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## The Secrets of Form 6-K: Getting Behind the Curtain With the FPI Wizard

*The world's leading former regulator of FPIs provides an exclusive look at Form 6-K reports.*

### Key Points:

- The simplicity of Form 6-K belies numerous interpretive questions that FPIs address on an ongoing basis.
- In practice, the SEC's Form 6-K reporting regime provides FPIs with an effective way to disseminate information to global investors.

### Introduction

Form 6-K, used by foreign private issuers (FPIs) to update their disclosures with the US Securities and Exchange Commission (SEC), seems straightforward. The form calls for sending to the SEC press releases, shareholder reports, and other information that an FPI has already published.

But this apparent simplicity hides a thicket of complexity, and raises a number of questions, for example:

- What information, specifically, does the SEC expect to receive on Form 6-K?
- What are the deadlines for sending materials to the SEC?
- Are FPIs exposed to additional liabilities as a result of their Form 6-Ks?
- What are best practices for Form 6-K reports?
- How can Form 6-K work with Form F-3 shelf registration statements?

In this *Client Alert*, Latham pulls back the curtain on the law, lore, and market practice for making Form 6-K disclosures. Our guide is the FPI wizard himself, Paul Dudek, who – as the Chief of the SEC's Office of International Corporate Finance for over 23 years – was the man behind the curtain for innumerable questions from FPIs on their Form 6-Ks.

## The Basics

### 1. What is Form 6-K and why is it required?

Form 6-K is an SEC reporting form under which SEC-registered FPIs provide ongoing disclosure about corporate news. Once an FPI has listed its securities in the United States, the FPI becomes subject to reporting obligations under Section 13 of the US Securities Exchange Act of 1934 (Exchange Act). FPIs have two primary reporting obligations:

- Filing an Annual Report on Form 20-F within four months after fiscal year end, as required by Exchange Act Rule 13a-1
- Furnishing reports on Form 6-K from time to time, as required by Exchange Act Rule 13a-16

### 2. Why is the Annual Report “filed” and the Form 6-K “furnished”?

In terms of the actual mechanics of providing required information to the SEC, there is no difference — virtually all reports are sent to the SEC in electronic form via the SEC’s EDGAR system. However, the different terms are labels applied under SEC rules and can have potential liability implications under US securities laws. These issues are outlined below in Question 2 under the Section “When Things Go Awry.” In the meantime, this *Client Alert* follows market practice of using the terms interchangeably, except if the different label leads to a different outcome.

### 3. What information does Form 6-K cover?

Here is the deceptively simple part: Form 6-K calls for furnishing to the SEC information that is (1) *material* to the FPI and (2) that the FPI:

- Makes or is required to make public under home country law
- Publicly files or is required to publicly file under stock exchange rules
- Distributes or is required to distribute to its shareholders

### 4. What types of topics does Form 6-K cover?

Form 6-K helpfully catalogs examples of items that may be material to an FPI. The matters listed roughly correspond to a similar list mandated by Form 8-K reports filed by US companies. The list includes:

- Earnings information
- M&A activity and other acquisitions or dispositions of assets
- Changes in control or in management
- Change in auditors
- Events regarding the company’s securities, such as a call for redemption, stock splits, payment defaults
- Bankruptcies or receiverships
- Cybersecurity incidents

Form 6-K also includes a catch-all provision requiring an FPI to submit any other information that the company deems of material importance to its security holders.

Importantly, there is an overarching threshold under Form 6-K that the information must be *material* with respect to the issuer and its subsidiaries on a consolidated basis. This materiality standard allows companies to avoid filing a large amount of insignificant and unimportant information with the SEC.

## 5. Drilling down into the details — what types of material documents are covered by Form 6-K?

Specifically — anything and everything. A Form 6-K report can include such documents as:

- Earnings releases
- All other types of press releases
- Materials sent to shareholders, such as glossy annual and quarterly reports, and documents prepared in connection with annual and extraordinary meetings of shareholders
- Presentations shown at analyst and industry conferences
- Transcripts of conference calls with senior management
- Home country reports for share transactions by officers and directors
- Court filings

## 6. Can an FPI easily decide if information is material?

There is no bright-line quantitative test for determining what is material to a particular company. Judicial decisions from the US Supreme Court and other courts have stated that matters of materiality are mixed questions of law and fact. The fundamental test for materiality is whether there is a substantial likelihood that a reasonable investor would consider the information important in deciding whether to purchase or sell a security.

The list of topics in Form 6-K is a great starting place — these items are likely to be material for many FPIs, although FPIs must come to their own conclusions as to any specific Form 6-K report.

## Practical Submission Issues

### 1. What is the due date for Form 6-K?

A Form 6-K must be furnished to the SEC “promptly” after the relevant material in the report is published. The SEC has not defined what promptly means for Form 6-K. However, in a different context, the SEC has stated that what constitutes promptly will depend on the type of document and the amount of time required to prepare an English translation.

Market practice is typically to furnish a Form 6-K on EDGAR on the day the material is published or posted to a website, especially for important corporate communications, such as press releases that contain new information about financial results or a business combination. Latham believes that an FPI could reasonably choose to aggregate run-of-the-mill press releases, corporate announcements, and shareholder mailings into a single Form 6-K within a business week of their publication or posting. In a quaint remnant of the days when paper copies of Form 6-K were mailed to the SEC from distant locations, the cover page of Form 6-K still indicates that it covers a monthly period. Companies should be cautious about taking that direction too literally.

### 2. Who can sign Form 6-K, and does it need to contain SOX certifications?

Form 6-K may be signed by any authorized officer or other representative of the company, who signs on behalf of the company and not in any personal capacity. The CEO and CFO certifications under Sections 302 and 906 of the Sarbanes-Oxley Act are never required as part of a Form 6-K, even if Form 6-K is incorporated by reference into a Form F-3 or contains quarterly or annual financial statements.

### **3. Are documents filed on a Form 6-K required to be in English?**

Yes, all material filed with the SEC must be in English. If Form 6-K materials are not in English, the FPI must provide a fair and accurate English summary of the document. SEC rules provide that some documents, such as press releases, financial statements, corporate charters and by-laws, and documents sent to shareholders, are too important to be the subject of an English summary. For those documents, a full English translation should be provided.

### **4. Is an FPI required to furnish Form 6-K electronically?**

Yes, Form 6-K is almost always required to be filed through the SEC's EDGAR system. A Form 6-K may be filed on paper if the issuer has received permission from the SEC under the hardship exemptions allowed by the EDGAR rules.

## **A Closer Look at Some Details**

### **1. If a Form 6-K event occurs but home country and exchange laws and rules do not require disclosure, does an FPI nonetheless need to submit a Form 6-K disclosing the event?**

An FPI does not have to, but might choose to. A triggering event for a Form 6-K report is that the company publishes information in the first place. Form 6-K itself does not mandate disclosure; instead, Form 6-K mandates an SEC report for material information that is published either voluntarily or because of another requirement.

In this situation, however, an FPI will often disclose the information voluntarily in a Form 6-K. This voluntary disclosure could, for example, help manage the possibility that the information will leak into the public market through channels the issuer does not control. Disclosure might also be useful in managing purchases and sales of shares by issuer insiders who have knowledge of the information and who might otherwise be prohibited from trading because of their knowledge of the material non-public information.

### **2. Does Regulation FD apply to Form 6-K?**

No. FPIs are exempt from SEC Regulation FD, which addresses selective disclosure by US issuers. Under Regulation FD, when an issuer, or someone acting on its behalf, discloses material non-public information to certain persons such as security analysts, securities market professionals, and others who may buy or sell securities based on that information, the issuer must make simultaneous public disclosure of that information (in the case of planned disclosures like an earnings release) or prompt public disclosure (in the case of unplanned disclosures like a CEO's statement during a press interview). A US issuer will often make this disclosure by filing a Form 8-K Current Report.

Even though FPIs are exempt from Regulation FD, many FPIs choose to comply with the regulation, at least in part. This practice often aligns with restrictions in home countries or under non-US stock exchange rules. To this end, FPIs will file Form 6-Ks to provide broad US dissemination of press releases, interview transcripts, and other matters that contain previously undisclosed material information.

### **3. Can Form 6-K contain forward-looking information?**

Yes, and the SEC Staff has indicated that Form 6-Ks are entitled to a special safe harbor that by its terms is available only for "filed" documents.

Under the safe harbors of Rule 175 under the Securities Act of 1933 (Securities Act) and Exchange Act Rule 3b-6, forward-looking information (such as projected revenues, guidance on future net income or

loss, management's plan for future operations, and other matters) is not deemed fraudulent (and thus is not subject to the anti-fraud liabilities discussed below) unless the statements demonstrate the absence of a reasonable basis or were not made in good faith. By its terms, this protection is afforded only to statements made in specified reports filed with the SEC.

Notwithstanding this limitation under the black letter of the rules, the SEC Staff has confirmed the safe harbor of Rule 175 applies "with equal force" to forward-looking statements in Form 6-K reports, even though Form 6-K is neither named in the rule nor deemed filed with the SEC.<sup>1</sup>

#### **4. Can a Form 20-F Annual Report cross-reference to a Form 6-K?**

Absolutely. For example, some FPIs provide their glossy annual shareholders report on a Form 6-K early in the year and then later on file a somewhat abbreviated Form 20-F Annual Report that incorporates by reference the various relevant portions of the glossy report. This practice allows an FPI to prepare a single annual disclosure document that complies with SEC and home country requirements and that also includes voluntary disclosures that the company elects to make, such as on social responsibility and sustainability matters. FPIs using this technique should provide in the Form 20-F specific cross-references to items and page numbers in the Form 6-K glossy report that are being incorporated by reference.

## **Financial Disclosure**

### **1. What types of interim financial statements can be submitted on a Form 6-K?**

To answer this question, this *Client Alert* will compare and contrast SEC financial statement requirements for a Form 20-F Annual Report and what is permitted in Form 6-K reports.

For purposes of a Form 20-F Annual Report (as well as registration statements filed under the Securities Act), the SEC accepts only financial statements prepared on the basis of US generally accepted accounting principles (GAAP), International Financial Reporting Standards as issued by the International Accounting Standards Board (IASB IFRS), or another GAAP as long as a reconciliation to US GAAP is provided.

Form 6-K is entirely different; the SEC does not have any requirements relating to the accounting principles used in financial statements that are part of a Form 6-K report. As a result, it is permissible, and in fact in many cases a common practice, for an FPI to:

- Use US GAAP for its Form 20-F annual financial statements but home country GAAP in its Form 6-K interim financial statements
- Use IASB IFRS for its Form 20-F annual financial statements but IFRS as endorsed by the European Union, or another home country regulator, or without reference to a specific version of IFRS
- Provide condensed or summary interim financial statements that are not in accordance with Article 10 of SEC Regulation S-X or IAS 34, each of which prescribe the minimum content of an interim financial report under SEC requirements and IASB IFRS, respectively

FPIs should keep in mind important caveats when publishing interim financial information that is on a different basis than the Form 20-F Annual Report:

- Special rules apply when an FPI is offering securities under a Form F-3 registration statement, as discussed below.

- Issuers should communicate with the market in a predictable and consistent manner that fulfills investor expectations.
- The SEC's anti-fraud prohibitions apply to all issuer communications. FPIs should of course not use their flexibility under Form 6-K to provide misleading financial information.

## 2. May Form 6-K reports contain non-GAAP financial measures?

Yes, subject to certain conditions. Two SEC rules limit the use of non-GAAP financial measures: Regulation G, and Item 10(e) of Regulation S-K.

**Regulation G.** This regulation applies to *any* public disclosure of non-GAAP financial measures, regardless of where and how published and even if the measure is not included in documents available through the EDGAR system. Under this regulation, if a company discloses a non-GAAP financial measure, it must:

- Present the most directly comparable financial measure calculated in accordance with US GAAP or IASB IFRS (depending on the accounting principles used by the company)
- Quantitatively reconcile the differences between the non-GAAP financial measure and the most directly comparable US GAAP or IASB IFRS financial measure

The SEC has crafted a limited exemption from Regulation G for FPIs that are listed on a non-US stock exchange, release information outside the United States, and do not derive their non-GAAP financial measures from US GAAP. If an FPI satisfies these conditions, its disclosure will not be required to comply with Regulation G. This exemption from Regulation G will be available even if the information is included in a Form 6-K report.<sup>2</sup>

**Regulation S-K Item 10(e).** This regulation applies only to documents that are filed with the SEC and therefore does not apply in the ordinary course to Form 6-K reports. If a Form 6-K is incorporated by reference into a Form F-3 registration statement, then the Form 6-K will become subject to the Item 10(e) requirements.<sup>3</sup>

## 3. Are interim or annual financial statements included with a Form 6-K required to be in XBRL format?<sup>4</sup>

Except in two circumstances, financial statements included in a Form 6-K are not required to be in XBRL format. This is true whether the financial statements are in US GAAP, IFRS, or another GAAP, and whether they are a comprehensive set of interim or annual financial statements (*i.e.*, complete with audit report and full footnotes) or a more condensed version.

The two circumstances in which financial statements in a Form 6-K are required to be in XBRL format are:

- The FPI has an effective Form F-3 registration statement and the Form 6-K is being used to satisfy the nine-month updating requirement that applies to registered securities offerings by FPIs.<sup>5</sup>
- The Form 6-K contains audited annual financial statements that are a revised version of financial statements that were previously filed with the SEC that have been revised to reflect discontinued operations, a change in reporting segments, a change in accounting principle, or other subsequent events.<sup>6</sup>

## Unregistered Securities Offerings

### 1. Should press announcements and offering circulars relating to offshore or other unregistered offerings be submitted on Form 6-K?

Maybe, depending on whether the offering was considered material information relating to the issuer and whether the offering circular contains new material information.

Securities Act Rule 135c permits an FPI that is registered with the SEC to issue an announcement (such as a press release) about a proposed or completed unregistered offering of securities if the announcement contains only specified limited information and a required legend. In addition, to take advantage of Rule 135c, the FPI must furnish the announcement on a Form 6-K.

With respect to offering circulars relating to solely foreign offerings, a Form 6-K is required to include only that portion of the offering circular that contains new material information (if any) that has not been included in another SEC report from the issuer. Furnishing an entire offering circular for an unregistered foreign offering is not required and, indeed, may raise questions about whether the issuer is attempting to market the securities in the United States.

## Securities Offerings Registered on Form F-3

Form F-3 is a “short form” registration document that is available for certain offerings by seasoned FPIs, including those that have been registered with the SEC for at least 12 months, are timely and current in their Exchange Act filings, and have a public equity float of at least US\$75 million, among other requirements. Form F-3 permits FPIs to incorporate by reference information contained in filings made under the Exchange Act.<sup>7</sup> A Form 20-F Annual Report is always incorporated by reference into a Form F-3; there are no carve-outs from that requirement. That said, some FPIs choose to file for their Form 20-Fs a lengthy home country annual report that covers topics outside the requirements of Form 20-F, which expressly states that certain portions are not deemed part of the Form 20-F. The SEC Staff has historically not objected to this practice.

Form F-3 has several substantive updating requirements, and FPIs can use their Form 6-K reports to satisfy those requirements and avoid the bother of filing a formal post-effective amendment or revised prospectus supplements to the Form F-3. The questions below cover the substantial amount of market practice and lore that has developed relating to the complex interconnections between Form 6-K and Form F-3.

### 1. Do all Form 6-K reports get incorporated by reference into a Form F-3?

No. Without specific language, a Form 6-K will not be incorporated by reference into a Form F-3. In order to be incorporated by reference into a Form F-3, an FPI must make an express statement to do so. This reference can be accomplished in two different ways:



**Form 6-K filed before Form F-3.** The Form F-3 includes in the “Incorporation by Reference” section a specific reference to the existing Form 6-K by identifying its filing date, as shown below in [this Form F-3](#):

This prospectus and any accompanying prospectus supplement incorporate by reference the documents set forth below that have previously been filed with the SEC:

- Our Annual Report on Form 20-F for the year ended December 31, 2017, filed by us with the SEC on March 28, 2018 (File No. 001-36815).
- Our Reports on Form 6-K furnished by us with the SEC on January 3, 2018, January 10, 2018, February 15, 2018, February 20, 2018, February 26, 2018, March 15, 2018, April 12, 2018 and May 9, 2018 (File No. 001-36815).
- The information contained in Exhibits 99.1 and 99.2 of the Report on Form 6-K filed with the SEC on May 30, 2018 (File No. 001-36815).

**Form 6-K filed after effectiveness of Form F-3.** The Form 6-K cover page expressly incorporates into Form F-3 by identifying its file number, as shown below in [this Form 6-K](#):

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**INCORPORATION BY REFERENCE**

Exhibits 99.1 and 99.2 of this report on Form 6-K shall be deemed to be incorporated by reference into the registration statements on Form S-8 (Registration Numbers 333-203040, 333-210810, 333-211512, 333-213412, 333-214843 and 333-216883) and Form F-3 (Registration Numbers 333-209336, 333-211511, 333-216882 and 333-223134) of Ascendis Pharma A/S (the “Company”) (including any prospectuses forming a part of such registration statements) and to be a part thereof from the date on which this report is filed, to the extent not superseded by documents or reports subsequently filed or furnished.

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## 2. What types of Form 6-Ks get incorporated by reference, and what types get excluded?

FPIs have a great deal of flexibility with respect to which Form 6-Ks they incorporate by reference. Some Form 6-Ks will include unquestionably material information and will be incorporated by reference into a Form F-3. Other Form 6-Ks will include less significant information that the company and its underwriters believe can be omitted from the Form F-3; these Form 6-K reports will not be incorporated by reference.

## 3. What is an example of the second type of Form 6-K report?

Suppose an FPI publishes its quarterly earnings announcement with a full set of interim financial statements, a full Management’s Discussion and Analysis (MD&A) for the quarter, and a statement by the CEO highlighting various corporate activities. The company may decide that the CEO’s statements are not appropriate to be included as part of the Form F-3. In this case, the company will often file two Form 6-Ks, one that contains the CEO’s statement and is not incorporated by reference, and another that does not contain the CEO’s statement and is incorporated by reference.

## 4. When and how does Form F-3 get updated for interim financial statements through Form 6-K filings?

For offerings more than nine months after the end of the last audited fiscal year, an FPI must update an effective Form F-3 by providing unaudited interim financial statements either in accordance with or reconciled to US GAAP, or in accordance with IASB IFRS, in either case covering at least the first six months of the year and the comparable period for the prior year. As a result, for an FPI with a December 31 fiscal year, if the FPI wants the flexibility to be able to do a takedown off of the Form F-3 shelf after October 1, the June 30 interim financial statements and MD&A must be filed on a Form 6-K that is incorporated by reference into the Form F-3 on or before September 30.

In addition, if at any time during the year an FPI publishes interim financial information that is more current than what is required, the FPI must include the more current information in an incorporated Form 6-K. For example, if an FPI with a December 31 fiscal year publishes March 31 interim financial



information for an offering done in April, the March 31 information would be furnished on a Form 6-K that is incorporated by reference.

## 5. Can Form 6-K be used to provide other information required to be included in a Form F-3?

Absolutely. For example:

**Year-end financial statements.** Audited financial statements become stale for use in a Form F-3 three months into the new fiscal year (*i.e.*, March 31 for a calendar year FPI). However, the Form 20-F Annual Report is not required to be filed until four months into the new fiscal year (*i.e.*, April 30 for a calendar year FPI). If the issuer wants to offer securities under an effective Form F-3 after the staleness date but before the Form 20-F is filed, it can file and incorporate by reference a Form 6-K that includes the audited financial statements, the related MD&A, and the auditor's consent to the use of their report.

**Acquired company financial statements.** Unlike domestic companies, FPIs are not required to file acquired company financial statements and pro forma financial information as part of their Exchange Act reporting. But things are a little different for an FPI that has an active Form F-3 shelf. Form F-3 requires the FPI to include financial information relating to significant acquisitions, including up to three years of audited financial statements of the acquired entity and pro forma financial statements for the acquisition. That information, and any related auditor's consents, can be provided in a Form 6-K report that is incorporated by reference into the Form F-3.

**Other information.** There are many additional circumstances in which a Form 6-K that is incorporated by reference into a Form F-3 shelf registration statement can also be used to avoid filing a post-effective amendment to the Form F-3 or other type of updating document. These circumstances include:

- Updates required by Securities Act Section 10(a)(3)
- Disclosure of material changes to the company's affairs or a fundamental change in the company's business
- Changes to the plan of distribution
- Filing a form of underwriting agreement, supplemental indenture, preferred stock terms, and required legal opinions in connection with takedowns of securities

## When Things Go Awry

### 1. What happens if an FPI does not submit a Form 6-K report because of oversight, inadvertence, or back office failure?

The authors are not aware of the SEC bringing enforcement actions against FPIs for missing or late Form 6-K reports in the same manner as the SEC has brought cases against US issuers that are delinquent in filing their Form 10-K, 10-Q, or 8-K reports. Nonetheless, the failure to submit a Form 6-K report on a timely basis could call into question whether an FPI has in place adequate disclosure controls and internal controls over financial reporting.

On the (hopefully rare) occasions when an FPI realizes it should have submitted a Form 6-K, it should do so promptly. A company cannot change what happened in the past, but it can take appropriate corrective action in the present.

A delinquent Form 6-K should not impact the eligibility of an FPI to use Form F-3, which generally requires that companies must have “filed in a timely manner all reports required to be filed” during the preceding 12 months, because (as noted above) Form 6-Ks are not deemed filed. Nonetheless, SEC Staff examiners could take a different view, and the SEC Staff’s broad discretion on declaring registration statements effective includes its assessment of the adequacy of public information about the issuer.

Likewise, a missed Form 6-K should not affect the availability of Rule 144 to shareholders relying on that rule for resales. For affiliates and certain other shareholders, Rule 144 requires that the issuer be current in filing all required Exchange Act reports for the prior 12 months, although Form 8-K reports are excluded from this test. There is no similar exclusion for Form 6-K, and the authors are not aware of SEC Staff guidance in that respect. Nonetheless, a missed Form 6-K should not be covered by the Rule 144 requirement, because Form 6-K is analogous to Form 8-K, and because the Rule 144 requirement speaks in terms of filed reports — and SEC rules refer to Form 6-K as being “made” or “furnished.”

In order to help minimize the potential for missed Form 6-K reports, on an annual basis in connection with preparing the Annual Report on Form 20-F, an FPI should review its controls relating to all company-wide, outward-directed information dissemination, scoping in all press activities, media endeavors, social media feeds, external blog posts, and other communications outlets. This review should involve senior management who oversee public relations, investor relations, and compliance with SEC and stock exchange requirements.

## **2. SEC rules provide that a Form 6-K is deemed “furnished” and not “filed.” What difference does it make?**

Potentially, furnished versus filed can make a great deal of difference in terms of the risk of liability under US law for alleged misleading disclosures. Section 18 of the Exchange Act holds companies liable for material misstatements and omissions in reports filed with the SEC in actions brought by private plaintiffs, if plaintiffs can show they relied on the disclosure and that the disclosure caused their loss. (The SEC cannot bring claims under Section 18.) Reports that are furnished to the SEC are not subject to this liability.

A Form 6-K that is incorporated by reference into a Form F-3 is subject to the liability provisions under the Securities Act relating to prospectuses and registration statements.

As discussed above, common practice is to refer to “Form 6-K filings,” because the vast majority of corporate documents delivered to the SEC through EDGAR are in fact formally filed. These casual references to filing Form 6-Ks do not change the applicable legal standard provided under SEC rules.

Of course, all documents filed with the SEC, and indeed all statements — whether or not they are filed with the SEC — may subject a company, its insiders, and others to liability under the general anti-fraud standard of Exchange Act Section 10(b) and Exchange Act Rule 10b-5. Those provisions allow for defenses and pleading standards that are not applicable to Section 18 claims.

## **3. Are there other potential liabilities associated with Form 6-K reports?**

Yes. The SEC has brought several enforcement actions against FPIs in connection with alleged misleading disclosures that were contained in Form 6-K reports.<sup>8</sup> These enforcement actions have been based on claims of improper accounting, fraudulent misrepresentations, deceptive statements, and other purported illegal conduct. In some instances, SEC actions have alleged violations of the basic anti-fraud provisions under Section 10(b) and Rule 10b-5 as well as violations of the seemingly plain vanilla requirements relating to Form 6-K under Section 13(a) and Rule 13a-16 mentioned above.

## Conclusion

Steve Jobs famously observed that “simple can be harder than complex.” Form 6-K, a four-page SEC form that is little more than a cover sheet and technical filing instructions, will never win any awards for elegant design, but with careful planning, robust controls, tight coordination, and sound counsel, an FPI can reduce complexity and uncertainty. An FPI that masters the Form 6-K disclosure process will gain an effective tool to provide US investors, the SEC, and the global market with important, up-to-date information — and that can seem like magic.

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### Endnotes

- <sup>1</sup> Securities Act Rules, Compliance & Disclosure Interpretation (C&DI) 174.01. The authors assume this would apply to Exchange Act Rule 3b-6 as well.
- <sup>2</sup> The exemption will also be available even if the non-GAAP information is released in the United States at the same time it is released outside the United States, US and foreign journalists have access to the information, and the information appears on a freely available website that is not targeted to US investors.
- <sup>3</sup> Item 10(e) imposes specific additional requirements relating to prominence, prohibited non-GAAP presentations, and a mandated explanation of the usefulness of the non-GAAP information.

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- <sup>4</sup> XBRL (eXtensible Business Reporting Language) is the machine-readable interactive data format that allows users to more easily access and analyze financial statement data.
- <sup>5</sup> This nine-month updating requirement is found under Item 8.A.5 of Form 20-F, which is applicable to all registered offerings by FPIs: "If the document is dated more than nine months after the end of the last audited financial year, it should contain consolidated interim financial statements, which may be unaudited ... covering at least the first six months of the financial year."
- <sup>6</sup> A Form 6-K for this purpose is not common among FPIs.
- <sup>7</sup> Form F-1, the traditional "long-form" registration document used by FPIs, also permits incorporation by reference to Exchange Act reports that have already been filed with the SEC. Unlike Form F-3, which permits incorporation by reference of future SEC filings (often referred to as "forward incorporation by reference"), Form F-1 only permits backward-looking incorporation by reference of documents then on file with the SEC.
- <sup>8</sup> *In the Matter of Sony Corporation and Sumio Sano*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934 and Findings and Order of the Commission, 67 SEC-Docket 1609-25; Release No. 34-40305 (Aug. 5, 1998); *SEC v. BP p.l.c.*, Case No. 2:12-cv-02774 (E.D. La. Nov. 15, 2012); *In the Matter of Panasonic Corporation*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Accounting and Auditing Enforcement Action, Release No. 34-83128 (April 30, 2018).