

Recent Changes for Foreign Private Issuer Filings on 20-F and 40-F

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Client Advisory

February 2, 2009 by Guy P. Lander

In 2008, the SEC adopted rule changes that affect when issuers test their eligibility to file annual reports on Forms 20-F and 40-F as well as the timing and content of those annual reports. Given the significance of the accommodations afforded to foreign private issuers and Multijurisdictional Disclosure System ("MJDS") issuers, we are sending this reminder to you.

Canadian Clients- Form 40-F

Eligibility:

MJDS issuers must test their eligibility as foreign private issuers at the end of their second fiscal quarter and continue to test their eligibility to file annual reports on Form 40-F as of the end of their fiscal year. Form 40-F may be used as an annual report by any SEC reporting company that: (i) is incorporated or organized under the laws of Canada or any Canadian province or territory; (ii) is a "foreign private issuer" as defined under the SEC's rules, as of the last business day of its second fiscal quarter; (iii) has been subject to the periodic reporting requirements of any securities commission or equivalent regulatory authority in Canada for at least 12 calendar months immediately preceding the filing of the Form 40-F and is currently in compliance with such obligations; and (iv) has outstanding equity shares with an aggregate "public float" of US\$75,000,000 or more.

If an issuer, at the end of its fiscal year, meets requirement (ii) above (because it was a foreign private issuer as of the last day of its second fiscal quarter), but fails to meet one or more of the other requirements (i.e. clause (i), (iii) or (iv) above), then it will be ineligible to use MDJS Form 40-F, but it may, as a foreign private issuer, use Form 20-F discussed below.

Filing Deadlines:

Canadian companies that file their audited financial statements and MD&A before the date on which the Annual Information Form ("AIF") is filed in Canada, are required to file the Form 40-F in the U.S. on the day the audited financial statements and MD&A are due to be filed in Canada. The company should then file a 40F/A to add the AIF on the day the AIF is due to be filed in Canada. In any event the Form 40-F must be filed not later than the date that the relevant information is filed in Canada.

Canadian companies that are not required to file an AIF in Canada may only use Form 40-F as an annual report if they prepare and file an AIF voluntarily in Canada. Otherwise a different form, such as a Form 20-F, must be used.

*Foreign Private Issuers- Form
20-F*

Eligibility:

Under the new rules, foreign private issuers may now 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. A “foreign private issuer” is defined in Rule 3b-4(c) under the Exchange Act as a foreign (non-U.S.) issuer, other than (i) a foreign government or (ii) an issuer with more than 50% of its outstanding voting securities being held of record by U.S. residents, if any of the following is true: (A) a majority of its executive officers or directors are citizens or residents of the U.S., (B) more than 50% of its assets are located in the U.S., or (C) its business is principally administered in the U.S.

Filing Deadlines:

Foreign private issuers filing annual reports on Form 20-F must file in the U.S. within six months after the foreign private issuer’s fiscal year-end, for fiscal years ending before December 15, 2011. For fiscal years ending on or after December 15, 2011, foreign private issuers must file within four months after their fiscal year-end.

*New Disclosure Requirements
on Form 20-F*

Disclosure:

As a result of the rule changes, foreign private issuers must, for fiscal years ending after December 15, 2009, disclose information about: (i) changes in the issuer’s certifying accountant and (ii) the fees and other charges paid by the holders of American Depositary Receipts (“ADRs”) to depositaries, as well as the payments made by the depository to the foreign issuer whose securities underlie the ADRs.

For fiscal years ending on or after December 15, 2008, foreign private issuers must disclose information regarding the significant differences in corporate governance practices of the foreign private issuer compared to those applicable to U.S. domestic companies under the relevant exchange’s listing standards.

*Form 20-F Extension of the
Two-Year Accommodation for
First-Time Adopters of IFRS*

Extension:

To provide additional incentive for the adoption of International Financial Reporting Standards (“IFRS”) in filings with the SEC, the accommodation to foreign private issuers that are first-time adopters of IFRS that allows such first-time adopters to present IFRS financial statements for the two, rather than the three, most recent fiscal years, has been extended indefinitely. Accordingly, if a foreign private issuer elects to adopt IFRS for the first time for purposes of its 2008 Annual Report (or any subsequent Annual Report), it can avail itself of the accommodation of having to provide only the two most recent years’ financial statements in IFRS in such Annual Report.

Questions regarding this advisory should be addressed to **Guy P. Lander** (212-238-8619, lander@clm.com).

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