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New Form 20-F—The Way Forward

By Sandra Folsom Kinsey*

The first annual report "season" using the revised version of Form 20-F has come and gone for most non-U.S. companies that file reports with the SEC. The "new" version of Form 20-F was effective for fiscal years that ended on or after September 30, 2000, so most companies made the transition with their annual reports for calendar year 2000, which were due by June 30, 2001. The SEC staff fielded a number of questions and made some technical corrections,¹ but there were no reported casualties, and the process went relatively smoothly.

Human nature being what it is, many companies and their counsel probably intended to do a careful analysis of the new Form 20-F requirements, but ended up at the last minute scrambling around to reformat the information from last year's report. After finding the new locations for information the company traditionally provided, the next steps were to figure out what information had changed (e.g., the time periods for exchange rate information) and what information was new (e.g., sum-

maries of material contracts entered into during the past two years). By next year, seasoned reporting companies will be back in the familiar position of just having to update the prior year's report.

Companies wishing to be a bit more creative, however, may find that there are ways to combine the disclosure requirements of Form 20-F with the disclosure requirements they follow in their home country. This is particularly possible for companies in European Union member states, because the IOSCO International Disclosure Standards (upon which the new Form 20-F requirements are based) were influenced heavily by the EU disclosure directives. Through judicious use of incorporation by reference, "wrap-around" cover sheets, cross-reference tables, or some combination of these approaches, a company may be able to produce one document that goes a long way toward satisfying the disclosure requirements of multiple jurisdictions. Not only would that lighten the company's disclosure burden, but it also

would mean that the company's "message" to the public would be more consistent, regardless of where the disclosure is made.

The SEC traditionally has permitted companies to comply with disclosure requirements by referring to information in another document and incorporating that information into the current document. In most cases, the information being referenced must either be in a document that was filed previously with the SEC or be attached to the current document as an exhibit. Companies must specify precisely which information they are incorporating by reference from a document, in order to avoid incurring liability for the remaining information in that document. Most annual reports of U.S. companies (Form 10-K) use this approach by incorporating management information from the company's proxy statement and incorporating financial information from what is referred to in the United States as the company's "glossy" annual report to shareholders. (The glossy annual report

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usually is not filed electronically with the SEC, but if portions of it are incorporated by reference into another filed document, those portions must be filed in electronic format. The SEC recently proposed mandating electronic filing for non-U.S. issuers, possibly beginning in the first half of 2002.) The instructions to Form 10-K also permit companies to file an "integrated" report, consisting of a cover page, cross-reference sheet and signature pages that are wrapped around a copy of their glossy annual report. Companies that rely on this alternative usually expand the disclosure in their glossy annual report to make sure it satisfies the Form 10-K requirements. This approach has not been

tion by reference to another document. Rule 12b-23 specifically states, however, that information should not be incorporated by reference into a statement or report if incorporation "would render the statement or report incomplete, unclear or confusing." Within these parameters, the SEC staff generally is receptive to ideas that will make the reporting process easier for non-U.S. companies, and willing to be flexible about how information is formatted and presented. Incorporating a significant amount of information that is directly responsive to an item of Form 20-F from another document is likely to be acceptable. On the other hand, piecemeal incorporation that has the reader

to regulatory requirements. For example, listed U.K. companies produce a glossy annual report that includes certain information required by EU directives, as well as a required report on compliance with codes of corporate governance. This document might form the basis for an "integrated" annual report on Form 20-F.

In May of this year, the European Commission proposed a new directive that would revise the system for offering or listing securities in EU member states. The proposal provides for a basic "registration document" with key information about the issuer, which would be supplemented by a "securities note" describing the specific securities to be issued. (A third document, the "summary note," would summarize the other two documents and contain risk factors.) Several things about this proposal are noteworthy. First, although the registration document is not referred to as an "annual report," it would have to be updated annually, making it a logical counterpart to Form 20-F. Second, the disclosure requirements for the registration document would be based on the International Disclosure Standards, which already form the basis for Form 20-F. Finally, the proposal indicates how committed the European Commission is to addressing some of the complexities in the current European disclosure system and making the EU capital markets more competitive with the U.S. markets. The press release accompanying the proposal also pointed out that introducing "enhanced" disclosure standards in line with the International Disclosure Standards would make it easier for European companies to offer their

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very popular with U.S. companies, but might be more useful for non-U.S. companies.

Some of the questions the SEC staff received this year about Form 20-F concerned the extent to which incorporation by reference would be permitted. The instructions to Form 20-F specifically permit companies to respond to items of the form by referring to information in their audited financial statements, as long as there is no difference between the information required by the Form 20-F item and the information in the financial statements. Exchange Act Rule 12b-23 also provides general guidance about the circumstances in which a company may incorporate informa-

tion by reference to another document. Rule 12b-23 specifically states, however, that information should not be incorporated by reference into a statement or report if incorporation "would render the statement or report incomplete, unclear or confusing." Within these parameters, the SEC staff generally is receptive to ideas that will make the reporting process easier for non-U.S. companies, and willing to be flexible about how information is formatted and presented. Incorporating a significant amount of information that is directly responsive to an item of Form 20-F from another document is likely to be acceptable. On the other hand, piecemeal incorporation that has the reader

constantly switching back and forth between documents, or hunting for a small nugget of data in pages of extraneous information, likely will not be. Most non-U.S. companies currently aren't required to file an annual report equivalent to Form 20-F, which could be combined with their U.S. disclosure requirements. Some companies, however, produce a glossy annual report that includes a message from management, a summary of the prior year's highlights, and, in some cases, the company's audited financial statements for the prior year. Some of these annual reports are primarily marketing pieces, but some contain substantive information in response

securities in non-EU countries such as the United States.

The type of system proposed—sometimes referred to in Europe as a “shelf” system—has been under discussion in the EU for awhile, but the speed with which the European Commission moved to propose such a sweeping change took many by surprise. The final implementation of this proposal is by no means certain, but EU companies that file

the world’s leading multinational companies are now producing annual reports for the SEC that follow those Standards. It would be a shame not to take advantage of this opportunity to help multinational companies reduce their compliance burden and provide more consistent disclosure.

Regardless of whether the European Commission’s proposal is adopted, however, companies can

on Form 20-F that take advantage of the increasing harmonization of disclosure requirements around the world. This can be accomplished without compromising investor protection, simply by demonstrating reasonable flexibility about how the required information is presented. ■

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reports with the SEC should be lobbying for the “registration document” requirements to be as close as possible to those of Form 20-F. A lot of work already has gone into agreeing on the International Disclosure Standards, and some of

find creative ways to present the information required by Form 20-F that will reduce the burden of providing similar information in more than one jurisdiction. The SEC should encourage companies to develop integrated annual reports

Endnotes

- 1 *International Disclosure Standards; Correction*, Release No. 33-7983 (June 11, 2001).

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