

Foreign Issuer Reporting Enhancements

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Client Advisory

June 5, 2008 by Guy P. Lander and Alice Kenniff

Summary

The U.S. Securities and Exchange Commission (the "SEC") recently proposed rule revisions intended to make the U.S. capital markets more accessible to foreign private issuers and enhance the information available to investors. The proposed amendments would:

1. Permit foreign issuers to test their eligibility to use the forms and rules available to foreign private issuers once a year, on the last business day of their second fiscal quarter, rather than continuously as the SEC currently requires.
2. Shorten the deadline for foreign private issuers filing annual reports on Form 20-F under the U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act") from six months after the foreign private issuer's fiscal year-end to within 90 days for large accelerated and accelerated filers, and to within 120 days for all other issuers, for fiscal years ending on or after December 15, 2010 (i.e., after a two-year transition period).
3. Amend Form 20-F to eliminate an option that permits certain foreign private issuers to omit segment data from their U.S. generally accepted accounting principles ("U.S. GAAP") financial statements.
4. Amend the rule governing going private transactions by reporting issuers and their affiliates to reflect the new rules for termination of reporting and deregistration for foreign private issuers.

Additionally, the SEC solicited comments on proposals to:

1. Require foreign private issuers that are required to provide a U.S. GAAP reconciliation to do so under Item 18 of Form 20-F (rather than under Item 17 which, where applicable, was a less onerous requirement).
2. Amend Form 20-F, the annual report and registration statement form used by foreign private issuers, to require foreign private issuers to disclose additional information about:
 - a. changes in the issuer's certifying accountant;
 - b. the fees and charges paid by holders of American Depositary Receipts ("ADRs") to depositaries;
 - c. the payments made by the depositary to the foreign issuer whose securities underlie the ADRs; and

- d. the differences in corporate governance practices of the foreign private issuer compared to those for U.S. companies under the relevant exchange's listing standards; and
- 3. Require foreign private issuers to provide certain financial information in annual reports on Form 20-F about a completed acquisition that is significant at the 50% or greater level.

Proposed Changes

Annual Test for Foreign Private Issuer Status

The SEC proposes to permit reporting foreign issuers to assess their status on the last business day of their second fiscal quarter, which coincides with the dates 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. If a foreign issuer determines that it no longer qualifies as a foreign private issuer, beginning on the first day of the fiscal year following the determination date it would be required to comply with the reporting requirements and use the forms prescribed for U.S. companies.^[1] In effect, the new rules would give issuers six months' advance notice that they must transition to the U.S. forms and applicable reporting requirements. A qualifying reporting company would be able to avail itself of the accommodations permitted to foreign private issuers beginning on the determination date on which it establishes its eligibility as a foreign private issuer.^[2]

Under the proposed amendment, a Canadian issuer that files registration statements and Exchange Act reports using the multijurisdictional disclosure system ("MJDS")^[3] would also be required to test its status as a foreign private issuer only as of the last business day of its second fiscal quarter. However, a Canadian issuer would still be required to check its eligibility to use Forms 40-F and 6-K at the end of its fiscal year, and test its ability to use the MJDS Securities Act registration statement forms at the time of filing.

Accelerating the Reporting Deadline for Form 20-F Annual Reports

The SEC proposes to accelerate the due date for annual reports filed by foreign private issuers on Form 20-F from within six months after the filer's fiscal year-end to within 90 days for large accelerated and accelerated filers, and to within 120 days for all other issuers, for fiscal years ending on or after December 15, 2008 (i.e., after a two-year transition period). Recent rule amendments that exempt foreign private issuers from the reconciliation requirement if they prepare their financial statements according to International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB) should make it easier for many foreign private issuers to prepare their annual reports on Form 20-F.

If adopted, the SEC would provide a two-year transition period for the new rules. Additionally, the SEC proposed a conforming deadline for transition reports filed on Form 20-F, so that the deadline is the same as the deadline for annual reports filed on Form 20-F.

It is important for our Canadian friends to note that the SEC does not propose to change the due date for issuers who file their annual reports on Form 40-F (an MJDS form) rather than on Form 20-F.

Segment Data Disclosure

The SEC proposes to eliminate a little-used accommodation, which currently permits foreign private issuers that present financial statements otherwise fully in compliance with U.S. GAAP to omit segment data from their financial statements, by removing Instruction 3 of Item 17 of Form 20-F.

Exchange Act Rule 13e-3

The SEC proposes to amend Exchange Act Rule 13e-3, which covers private transactions by reporting issuers or their affiliates, to cross-reference the recently adopted rules under which foreign private issuers may terminate their Exchange Act registration and reporting obligations. Rule 13e-3 is 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. The SEC proposes to amend the Rule to better reflect the current deregistration provisions and specify that the cited effect is deemed to have occurred when a domestic or foreign issuer becomes eligible to deregister under the new deregistration rules adopted in 2007.

Other Matters Under Consideration

The SEC is considering whether to amend Form 20-F to revise the disclosure elicited from foreign private issuers in annual reports and registration statements.

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

The SEC is considering eliminating the limited U.S. GAAP reconciliation option available under Item 17 of Form 20-F which is currently available to a foreign private issuer that is only listing a class of securities on an exchange or only registering a class of securities under Exchange Act Section 12(g) without conducting a public offering.^[4] It proposes to amend Form 20-F and the registration statement forms available to foreign private issuers under the U.S. Securities Act of 1933, as amended (the "Securities Act") (Forms F-1, F-3 and F-4) to require the disclosure of financial information according to Item 18 of Form 20-F for registration statements filed under both the Exchange Act and the Securities Act, as well as for annual reports. ^[5]

However, the SEC did not propose to eliminate the availability of Item 17 disclosures for Canadian MJDS filers in light of the special recognition accorded to MJDS filings and the expected increased use of IFRS. Item 17 would 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.^[6]

Disclosure About Changes in a Registrant's Certifying Accountant

The SEC, noting that NYSE-listed foreign private issuers are already required to disclose a change in their auditors on Form 6-K, proposes to amend Form 20-F to require foreign private issuers to disclose the same types of changes in and disagreements with accountants as U.S. companies are required to disclose in Form 8-K.^[7] Because foreign private issuers do not file Forms 8-K and 10-K and are not otherwise subject to Item 304 of Regulation S-K, the SEC proposes that they provide disclosure about changes in and disagreements with their certifying accountants in their annual reports on Form 20-F, as well as in their initial registration statements.

Annual Disclosure About ADR Fees and Payments

The SEC proposes to amend Form 20-F to require annual disclosure of the fees and other payments made by ADR holders to the depository. Currently, this information is disclosed in the Form 20-F filed to register the securities and in the ADR itself,^[8] but because ADR holders frequently purchase their ADRs in book-entry form they do not see the disclosures provided in the physical certificate.

Disclosure About Differences in Corporate Governance Practices

Many U.S. securities exchanges permit foreign private issuers to follow the corporate governance practices of their home jurisdictions rather than comply with the standards of the exchange, so long as the differences are disclosed either in the company's annual report or on its website. The SEC proposes to require annual disclosure of this information in Form 20-F reports so that all of the relevant corporate governance disclosure about a listed company will be consolidated in one location. As proposed, Item 16G in Form 20-F would require foreign

private issuers to include in their annual reports a concise summary 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.

Financial Information for Significant, Completed Acquisitions

The SEC proposes to require foreign private issuers to provide in their annual report on Form 20-F financial information about highly significant acquisitions completed during the most recent fiscal year covered by their annual report. As proposed, the disclosure requirement would be triggered at the 50% or greater level,^[9] and would require the provision of financial statements for three fiscal years.

The SEC did not propose to require annual reports filed on Form 20-F to contain the information required by Rule 3-05 (the financial statements for a significant business that has been acquired) and Article 11 of Regulation S-K (for the preparation of related pro forma financial statements) if the information has already been provided previously in a registration statement. Additionally, the SEC did not propose to require financial information about probable acquisitions or financial information for the aggregation of individually insignificant acquisitions.

Questions regarding this client advisory may be directed to **Guy P. Lander** at (212-238-8619, lander@clm.com).

Endnotes

^[1] Accordingly, a foreign issuer that failed to qualify as a foreign private issuer as of the end of its second fiscal quarter in 2009 would file a Form 10-K in 2010 for its 2009 fiscal year, and on the first day of its 2010 fiscal year would begin to comply with the proxy rules and Section 16, and would become subject to reporting on Forms 8-K and 10-Q.

^[2] The new foreign private issuer, who would be eligible to file its annual report for that fiscal year on Form 20-F, would be required to provide reports on Form 6-K, and would not need to continue to provide reports on Forms 8-K and 10-Q for the remainder of that fiscal year.

^[3] 17 CFR 239.37 to 17 CFR 239.41 and 17 CFR 249.240f

^[4] Under Item 17, an issuer is not required to provide the extensive footnote disclosures required by U.S. GAAP and Regulation S-X, unless these disclosures are otherwise required under its home country GAAP. For example, the footnote disclosures related to pension assets, obligations and assumptions, lease commitments, business segments, tax attributes, stock compensation awards, financial instruments and derivatives, among many others, are not required under Item 17 unless they are otherwise required by the issuer's home country GAAP.

^[5] If this amendment is adopted in 2008, a foreign private issuer that currently prepares its financial statements according to Item 17 of Form 20-F would not be required to prepare financial statements pursuant to Item 18 until it files an annual report for its first fiscal year ending on or after December 15, 2009.

^[6] 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.

^[7] Item 4.01 of Form 8-K

[8] As a technical matter, an ADR is the physical certificate that evidences American Depositary Shares (ADS), and an ADS is the security that represents an ownership interest in deposited securities. However, the terms are often used interchangeably by market participants.

[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' total assets to the total assets of the registrant, or (3) the acquired business' pre-tax income to the pre-tax income of the registrant. See Rule 1-02(w) [17 CFR 210.1-02] of Regulation S-X.

related professionals

Guy P. Lander / Partner

D 212-238-8619

lander@clm.com