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Global Securities Group Client Alert

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RECENT RULES AND REGULATIONS AFFECTING DISCLOSURE BY FOREIGN PRIVATE ISSUERS ON FORM 20-F

Several new rules and proposed rules by the U.S. Securities and Exchange Commission (the "SEC") will affect foreign private issuers filing annual reports on Form 20-F. This client alert highlights certain of these recent developments.

1. New Compensation Committee Independence/Disclosure rules:

Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), the SEC has proposed Rule 10C-1(b) requiring U.S. stock exchanges to mandate that all listed companies have independent compensation committees. The proposed standard is similar to current SEC rules on audit committee independence in terms of affiliation with the company and receipt of compensation in a capacity other than being a director. Exemptions to the new rule will be provided for "controlled companies" (owned 50% or more by a holder) or "foreign private issuers" ("FPIs") which disclose the reasons for not having an independent compensation committee in place. The public comment period ends on April 29, 2011. Final rules are expected to be adopted by July of 2011. The implementation schedule requires U.S. stock exchanges to have final rules in place no later than one year after the SEC adopts final rules.

2. Pay ratio:

Pursuant to the Dodd-Frank Act, the SEC was directed to promulgate rules requiring issuers to disclose the median annual total compensation of all employees (excluding the CEO), the CEO's annual total compensation, and the ratio of median compensation to the CEO's compensation. The disclosure requirement is proposed to be implemented through an amendment to Item 402 of Regulation S-K. Therefore, unless the SEC specifically decides to make a conforming change to Form 20-F or change the applicability of Item 402 of Regulation S-K to FPIs, this proposal should not affect FPIs. According to the SEC's Dodd-Frank timeline, the SEC expects to issue a proposing release between August and December of 2011.

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3. Credit ratings:

The Dodd-Frank Act repealed Rule 436(g) under the Securities Act of 1933, as amended (the “Securities Act”), which had provided that ratings assigned to debt securities were not considered expert statements under the Securities Act. The repeal of the rule means that issuers are generally required to obtain and file consents from rating agencies when credit ratings are included or incorporated by reference in registration statements or prospectuses. Because rating agencies have indicated that they will not be providing such consents, companies should avoid including specific ratings disclosure in their Form 20-F’s due to the fact that such disclosures would ordinarily be incorporated by reference into any registration statements. Certain exceptions to the rule permit the disclosure of ratings in specific disclosure items without the rating being considered an expert statement and without receiving the applicable rating agency’s consent. These specific items include risk factors relating to the importance of ratings in accessing the credit markets, general discussions of funding and liquidity or when describing covenants, interest rates or dividends tied to ratings.

4. Mining and natural resource companies:

The SEC has promulgated three new rules affecting mining and natural resource companies:

- **Conflict minerals:** Pursuant to Section 1502 of the Dodd-Frank Act, the SEC has proposed rules which will require public companies to disclose annually the use of conflict minerals and to disclose whether such minerals originated in the Democratic Republic of Congo or an adjoining country and to include an audit report if the specified minerals are necessary to the functionality or production of a product manufactured by the reporting company. Conflict minerals are defined as columbite-tantalite (coltan), cassiterite, gold, wolframite and derivatives thereof, and any other mineral or its derivatives determined by the Secretary of State to be tied to financing conflict in the Democratic Republic of Congo. Final rules are expected to be issued in April of 2011 and will be effective with respect to a company’s first fiscal year following the adoption of the rules.
- **Mining safety:** Under Section 1503 of the Dodd-Frank Act, the SEC has promulgated rules requiring companies which operate coal or other mines to provide disclosure in their Form 20-Fs about health or safety violations.
- **Payments by resource extraction issuers:** Pursuant to Section 1504 of the Dodd-Frank Act, the SEC has proposed rules which mandate disclosure by “resource extraction issuers” (registrants engaged in commercial development of oil, natural gas or minerals) in their annual report of payments made to U.S. or foreign governments for the purpose of commercial development of oil, natural gas or minerals, including: (i) the type and total amount of such payments made for each project relating to the commercial development of oil, natural gas or minerals; and (ii) the type and total amount of such payments made to each government. Final rules are expected in April 2011.

5. Short-term borrowings disclosure:

The SEC proposed rules in September 2010 applicable to domestic U.S. companies and FPIs calling for more clarity in the disclosure of short-term borrowings. Currently, short-term borrowings are typically disclosed in a snap-shot form at the end of a period, which in some cases may not capture the true liquidity risk of a company. The rules intend to impose disclosure obligations on all issuers, with more rigorous requirements on financial companies. The proposed rules would require the following:

- **Quantitative disclosure in the Management Discussion and Analysis of Results of Operation and Financial Condition (“MD&A”) section for each type of short-term borrowings used, including:**
 - the amount of borrowings outstanding at the end of the reporting period and the weighted average interest rate on those borrowings;

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- the average amount of borrowings outstanding during the period and the weighted average interest rate on those borrowings; and
- the maximum amount of borrowings outstanding during the period.
- To provide context for the quantitative data, companies would be required to disclose:
 - a general description of the short-term borrowing arrangements included in each category and the business purpose of those arrangements;
 - the importance of short-term borrowing arrangements to the company's liquidity, capital resources, market-risk support, credit-risk support or other benefits;
 - the reasons for the maximum reported level for the reporting period; and
 - the reasons for any material differences between average short-term borrowings and period-end short-term borrowings.

Financial companies¹ would be required to provide averages calculated on a daily average basis and to disclose the maximum amount outstanding on any day in the period. All other companies would be permitted to calculate averages using an averaging period not to exceed one month and to disclose the maximum month-end amount during the period.

6. MD&A interpretive guidance on liquidity and capital resources:

Along with the proposed rules on short-term borrowings, the SEC also issued interpretive guidance on the liquidity and capital resources section of the MD&A applicable to both domestic U.S. companies and FPIs. This new guidance relates to the following:

- The SEC urged issuers to continue taking into consideration the SEC's prior guidance on MD&A disclosure, including its 2003 MD&A interpretive guidance release. This applies, in particular, to critical liquidity matters to ensure that MD&A disclosure keeps pace with increasingly diverse and complex financing alternatives. Specifically, the SEC urged issuers to focus on the following items in its 2003 guidance:
 - Companies should provide a clear analysis of the sources and uses of liquidity, and note important trends and uncertainties relating to liquidity. The SEC provided additional examples of these trends, such as difficulties accessing the debt markets, reliance on commercial paper or other short-term financing arrangements, maturity mismatches between borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral and counterparty risk. Disclosure of trends or uncertainties that may affect liquidity should be made unless an issuer concludes that such event is not reasonably likely to (1) occur or (2) have a material effect on the issuer's liquidity. Issuers should also analyze factors which may make historical results or trends either indicative or not indicative of future results, as well as matters which have had a historical impact but are not expected to continue to do so and matters expected to have a future impact while not having had such an impact in the past.
 - Disclosure is also required for a known commitment, event or uncertainty that will result in (or is reasonably likely to result in) the registrant's liquidity increasing or decreasing in a material way. Anticipated capital expenditures (both discretionary and nondiscretionary) as well as funding sources

¹ A financial company is defined as a company which, during the relevant reporting period, is engaged to a significant extent in the business of lending, deposit taking, insurance underwriting or providing investment advice, or is a broker or dealer as defined in section 3 of the U.S. Securities Exchange Act of 1934, as amended.

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need to be described.

- In connection with a repurchase transaction, securities lending transaction, or any other transaction involving the transfer of financial assets with an obligation to repurchase financial assets, that has been accounted for as a sale under applicable accounting standards, the registrant should consider whether the transaction is reasonably likely to result in the use of a material amount of cash or other liquid assets.
- The SEC also highlighted new issues in its release, including the following:
 - If borrowings during the reporting period are materially different than the period-end amounts recorded in the financial statements, disclosure about the intra-period variations would be required.
 - Companies should consider describing cash management and risk management policies that are relevant to an assessment of their financial condition. A company that maintains or has access to a portfolio of cash and other investments that is a material source of liquidity should consider providing information about the nature and composition of that portfolio, including a description of the assets held and any related market risk, settlement risk or other risk exposure.
 - An issuer cannot use financing structures (whether “on-balance sheet” or “off-balance sheet”) designed to mask the registrant’s reported financial condition. The release states that transparent disclosure is required.
 - The SEC emphasized that leverage ratios and other financial measures included in filings with the SEC must be calculated and presented in a way that does not obscure the company’s leverage profile or reported results. Any ratio or measure included in a filing should be accompanied by a clear explanation of the calculation methodology. The explanation would need to clearly articulate the treatment of any inputs that are unusual, infrequent or non-recurring, or that are otherwise adjusted so that the ratio is calculated differently from directly comparable measures. If the measure presented differs from other measures commonly used in the registrant’s industry, the registrant would need to consider whether a discussion of those differences or presentation of those measures would be necessary to make the disclosures not misleading. Finally, an issuer needs to consider its reasons for presenting the particular measure, and should include disclosure clearly stating why the measure is useful to understanding its financial condition. Regulation G for non-GAAP disclosure should be kept in mind if the measure in question is a financial measure.
 - With respect to the tabular disclosure of contractual obligations, issuers should focus on providing informative and meaningful disclosure about their future payment obligations. Issuers should highlight any changes in presentation that are made so that investors are able to use the information to make comparisons from period to period. Footnotes should be used to provide information necessary for an understanding of the timing and amount of the specified contractual obligations. Additional narrative discussion outside of the table should be considered to promote understanding of the tabular data. Issuers should provide additional disclosure where necessary to explain what the tabular data includes and does not include.

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7. Safe harbor for forward-looking statements:

At the SEC's "2011 SEC Speaks" roundtable event, the SEC stressed the importance of including legends regarding forward-looking statements that are specific to a particular company. While a company does not have to revise its legend year to year, it should endeavor to review periodically and revise the legend as needed to ensure that the disclosure is accurate and complete, capturing all known factors that may cause anticipated results and plans to differ from current projections.

8. Disclosure of Non-GAAP metrics:

The SEC also reminded issuers at the "2011 SEC Speaks" round table event of the need to present GAAP information prominently alongside non-GAAP metrics. The SEC highlighted the fact that presenting non-GAAP per share data may be misleading in certain circumstances. The SEC also pushed for consistency in the presentation of non-GAAP information between a company's SEC filings and the company's communications with investors (such as press releases, earnings calls, etc.).

9. IFRS convergence:

In its latest action on the topic of International Financial Reporting Standards ("IFRS") convergence, the SEC issued a "Commission Statement" in February 2010 stating that it plans on taking action in 2011 towards furthering the goal of mandating IFRS accounting, with the proposed phase-in period to be no earlier than 2015 to 2016 (the original roadmap released by the SEC in late 2008 had contemplated the earliest phase-in date to be around 2014).

10. Climate change:

The SEC remains focused on the topic of disclosure, if material, of the effects of climate change on a company's business and operations. The SEC interpretive guidance on climate change indicates that companies must consider whether sufficient disclosure controls and procedures are in place to process climate change related information.

11. Accounting issues:

The Financial Accounting Standards Board ("FASB") recently made certain proposals and amendments to accounting disclosure requirements. The items implicated are as follows:

- Loss contingencies disclosure: FASB has published a proposal to amend the disclosure requirements for loss contingencies. Companies should focus on disclosing material trends and uncertainties, especially given that the SEC has stated that it may ask issuers to justify the disclosure of material settlements in cases where no prior disclosure of a potential contingency had been made.
- Financial receivables disclosure: FASB issued a new accounting standard requiring disclosure of the credit quality of a company's financing receivables and the credit reserves held against them.

12. Iran:

The Iran Transparency and Accountability Act was introduced in the U.S. Senate on February 16, 2011 and would "require companies to disclose any sanctionable investments in Iran in their quarterly and annual reports to the SEC, and require U.S. banks to report sanctionable activities by their foreign correspondent banks." The proposed legislation extends the SEC's explicit authority to require the disclosure of business dealings in Iran by reporting companies. The legislation would also require the SEC to publicly post on its website the list of reporting companies investing in Iran. There have been similar proposals in the past suggesting that enhanced disclosure of business activities with countries considered sponsors of terrorism is required in publicly filed documents with the SEC.

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13. XBRL reporting requirements:

Beginning in 2009, U.S. reporting companies and FPIs that prepare their financial statements using U.S. GAAP must file certain financial information with the SEC in XBRL format. Large accelerated filers (whether domestic issuers or FPIs) with a public equity float of more than \$5 billion were required to include XBRL exhibits for the first fiscal period ending on or after June 15, 2009, while other large accelerated filers must do so beginning with the first fiscal period ending on or after June 15, 2010. All other reporting companies and FPIs preparing financial statements under IFRS must begin including XBRL exhibits for the first fiscal period ending on or after June 15, 2011. In the first year of XBRL reporting, notes and schedules to the financial statements must be tagged as a single block of text. Starting in the second year and going forward, all data or tables within each note and schedule must be tagged separately. Companies are granted a 30-day grace period to deliver the tagged XBRL data with respect to their first XBRL filing and their first filing of detailed XBRL tagging of the notes and schedules to the financial statements.

14. Form 20-F filing deadline to change for fiscal years ending on or after December 15, 2011:

Beginning with the first fiscal year ending on or after December 15, 2011, the deadline for filing Form 20-F will be shortened to four months. While this shortened deadline does not affect FPIs immediately, advanced planning is warranted. Companies should work with their auditors and legal counsel in preparation for the shortened filing deadline. In addition, timing of annual shareholders' meetings, approval of financial statements and other corporate matter may be affected. Home country as well as U.S. counsel should be consulted on these matters.

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