Foreign Private Issuer Reporting Requirements

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

SUMMARY

The Securities and Exchange Commission has published proposed amendments to the Exchange Act filing and disclosure requirements applicable to foreign private issuers. The SEC first outlined the key elements of the proposed rules at a public meeting held on February 13, 2008 (see our publication dated February 14, 2008). The principal elements of the new SEC proposals are the following:

- **Reporting deadline.** Accelerate the reporting deadline for annual reports filed on Form 20-F by foreign private issuers to 90 days after the issuer’s fiscal year-end for large accelerated filers and accelerated filers, and to 120 days after the issuer’s fiscal year-end for all other issuers, after a two-year transition period. The current reporting deadline is six months after the issuer’s fiscal year-end for all foreign private issuers;

- **Foreign private issuer status.** Permit reporting foreign private issuers to assess their eligibility to use the special forms and rules available to foreign private issuers, as opposed to U.S. issuers, once per year, on the last business day of their second fiscal quarter, rather than on a continuous basis as is currently required;

- **Form 20-F.** 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; and

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

In addition, the SEC is soliciting public comment on other possible amendments that would affect foreign private issuers, including whether to:
amend Form 20-F to require disclosure about highly significant, completed acquisitions, including pro-
forma financial information and separate financial statements of the acquired company;
• amend Form 20-F to require disclosure about: any changes in and disagreements with the registrant’s
certifying accountant; fees, payments and other charges relating to American Depositary Receipts; and
certain corporate governance matters; and
• eliminate the availability of the limited U.S. GAAP reconciliation option that is contained in Item 17 of
Form 20-F for the financial statements of the issuer and instead require a U.S. GAAP reconciliation
pursuant to Item 18 of Form 20-F.

The SEC has solicited comment from interested parties on all aspects of the proposed rules.1 Comments
on the proposal should be submitted on or before May 12, 2008. Sullivan & Cromwell LLP will submit a
comment letter. We also encourage our non-U.S. issuer clients to comment on the proposals.

THE NEW PROPOSED RULES

The proposals, if adopted, would (i) accelerate the deadline for filing annual reports on Form 20-F by
foreign private issuers; (ii) allow “foreign private issuer” status to be tested once per year; (iii) revise certain
Form 20-F form requirements; and (iv) amend rules regarding going-private transactions to reflect recent
regulatory changes.

Accelerating the Reporting Deadline for Form 20-F Annual Reports

Under the SEC’s current rules, an SEC-reporting foreign private issuer must 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 proposed amendments would accelerate the due date for annual reports filed on Form 20-F to within
90 days after the foreign private issuer’s fiscal year-end in the case of large accelerated and accelerated
filers, and to within 120 days after the issuer’s fiscal year-end for all other issuers, after a two-year
transition period.2 This proposal would not change the age of financial statement requirements for
registration statements under the Securities Act or Exchange Act.

In the release containing the proposed amendments, the SEC notes that its recent rule amendments
exempting foreign private issuers from the U.S. GAAP reconciliation requirement if they prepare their

1  SEC Release 33-8900; 34-57409, International Series Release No. 1308; Foreign Issuer Reporting
Enhancements.

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

If the proposed rule is adopted and the due date for Form 20-F is accelerated, the SEC expects to have a two-year transition period for effecting the accelerated due date. According to the SEC, for example, if the proposal is adopted this year, the Form 20-F filing deadline would change for the fiscal years ending on or after December 15, 2010.

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

Under the SEC's current rules, to make sure that it qualifies for the various accommodations and exemptions available to a foreign private issuer, a foreign private issuer must 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 domestic reporting forms in the same fiscal year due to a change in status, which may be difficult and costly for the issuer.

Under the proposed rule amendments, an SEC-reporting foreign private issuer would be permitted to assess its status as a foreign private issuer once per year, on the last business day of its second fiscal quarter. If a reporting company determines that it qualifies as a foreign private issuer on the determination date, it may then immediately avail itself of the foreign private issuer accommodations, including use of the foreign private issuer forms and reporting requirements, as of the determination date. Therefore, under

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3 Foreign private issuers are exempt from the Commission’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.

4 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 percent of its assets are located in the United States, or (iii) its business is principally administered in the United States.

5 For example, if a foreign issuer concludes that it does not qualify 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 domestic issuers under the Exchange Act. These issuers also face the challenge of modifying their information and processing systems to comply with the domestic reporting and registration regime, as well as the executive compensation disclosure requirements, proxy rules and Section 16 reporting requirements that are applicable to domestic issuers.

6 Under the proposed amendment, a Canadian issuer that files registration statements and Exchange Act reports using the multijurisdictional disclosure system ("MJDS") would 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 would 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 proposed amendment
the proposed rules, a new foreign private issuer would be eligible to file its annual report for that fiscal year on Form 20-F and would 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 would be required to provide reports on Form 6-K.

However, if a foreign issuer determines that it would no longer qualify as a foreign private issuer on the last business day of its second fiscal quarter, it would be required to comply with the reporting requirements and use the forms prescribed for domestic companies beginning on the first day of the fiscal year following the determination date. For example, under the proposed rule a foreign issuer that failed to qualify as a foreign private issuer as of the end of its second fiscal quarter in 2009 would be required to file a Form 10-K in 2010 for its 2009 fiscal year. The issuer would also become subject to the proxy rules and Section 16, 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 domestic forms and applicable reporting requirements.

Aside from facilitating a smoother transition when foreign private issuers change status in the middle of a fiscal year, the SEC believes that this approach would 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.

**Item 17 of Form 20-F**
Currently, Instruction 3 to Item 17 of Form 20-F permits 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 estimates that fewer than 10 foreign private issuers currently use this accommodation. The proposed rules would eliminate Instruction 3 to Item 17 of Form 20-F.

**Exchange Act Rule 13e-3**
Under the SEC’s current rules, Rule 13e-3 requires, among other things, that any issuer or affiliate that engages in a Rule 13e-3 transaction\(^7\) file with the SEC and disseminate to security holders a Schedule 13E-3 disclosing its plan to take the company private. Rule 13e-3 is intended to provide the issuer’s security holders with one last opportunity to obtain information about the issuer and to consider their alternatives.

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\(^7\) 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 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.
When Rule 13e-3 was adopted, the Commission 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. Recently, the Commission 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. Rule 13e-3 does not currently reflect the new deregistration provisions.

The proposed rules would amend Rule 13e-3 to reflect the recently adopted rules pertaining to the ability of foreign private issuers to terminate their Exchange Act registration and reporting obligations. Specifically, under the proposed amendments to Rule 13e-3(a)(3)(ii)(A), Rule 13e-3 would 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 a purpose of causing the termination of the issuer’s registration or reporting obligations under Exchange Act Rules 12g-4 or 12h-6, respectively.

OTHER MATTERS UNDER CONSIDERATION

In addition, the SEC is considering whether it is appropriate to amend Form 20-F in order to make other revisions to the disclosure by foreign private issuers in annual reports and registration statements. Specifically, the SEC is soliciting comments on proposals to:

- require foreign private issuers to provide pro-forma and other financial information in annual reports on Form 20-F about a significant, completed acquisition that is significant at the 50% or greater level;
- amend Form 20-F to require foreign private issuers to disclose information about (i) changes in the issuer’s certifying accountant, (ii) the fees and charges paid by holders of American Depositary Receipts and the payments made by the depositary to the foreign issuer whose securities underlie the American Depositary Receipts, and (iii) for listed issuers, the differences in the foreign private issuer’s corporate governance practices and those applicable to domestic companies under the relevant exchange’s listing rules; and
- require foreign private issuers that are required to provide a U.S. GAAP reconciliation of their financial statements to do so pursuant to Item 18 of Form 20-F.

Financial Information for Significant, Completed Acquisitions

The proposals would amend Item 17(a) of Form 20-F to require foreign private issuers to provide in their annual report on Form 20-F the financial information required by Rule 3-05 and Article 11 of Regulation S-X in connection with certain acquisitions as is currently provided by domestic issuers in reports on Form 8-K. Under the proposals, a foreign private issuer would have to include in its annual report on Form 20-F the financial statements of the acquired company and pro forma financial statements for any acquisition.
completed during the year covered by the report if the acquisition was significant at the 50% or greater level.\(^9\) In such cases, the proposal would require the provision of financial statements of the acquired company for three fiscal years as prescribed by Rule 3-05(b)(2)(iv) of Regulation S-X. The proposals would not require annual reports filed on Form 20-F to contain the information required by Rule 3-05 and Article 11 of Regulation S-K if the information has been provided previously in a registration statement. Also, the proposals would not require financial information about probable acquisitions, or financial information for the aggregation of individually insignificant acquisitions.

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

The proposals would require substantially the same types of disclosures for foreign private issuers\(^10\) as are currently provided by domestic issuers regarding changes in and disagreements with their certifying accountants in response to the requirements of Item 304(a) and (b) of Regulation S-K.\(^11\) The proposed rules would amend Form 20-F by adding an Item 16F that would solicit the same types of disclosures by foreign private issuers.

**Item 304(a).** Among other things, Item 304(a) of Regulation S-K requires a domestic 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 304(a) of Regulation S-K 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 304(b).** Item 304(b) of Regulation S-K solicits disclosure about whether, during the fiscal year in which the change of accountants took place 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 304(b) requires the issuer to disclose the existence and

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\(^9\) The significance of an acquired business is measured by the comparison of: (1) the registrant’s investment in the acquired business (acquisition price) to the registrant’s total assets, (2) the acquired business’s total assets to the total assets of the registrant, or (3) the acquired business’s pre-tax income to the pre-tax income of the registrant.

\(^10\) Foreign private issuers that are listed on the New York Stock Exchange (NYSE) are required by that Exchange to notify the market about a change in their auditors. This information is required to be furnished under cover of Form 6-K, which does not, however, have the detailed substantive disclosure requirements of Form 8-K.

\(^11\) Among other things, this disclosure provides information about potential opinion shopping situations by issuers. “Opinion shopping” generally refers to the search 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.
nature of the disagreement or reportable event, and also disclose the effect on the financial statements if the method that would have been required by the former accountants had been followed.

**Forms F-1 and F-4.** The proposals would also amend Forms F-1 and F-4, which are used to register public offerings of securities by foreign private issuers under the Securities Act, to require first-time registrants with the Commission to include the new Item 16F disclosures requirement about the issuer’s changes in and disagreements with their certifying accountant in filings made on these Forms.12

**Annual Disclosure About ADR Fees and Payments**
Under the SEC’s current rules, disclosures about fees and other payments made by ADR holders to the depositary are provided in registration statements on Form 20-F that are used to register deposited securities under the Exchange Act, but are not disclosed in annual reports on Form 20-F.

The proposals would amend Form 20-F by revising Item 12.D.3. and the Instructions to Item 12 to solicit disclosure on an annual basis of fees and other charges paid in connection with ADR facilities, including any annual fee for general depositary services as well as payments that some depositaries may make to foreign issuers whose securities underlie the ADRs. The proposed amendments to Item 12.D.3. and the Instructions to Item 12 of Form 20-F would require disclosure of these payments in both registration statements and annual reports on Form 20-F.

**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 domestic companies. In recognition of this, some U.S. securities exchanges exempt listed foreign private issuers from many of their corporate governance requirements. However, these exchanges require these issuers to disclose the significant ways in which their corporate governance practices differ from those followed by domestic companies under the relevant exchange’s listing standards. Under current rules, foreign private issuers may provide this disclosure either in their annual reports and/or on their websites. Foreign private issuers frequently opt to provide this disclosure on their websites, rather than in their annual reports.

The proposals would add a new Item 16G in Form 20-F that would require foreign private issuers 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 domestic companies listed on the same exchange in the United States. The SEC expects that the disclosure that would be provided in response to the proposed Item 16G would be similar to the disclosure that foreign private issuers now provide on their websites.

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12 The proposed amendments would not require such disclosure for repeat registrants, as this information would be included in their annual reports on Form 20-F.
issuers currently provide in response to the corporate governance disclosure requirements of the U.S. exchange on which their securities are listed.

**Requiring Item 18 Reconciliation on Form 20-F Annual Reports and Registration Statements**

Currently, a foreign private issuer that is only listing a class of securities on a national securities exchange, or only registering a class of securities under Exchange Act Section 12(g) without conducting a public offering of those securities may provide financial statements according to Item 17 of Form 20-F. Foreign private issuers may also provide financial statements according to Item 17 for 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 must provide all the information required by U.S. GAAP and Regulation S-X, in addition to the reconciling information required by Item 17.

The proposals would require Item 18 information for all foreign private issuers that file annual reports on Form 20-F. 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 may currently follow Item 17, would also be required to file financial statements that comply with Item 18 when registering these types of offerings under the Securities Act.

The proposals would not eliminate the availability of Item 17 disclosures for Canadian MJDS filers in light of the special recognition accorded to MJDS filings. Item 17 would also continue to be available for financial statements of non-registrants that are required to be included in a foreign or domestic issuer’s registration statement, annual report or other Exchange Act report.13

If these proposals are adopted, a compliance date would be established that would provide foreign private issuers with sufficient time to transition to the Item 18 requirements.

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13 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, entities whose securities are pledged as collateral under Rule 3-16 of Regulation S-X, and exempt guarantors under Rule 3-10(i) of Regulation S-X.
Reporting deadline -

- the proposed due dates are appropriate or whether different due dates should be applied depending on the worldwide market value of the common equity held by non-affiliates, similar to the different annual report filing deadlines that are applied to domestic issuers,
- there would be different impacts on foreign private issuers or investors depending on the particular country or the nature of the issuer’s business,
- foreign private issuers with a larger worldwide market value should be required to provide reports on a faster basis than other foreign private issuers,
- any unreasonable burdens would be imposed on foreign private issuers, who may have to collect and provide more information in Form 20-F than may be required in their home jurisdictions, and may also have to translate the information into English,
- different due dates should be imposed depending on whether (i) foreign private issuers file financial statements using U.S. GAAP, IFRS as issued by the IASB, or another GAAP with a reconciliation to U.S. GAAP, and/or (ii) foreign private issuers’ disclosure was originally prepared in a foreign language and needs to be translated into English,
- the proposed accelerated due dates would impose any burdens on foreign private issuers that may be required to file annual reports on Form 20-F before they are required to provide annual reports in their home jurisdictions, or whether the deadline for filing Form 20-F annual reports should be linked to the issuer’s home country requirements for filing annual reports,
- a different transition period would be more appropriate for implementation of the accelerated deadline,
- foreign private issuers face unique challenges in preparing transition reports that would render a reduced filing period for those reports unduly burdensome;

Foreign private issuer status -

- six months’ notice is an appropriate period to transition to domestic registration and reporting forms,
- issuers who have been foreign private issuers, but who fail to qualify as foreign private issuers, should be required to use the domestic forms immediately, as is currently required,
- it is likely that foreign issuers will attempt to manipulate the amount of their voting securities that are held by U.S. residents and/or other factors under the definition of foreign private issuer at the end of the second fiscal quarter as a result of the proposed test,
- an issuer that qualifies as a foreign private issuer on the last business day of its second fiscal quarter should be allowed to switch over immediately to the foreign private issuer forms,
- a foreign issuer should be required to notify the market when it has determined that it has switched its status from domestic issuer to foreign private issuer, or vice versa;

Item 17 of Form 20-F -

- an exemption or grandfather provision should be provided for foreign private issuers that are currently omitting segment data;

Rule 13e-3 -

- it is appropriate to amend Rule 13e-3 by using the quantitative benchmark set forth in the new termination of reporting and deregistration provisions or whether another threshold should be applied in Rule 13e-3(a)(3)(ii)(A) to foreign private issuers,
- adoption of the proposed amendments would require more registrants to comply with Rule 13e-3 than intended because they may be engaged in one of the transactions described in Rule 13e-3(a)(3)(i) as a step toward terminating their registration or reporting obligations with respect to a class of securities, transactions that previously might not have resulted in the application of Rule 13e-3,
- foreign private issuers may engage in ordinary course securities transactions (such as buybacks or repurchases) that may trigger Rule 13e-3, and exceptions should be provided so that these transactions do not trigger Rule 13e-3;
Financial information for significant, completed acquisitions –

- business acquisitions significant at 50% or greater is an appropriate level to require issuers to provide information,
- information about significant, completed acquisitions should be disclosed annually or on a more current basis;

Disclosure about changes in a registrant’s certifying accountant -

- foreign private issuers should be required to provide information about changes in and disagreements with their certifying accountant,
- there are any restrictions under a foreign issuer’s home country law or regulations that would prohibit an auditor from reporting to a foreign regulator about disagreements with the issuer,
- the proposed change of accountant disclosure requirements contained in Item 16F should be extended to registration statements filed by all foreign private issuers under the Securities Act, not just first-time registrants;

Annual disclosure about ADR fees and payments -

- it is useful to investors to receive information about ADR fees and payments made by depositaries on an annual basis,
- other information relating to ADRs would be useful to investors on an annual basis, such as the number of ADRs outstanding,
- foreign private issuers should be required to disclose the information in their Form 20-F annual reports only if the information is not disclosed on their websites,
- Item 12 should be amended to also explicitly solicit the reasons why the depositary is making payments to the foreign private issuer, or whether disclosure of the amount paid to the issuer sufficient,
- depositaries should be required to disclose payments that they make to third parties and whether these payments are passed on to ADR holders,
- Regulation S-K and Form 10-K should be amended to solicit similar disclosure from foreign issuers that are not foreign private issuers and that file annual reports on Form 10-K, but that have securities traded in ADR form;

Disclosure about differences in corporate governance practices -

- there is an alternative format, such as a tabular presentation of the differences in corporate governance practices, that would make the information easier to understand and thus more useful to investors,
- it is sufficiently clear what differences in corporate governance should be disclosed,
- there are important elements of corporate governance of which investors should be informed;

Requiring Item 18 reconciliation in Form 20-F annual reports and registration statements -

- eliminating the availability of the Item 17 option would benefit investors,
- it is appropriate to provide a transition period,
- the Item 17 financial information option should be retained for non-capital raising offerings or annual reports,
- the elimination of the Item 17 option would increase costs for companies,
- the benefits to investors from the additional Item 18 financial disclosure are linked to more timely filing of Form 20-F and whether it should be required if the deadline for filing Form 20-F is not accelerated as proposed, and
- an exemption for foreign private issuers that are currently preparing financial statements pursuant to Item 17 is appropriate.
In addition to the specific proposals discussed above, the SEC also welcomes comments regarding other areas as to which the SEC should consider revising disclosure requirements applicable to foreign private issuers, either with respect to requiring new areas of disclosure or eliminating current disclosure requirements.

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