ **Comply with mine safety rules.** The Dodd-Frank Act included specialized disclosure provisions related to mine safety. Those mine safety provisions went into effect August 20, 2010, 30 days after the date the Dodd-Frank Act went into effect. In addition, the SEC proposed and adopted certain other more specific mine safety disclosure requirements. The new SEC rules went into effect on January 27, 2012. Foreign private issuers are required to include the mine safety disclosures in their Forms 20-F. As the triggers for disclosures under the mine safety rules are based on the Mine Safety and Health Act of 1977, which only applies to mines located in the U.S., the new rules do not require disclosures about mines located outside the United States. The SEC included a reminder in the adopting release, however, that material mine safety issues could be required to be disclosed by issuers, including foreign private issuers, based on other SEC disclosure requirements, such as risk factor disclosures (Item 503(c) of Regulation S-K) or legal proceedings disclosures (Item 103 of Regulation S-K).

❑ **Evaluate global security risk issues.** The SEC staff has been increasingly monitoring the disclosure of U.S. and non-U.S. registered companies with respect to their dealings with countries identified as state sponsors of terrorism, including Cuba, Iran, Sudan and Syria. The staff's approach has been intensified as the international community has imposed new and increasingly more stringent sanctions on these countries.

The SEC staff comments suggest that the materiality standards applicable to disclosure related to global security are somewhat differentiated and thus require a careful evaluation and analysis by the registrants, including foreign private issuers. A foreign private issuer must consider, for example, if a transaction with a state sponsor of terrorism, regardless of its value, could have a material impact on the company, including as a result of the termination of business relations with global suppliers or financial institutions or possible divestments by key investors following such disclosure. Other factors to be considered include potential damages to the company's reputation as a result of the publicity of these dealings. Foreign private issuers should evaluate if sufficient disclosure is being provided and must be prepared to respond to additional questions and comments from the SEC staff, which are publicly available and may further contribute to the materiality of such business dealings.

In addition, foreign private issuers should carefully evaluate the nature of any relations with a state sponsor of terrorism to ensure that they are not subject to further sanctions imposed by the U.S. government that could limit their activities in the country.

❑ **Additional political or economic risks.** As a result of ongoing and political uncertainty, foreign private issuers should also consider, in addition to the risk factors discussed above, whether political or economic developments could have a material effect on their financial condition or operations and, therefore, require disclosure. Examples of these developments could include the political instability in the Middle East and African countries, as well as recent changes to global economic trends (other than the European sovereign debt crisis discussed above) which could potentially affect the perception of economic recovery from the 2008 global financial crisis. Companies should provide sufficient disclosure to allow investors to appreciate the nature of the risks faced by such companies and reflecting their particular circumstances.

❑ **Plan for additional Dodd-Frank Act requirements.** There are a number of corporate governance and disclosure provisions in the Dodd-Frank Act that are not in effect yet because the SEC has not adopted final rules. Although it is unclear whether all these new provisions will fully apply to foreign private issuers, it is expected that certain of the provisions, such as the provisions related to the disclosures about conflict minerals and resource extraction payments, will most likely apply to all companies that are required to comply with the U.S. public reporting requirements.

The additional Dodd-Frank Act rules that are forthcoming are not expected to be in effect for the 2012 reporting season. We have included a summary of the status of these provisions and the proposed timing of adoption below. The provisions that are listing standards will require action by the respective exchanges before the rule is in effect. For this season, companies may want to advise their board committee members about the phase-in of these rules and the expected impact next season.

Companies may want to pay particularly close attention to the development and timing of the final conflict minerals rules. When adopted, the conflict minerals rules are expected to

have a widespread impact on reporting companies. The conflict minerals rules will require SEC reporting companies to take a number of steps to determine whether certain minerals, namely columbite-tantalite (coltan), cassiterite, gold or wolframite, are necessary to the functionality or production of a product manufactured, or contracted to be manufactured, by the company and, if so, to attempt to determine the country of origin of such minerals. The rules will also require companies to disclose information related to conflict minerals in their annual reports and on their websites and, potentially, to file a "Conflict Minerals Report" with the SEC. Although at this time companies are not required to take any specific steps to prepare for the new conflict minerals rules, companies that may be impacted by the rules should begin to establish a process to comply with them.[5]

Dodd-Frank Act Provisions – SEC Implementation Timetable

To be adopted by June 2012:

- Disclosure by Institutional Investment Managers of Votes on Executive Compensation
- Compensation Committees & Consultants
  - Exchange listing standards regarding compensation committee independence and factors affecting compensation adviser independence
  - Disclosure rules regarding compensation consultant conflicts
- Specialized Disclosure
  - Rules regarding disclosure related to "conflict minerals"
  - Rules regarding disclosure by resource extraction issuers

To be proposed by June 2012 and adopted by December 2012:

- Executive Compensation
  - Rules regarding disclosure of pay-for-performance, pay ratios and hedging by employees and directors
  - Rules regarding listing standards related to recovery of "erroneously awarded" executive compensation

❑ **Beware of spiders; other potential Regulation FD issues.** Although foreign private issuers are exempt from Regulation FD requirements, selective disclosure of material information could lead to potential liability under other rules and regulations. Accordingly, many foreign private issuers voluntarily comply with Regulation FD. Last season a number of companies were surprised to discover that material information that was posted to their websites had been located before the public launch of those pages and the information was reported in the media. The discovery of those web pages often resulted from the use

[5] We have prepared a Preliminary Preparedness Checklist that can be used as a guide to begin the process of preparing to comply with the conflict minerals provisions. A copy of the checklist can be found here and on our website at http://skadden.com/newsletters/Dodd-Frank_Act_Minerals_Provisions_Preliminary_Preparedness_Checklist.pdf. This checklist is based on the conflict minerals rules proposed by the SEC on December 15, 2010. The final rules adopted by the SEC may differ from the proposal.

of "spiders" or software programs that specifically targeted the undisclosed information with a view to unauthorized public distribution. These situations raise potential Regulation FD concerns. Companies should monitor the posting of material information on Web pages and adopt security procedures for this process. The use of other new communication techniques, such as Twitter and blogs, also raises other potential Regulation FD concerns that companies and their counsel should consider and address through policies and procedures. Recently, some companies have reviewed their communication policies to ensure that they apply to both management and members of the board of directors.