Foreign Private Issuer Reporting Requirements

SEC Adopts Rules to Accelerate the Filing Deadline for Annual Reports on Form 20-F and to Amend Certain Disclosure Requirements for Foreign Private Issuers

SUMMARY

On September 23, 2008, the Securities and Exchange Commission issued its adopting release relating to the rule amendments to certain Exchange Act filing and disclosure requirements applicable to foreign private issuers, which the SEC had adopted at its open meeting on August 27, 2008. The SEC indicated that these amendments are part of a series of SEC amendments that seek to change disclosure and other requirements applicable to foreign private issuers in light of new technologies and other matters in a manner that promotes investor protection and cross-border capital flows.

As adopted, the SEC’s rule amendments make the following changes, effective December 6, 2008 unless subject to transition periods as specified below:

- Reporting deadline. Accelerate the reporting deadline for annual reports filed on Form 20-F by all foreign private issuers to four months after the issuer’s fiscal year-end. The current reporting deadline is six months after the issuer’s fiscal year-end. Foreign private issuers will have to comply with this accelerated deadline for annual reports on Form 20-F relating to fiscal years ending on or after December 15, 2011. This deadline applies to all foreign private issuers irrespective of their size or the accounting principles used to prepare their financial statements;

- Foreign private issuer status. Permit reporting foreign private issuers to assess their status as a “foreign private issuer” once per year, on the last business day of their second fiscal quarter, rather than on a continuous basis as is currently required;

- New Form 20-F disclosures. Amend Form 20-F to require disclosure about differences between home country corporate governance practices compared to those applicable to U.S. companies. This disclosure requirement will apply to Form 20-F filings relating to fiscal years ending on or after December 15, 2008. In addition, the Form 20-F amendments require disclosure about fees, payments and other charges relating to American Depositary Receipts and about any changes in and
disagreements with the registrant’s certifying accountant, in respect of Form 20-F filings relating to fiscal years ending on or after December 15, 2009;

- **Segment data disclosure.** Amend Form 20-F by eliminating an instruction to Item 17 of that Form that permits certain foreign private issuers to omit segment data from their U.S. GAAP financial statements. Foreign private issuers will have to comply with this requirement for Form 20-F filings relating to fiscal years ending on or after December 15, 2009;

- **Item 18 information in Form 20-F.** Amend Form 20-F by eliminating the availability of the limited U.S. GAAP reconciliation option that is currently contained in Item 17 of Form 20-F for the financial statements of the issuer and instead require a U.S. GAAP reconciliation of an issuer’s financial statements pursuant to Item 18 of Form 20-F. Foreign private issuers will have to comply with this requirement for Form 20-F filings relating to fiscal years ending on or after December 15, 2011. This requirement only applies to issuers that are not otherwise exempt from the U.S. GAAP reconciliation requirement; and

- **Rule 13e-3.** Amend Exchange Act Rule 13e-3, which relates to going-private transactions by reporting issuers or their affiliates, so that it applies to specified transactions that have the purpose or effect of making the issuer eligible to deregister and terminate its SEC reporting obligations under the SEC’s rules.

The amendments were adopted substantially in the form proposed by the SEC in February 2008 and described in our publication dated March 14, 2008, with the following notable exceptions:

- The SEC adopted the rule amendment to accelerate the reporting deadline for annual reports filed on Form 20-F by all foreign private issuers to four months after the issuer’s fiscal year-end, following a three-year transition period. The SEC had originally proposed a 90 day deadline for large accelerated filers and accelerated filers and a 120 day deadline for all other issuers, following a two-year transition period; and

- The SEC did not adopt the proposed amendment to Form 20-F that would have required additional disclosure regarding significant, completed acquisitions, including pro forma financial information and separate financial statements of the acquired company.¹

### THE ADOPTED RULE AMENDMENTS

#### Accelerating the Reporting Deadline for Form 20-F Annual Reports

Under the SEC’s previous rules, an SEC-reporting foreign private issuer was required to file its annual report on Form 20-F within six months after its fiscal year-end. The six-month filing due date for these reports was initially established as an accommodation in light of the different disclosure requirements in foreign private issuers’ home jurisdictions.

The adopted rule amendments accelerate the due date for annual reports filed on Form 20-F to within four months after the issuer’s fiscal year-end for all foreign private issuers, after a three-year transition

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Foreign private issuers will have to comply with this accelerated deadline for annual reports on Form 20-F relating to fiscal years ending on or after December 15, 2011. This amendment does not change the requirement that, for registration statements under the Securities Act or Exchange Act, the last year of audited financial statements may not be older than 15 months at the time of the offering or listing (or 12 months in the case of a company’s initial public offering).

In the adopting release, the SEC noted that technological advances have made it easier for companies to process and disseminate information quickly, and that its recent rule amendments exempting foreign private issuers from the U.S. GAAP reconciliation requirement if they prepare their financial statements on the basis of IFRS as issued by the IASB should make it easier for many foreign private issuers to prepare their annual reports on Form 20-F.

The SEC also noted that the amendments reflect its view that annual reports filed on a faster basis would not only provide investors with more timely access to these filings, but also improve the delivery and flow of reliable information to investors and the capital markets, thereby helping to improve the efficiency of the markets.

**Annual Test for “Foreign Private Issuer” Status**

Under the SEC’s previous rules, to make sure that it qualifies for the various accommodations and exemptions available to a foreign private issuer, a foreign private issuer was required to monitor on a continuous basis the different factors used to assess foreign private issuer status. This continuous monitoring of foreign private issuer status could result in an issuer needing to move between foreign and

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2 The SEC states that these due dates for Form 20-F still represent an accommodation to many foreign private issuers, since large accelerated and accelerated U.S. filers are required to file annual reports on Form 10-K within 60 days and 75 days, respectively, of their fiscal year-ends, and all other U.S. issuers are required to file annual reports on Form 10-K within 90 days after their fiscal year-end.

3 The SEC has also adopted amendments to conform the deadline for transition reports filed on Form 20-F, and for the filing of special financial reports pursuant to Rule 14d-2 of the Exchange Act. For financial years ending on or after December 15, 2011, the deadlines for these reports will be the same as for annual reports filed on Form 20-F.

4 Foreign private issuers are exempt from the SEC’s proxy rules and from the insider stock trading reports and short-swing profit recovery provisions under Section 16 of the Exchange Act. They also provide any interim reports on the basis of home country regulatory and stock exchange practices, rather than the quarterly reports that are required of U.S. issuers, and executive compensation disclosure in accordance with the issuer’s home country requirements.

5 The definition for “foreign private issuer” is contained in Exchange Act Rule 3b-4(c). A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that (1) has more than 50% of its outstanding voting securities held of record by U.S. residents and (2) any one of the following: (i) a majority of its officers and directors are citizens or residents of the United States, (ii) more than 50% of its assets are located in the United States, or (iii) its business is “principally administered” in the United States.
U.S. reporting forms in the same fiscal year due to a change in status, which may be difficult and costly for the issuer.⁶

Under the adopted rule amendments, an SEC-reporting foreign private issuer will be permitted to assess its status as a foreign private issuer once per year, on the last business day of its second fiscal quarter.⁷ If a reporting company determines that it qualifies as a foreign private issuer on the determination date, it may then immediately, as of the determination date, avail itself of the foreign private issuer accommodations, including use of the foreign private issuer forms and reporting requirements.⁸ Therefore, under the amendments, a new foreign private issuer will be eligible to file its annual report for that fiscal year on Form 20-F and will not need to continue to provide reports on Forms 8-K and 10-Q for the remainder of that fiscal year. Instead, the new foreign private issuer will be required to provide reports on Form 6-K.

However, under the amendments, if a foreign issuer determines that it no longer qualifies as a foreign private issuer on the last business day of its second fiscal quarter, it will be required to comply with the reporting requirements and use the forms prescribed for U.S. companies beginning on the first day of the fiscal year following the determination date. For example, under the amendments, a foreign issuer that failed to qualify as a foreign private issuer as of the end of its second fiscal quarter in 2009 will be required to file a Form 10-K in 2010 for its 2009 fiscal year. The issuer will also become subject to the SEC proxy rules, to the insider stock trading reports and short-swing profit provisions of Section 16 of the Exchange Act, and to reporting on Forms 8-K and 10-Q, on the first day of its 2010 fiscal year. The SEC states that this delay in effect would give affected issuers six months’ advance notice that they would need to transition to the U.S. forms and applicable reporting requirements.

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⁶ For example, if a foreign issuer concludes that it no longer qualifies as a foreign private issuer in the middle of its fiscal year, it may find it difficult to change its basis of accounting to U.S. GAAP in order to comply on a timely basis with the reporting requirements applicable to U.S. issuers under the Exchange Act. These issuers also face the challenge of modifying their information and processing systems to comply with the U.S. reporting and registration regime, as well as the executive compensation disclosure requirements, proxy rules and Section 16 reporting requirements that are applicable to U.S. issuers.

⁷ This is the same date used to determine accelerated filer status under Exchange Act Rule 12b-2 and smaller reporting company status in Item 10(f)(2)(i) of Regulation S-K.

⁸ Under the adopted amendments, a Canadian issuer that files registration statements and Exchange Act reports using the multijurisdictional disclosure system (“MJDS”) will also be required to test its status as a foreign private issuer as of the last business day of its second fiscal quarter, but it will have to continue to test its eligibility to file annual reports on Form 40-F based on all of the other requirements of that Form, such as public float, at the end of the fiscal year. The adopted amendments do not change the responsibility of a Canadian issuer to determine its eligibility to use Forms 40-F and 6-K at the end of its fiscal year, or the requirement that a Canadian issuer test its ability to use the MJDS Securities Act registration statement forms at the time of filing.
The SEC believes that, aside from facilitating a smoother transition when foreign private issuers change status in the middle of a fiscal year, this approach will benefit investors by eliminating confusion in the markets as to an issuer’s status and would be more consistent with the SEC’s approach to determining accelerated filer and smaller reporting company status.

Disclosure About Differences in Corporate Governance Practices

Foreign private issuers are subject to legal and regulatory requirements in their home jurisdictions that are different from those of the United States, and as a result frequently follow different corporate governance practices from U.S. companies. In recognition of this, many U.S. securities exchanges (including the NYSE and NASDAQ) exempt listed foreign private issuers from many of their corporate governance requirements. However, these exchanges require foreign private issuers to disclose the significant ways in which the issuers’ corporate governance practices differ from those followed by U.S. companies under the relevant exchange’s listing standards. Under current rules, foreign private issuers may provide this disclosure either in their annual reports or on their websites.

The adopted rule amendments add a new Item 16G in Form 20-F that require foreign private issuers whose securities are listed on a U.S. securities exchange to provide a concise summary in their annual reports of the significant ways in which the foreign private issuer’s corporate governance practices differ from the corporate governance practices of U.S. companies listed on the same exchange in the United States. The SEC expects that the disclosure provided in response to the new Item will be similar to the disclosure that foreign private issuers currently provide in response to the corporate governance disclosure requirements of the U.S. exchange on which their securities are listed. Foreign private issuers will have to comply with this requirement for Form 20-F filings relating to fiscal years ending on or after December 15, 2008.

Annual Disclosure About ADR Fees and Payments

Under the SEC’s previous rules, disclosures about fees and other payments made by ADR holders to the depositary are provided in Securities Act registration statements on Form F-6 used to register the ADRs and in Exchange Act registration statements on Form 20-F, but are not disclosed in annual reports on Form 20-F.

The adopted rules amend Form 20-F by revising Item 12.D.3. and the Instructions to Item 12 to require disclosure on an annual basis of fees and other charges paid in connection with ADR facilities, including any annual fee for general depositary services. In addition, foreign private issuers will be required to disclose the payments that they have received from depositaries in connection with their ADR programs.

To address concerns about the disclosure of incentive payments made by depositaries to foreign issuers, the SEC has allowed a two-year transition period, permitting depositary banks and foreign issuers a period of time to enter into appropriate contractual arrangements, as necessary. Foreign private issuers
will have to comply with this disclosure requirement in both registration statements and annual reports on Form 20-F for filings relating to fiscal years ending on or after December 15, 2009.

**Disclosure About Changes in a Registrant's Certifying Accountant**

The adopted rules amend Form 20-F by adding an Item 16F that requires substantially the same type of disclosures for foreign private issuers as are currently provided by U.S. issuers regarding changes in and disagreements with their certifying accountants in their annual reports on Form 10-K. Foreign private issuers will have to comply with this requirement for Form 20-F filings relating to fiscal years ending on or after December 15, 2009.

Item 16F requires an issuer to disclose whether an independent accountant that was previously engaged as the principal accountant to audit the issuer's financial statements, or a significant subsidiary on which the accountant expressed reliance in its report, has resigned, declined to stand for re-election, or was dismissed. Item 16F also requires an issuer to disclose any disagreements or reportable events that occurred within the issuer’s latest two fiscal years and any interim period preceding the change of accountant. Item 16F further requires disclosure about whether, during the fiscal year in which the change of accountants occurred or during the subsequent year, the issuer had similar, material transactions to those which led to the disagreements with the former accountants, and whether such transactions were accounted for or disclosed in a manner different from that which the former accountants would have concluded was required. If so, Item 16F requires the issuer to disclose the existence and nature of the disagreement or reportable event, and also to disclose the effect on the financial statements if the method that would have been required by the former accountants had been followed.

The adopted rules also amend Forms F-1, F-3 and F-4, which are used to register public offerings of securities by foreign private issuers under the Securities Act, to require registrants with the SEC, including repeat issuers, to include the new Item 16F disclosures in such registration statements as well as in any prospectus used in connection with a shelf offering.

**Segment Data Disclosure**

Under the SEC’s previous rules, Instruction 3 to Item 17 of Form 20-F permitted foreign private issuers that present financial statements otherwise fully in compliance with U.S. GAAP to omit segment data from their financial statements and to have a qualified U.S. GAAP audit report as a result of this omission. The SEC notes that only five foreign private issuers in the past few years have used this accommodation.

The adopted rule amendments eliminate Instruction 3 to Item 17 of Form 20-F. Foreign private issuers

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9 Among other things, this disclosure provides information about potential opinion shopping situations by issuers. “Opinion shopping” generally refers to the search by an issuer for an auditor that is willing to support a proposed accounting treatment that is designed to help an issuer achieve its reporting objectives, even though that treatment could frustrate reliable reporting.
reporting under U.S. GAAP must comply with these amendments for Form 20-F filings relating to fiscal years ending on or after December 15, 2009.

Requiring Item 18 Information in Form 20-F Annual Reports and Registration Statements
Under the SEC’s previous rules, a foreign private issuer that was only listing a class of securities on a U.S. securities exchange or only registering a class of securities under Exchange Act Section 12(g), without conducting a public offering of those securities, could provide financial statements according to Item 17 of Form 20-F (as opposed to the more onerous Item 18 requirements). Foreign private issuers could also provide financial statements according to Item 17 in their annual reports on Form 20-F.

Under Item 17, a foreign private issuer that prepares its financial statements on a basis other than U.S. GAAP or IFRS as issued by the IASB must include a reconciliation to U.S. GAAP. An issuer that prepares financial statements under Item 18 of Form 20-F must also provide all the information required by U.S. GAAP and Regulation S-X, in addition to the reconciling information required by Item 17.

The adopted rule amendments require Item 18 information for all foreign private issuers that file annual reports on Form 20-F. Foreign private issuers will have to comply with these amendments for Form 20-F filings relating to fiscal years ending on or after December 15, 2011. In addition, foreign private issuers that are making certain non-capital raising offerings, such as offerings pursuant to reinvestment plans, offerings upon the conversion of securities or offerings of investment grade securities, which formerly could follow Item 17, will also be required to file financial statements that comply with Item 18 when registering these types of offerings under the Securities Act. Under the adopted amendments, Form 20-F as well as the registration statement forms available to foreign private issuers under the Securities Act (Forms F-1, F-3 and F-4) will require the disclosure of financial information according to Item 18 of Form 20-F.

The amendments do not eliminate the availability of Item 17 disclosures for Canadian MJDS filers in light of the special recognition accorded to MJDS filings. Item 17 will also continue to be available for financial statements of non-registrants that are required to be included in a foreign or U.S. issuer’s registration statement, annual report or other Exchange Act report.10

Exchange Act Rule 13e-3 – Going Private Transactions
Under the SEC’s previous rules, Rule 13e-3 required, among other things, that any issuer or affiliate that engages in a Rule 13e-3 transaction11 file with the SEC and disseminate to security holders a Schedule

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10 These include significant acquired businesses under Rule 3-05 of Regulation S-X, significant equity method investees under Rule 3-09 of Regulation S-X, and exempt guarantors under Rule 3-10(i) of Regulation S-X.

11 A “Rule 13e-3 transaction” is defined as (i) a purchase of any equity security by the issuer of such security or by an affiliate, (ii) a tender offer, (iii) a proxy solicitation or information statement (footnote continued on next page)
13E-3 disclosing its plan to take the company private. Rule 13e-3 was intended to provide the issuer’s security holders with one last opportunity to obtain information about the issuer and to consider their alternatives.

When Rule 13e-3 was originally adopted, the SEC indicated that the Rule would be triggered if a specified transaction has either the reasonable likelihood or purpose of causing the termination of reporting obligations under the Exchange Act because the class of securities would be held of record by less than 300 persons as a result of the transaction. In March 2007, the SEC adopted amendments to the Exchange Act’s deregistration provisions applicable to foreign private issuers that permit them to terminate their SEC reporting obligations by meeting a quantitative benchmark based on trading volume rather than on a head count of the issuers’ U.S. security holders. Until these new amendments, Rule 13e-3 had not reflected the new deregistration provisions.

Under the amendments to Rule 13e-3(a)(3)(ii)(A), Rule 13e-3 will be triggered when an issuer and/or any of its affiliates are engaged in a specified transaction or series of transactions that have either a reasonable likelihood or the purpose of causing the termination of: the issuer’s registration under Exchange Act Rule 12g-4, the issuer’s registration or reporting obligations under Exchange Act Rule 12h-6, or the issuer’s reporting obligations under Exchange Act Rule 12h-3 or Exchange Act Section 15(d). Accordingly, if a transaction or series of transactions has either a reasonable likelihood or the purpose of lowering the U.S. trading volume below the quantitative benchmark for deregistration, Rule 13e-3 will be triggered.

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(footnote continued)

distribution in connection with a merger or similar transaction, (iv) the sale of substantially all the assets of an issuer to its affiliate, or (v) a reverse stock split.

12 SEC Release 34-55540 (Mar. 27, 2007); see our publication dated March 21, 2007.
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