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SEC Amends Reporting and Disclosure Requirements for Foreign Private Issuers

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Client Advisory
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Summary

In February 2008, the U.S. Securities and Exchange Commission (the "SEC") proposed rule revisions intended to make the U.S. capital markets more accessible to foreign private issuers and enhance the information available to investors and known as "Foreign Issuer Reporting Enhancements," or FIRE. The proposed amendments were adopted substantially as proposed on August 27, 2008. The amendments are part of a series of SEC initiatives that seek to effect changes in the disclosure and other requirements applicable to foreign private issuers in light of market developments, new technologies and other matters in a manner that promotes investor protection and cross-border capital flow. The FIRE amendments:

- 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 on a continuous basis, as the SEC currently requires
- Accelerate 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 to four months after the foreign private issuer's fiscal year-end, for fiscal years ending on or after December 15, 2011 (i.e., after a three-year transition period for implementation of the accelerated deadline)
- 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
- Amend the rule governing going private transactions by reporting issuers and their affiliates to reflect the recently adopted rules for termination of reporting and deregistration for foreign private issuers
- Amend Form 20-F to eliminate the availability of the limited U.S. GAAP reconciliation option that is contained in Item 17 of Form 20-F for foreign private issuers (but that option will remain available for third party financial statements required to be included in Form 20-F). Under the amendments, foreign private issuers that are required to provide a U.S. GAAP reconciliation must to do so under Item 18 (although required third party financial statements may continue to be prepared under Item 17 of Form 20-F)
- Amend Form 20-F to require foreign private issuers to disclose additional information about:
  - changes in the issuer's certifying accountant;

- the fees and other charges paid by holders of American Depositary Receipts ("ADRs") to depositaries, as well as the payments made by the depositary to the foreign issuer whose securities underlie the ADRs; and

- 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

Annual Test for Foreign Private Issuer Status

Under the SEC's amendments, a reporting issuer is permitted to assess its qualification as a foreign private issuer once a year, on the last business day of its second fiscal quarter.[1] This is the same date used to determine accelerated filer status under Exchange Act Rule 12b-2 and smaller reporting company status under Item 10(f)(2)(i) of Regulation S-K. 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 would be required to comply with the reporting requirements and use the forms prescribed for U.S. domestic companies beginning on the first day of the fiscal year following the determination date.[2] This gives issuers six months' advance notice that they must transition to the U.S. forms and applicable reporting requirements. A reporting company that qualifies as a foreign private issuer would be able to avail itself of the accommodations permitted to foreign private issuers, including use of the foreign private issuer forms and reporting requirements, beginning on the determination date on which it establishes its eligibility as a foreign private issuer.[3] There is no specific requirement that the issuer notify the market of a change in its foreign private issuer status.

In addition, the SEC adopted amendments requiring a Canadian issuer that files registration statements and Exchange Act reports using the multi-jurisdictional disclosure system ("MJDS") to test its status as a foreign private issuer only as of the last business day of its second fiscal quarter. However, such a Canadian issuer would continue to have to test 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 registration statement forms under the U.S. Securities Act of 1933, as amended (the "Securities Act") at the time of filing. As a result of the amendments, the new foreign private issuer testing date will provide MJDS filers with advance notice that they may need to switch to the domestic issuer forms after the end of the fiscal year. Even if an MJDS filer determines that it no longer qualifies as a foreign private issuer as of the test date, it will be permitted to use registration forms under the Securities Act, available to foreign private issuers, other than the MJDS forms, for the remainder of the fiscal year.

Accelerating the Reporting Deadline for Form 20-F Annual Reports

The SEC adopted amendments accelerating the due date for annual reports filed by foreign private issuers on Form 20-F, from the current six months after the filer's fiscal year-end to four months after the filer's fiscal year-end, for fiscal years ending on or after December 15, 2009 (i.e., after a three-year transition period for implementation of the accelerated deadline). Recent rule amendments that exempt foreign private issuers from the U.S. GAAP 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.

Additionally, the SEC adopted a conforming deadline for transition reports filed on Form 20-F, and for the filing of special financial reports under Rule 15d-2 of the Exchange Act,[4] so that the deadline is the same as the deadline for annual reports filed on Form 20-F.

The SEC has not adopted a similar acceleration in the filing deadline for annual reports filed on Form 40-F (an MJDS form) rather than on Form 20-F.

Segment Data Disclosure

The SEC adopted amendments eliminating a little-used accommodation permitting 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. Foreign private issuers will be required to comply with the amendment beginning with their fiscal years ending on or after December 15, 2009.

Exchange Act Rule 13e-3

The SEC adopted amendments to Exchange Act Rule 13e-3, which covers going-private transactions by reporting issuers and 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 currently triggered when an issuer and/or any of its affiliates are engaged in a specified transaction or series of transactions relating to equity securities that have either a reasonable likelihood or purpose of causing (i) 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(s), or (ii) the securities to be neither listed on any national securities exchange nor authorized to be quoted on an inter-dealer quotation system of any registered national securities association. The SEC amended the Rule to better reflect the current deregistration provisions applicable to foreign private issuers that permit them to terminate their Exchange Act reporting obligations by meeting a quantitative benchmark measuring U.S. market interest in the company that does not depend on a head count of the issuer's U.S. security holders. Under the amendment, the cited effect is deemed to have occurred when a domestic or foreign issuer becomes eligible to deregister under the new deregistration rules adopted by the SEC in 2007.

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

The SEC adopted amendments eliminating the limited U.S. GAAP reconciliation option available under Item 17 of Form 20-F. [5] Currently, 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 may provide financial statements according to Item 17 of Form 20-F. In addition, currently foreign private issuers may provide financial statements according to Item 17 for their annual report on Form 20-F. To eliminate the distinction between the disclosure provided to the primary market and secondary markets, under the amendments, Form 20-F and 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 for registration statements filed under both the Exchange Act and the Securities Act, as well as for annual reports. A foreign private issuer that currently prepares its financial statements according to Item 17 of Form 20-F will be required to prepare financial statements under Item 18 beginning with the annual report for its first fiscal year ending on or after December 15, 2011.

The SEC did not 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 also continues 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 adopted amendments to Form 20-F and the registration statement forms available to foreign private issuers under the Securities Act (Forms F-1, F-3 and F-4) to require foreign private issuers to disclose substantially the same types of disclosures about changes in and disagreements with accountants as U.S. companies are required to disclose in Form 8-K.[7] While NYSE-listed foreign private issuers are already required to disclose a change in their auditors on Form 6-K, neither Form 20-F nor any registration statement or other form or filing available to foreign private issuers previously included such a requirement. Foreign private issuers will be required to comply with the amendments beginning with their first fiscal year ending on or after December 15, 2009.

Annual Disclosure About ADR Fees and Payments

The SEC adopted amendments to Form 20-F to require annual disclosure of the fees and other payments made by ADR holders to the depositary. Currently, this information is disclosed in the deposit agreement, on the Form F-6 registration statement filed to register the ADRs with the SEC under the Securities Act, as well as in the Form 20-F filed to register the deposited securities under the Exchange Act and in the ADR itself, but because ADR holders frequently purchase their ADRs in book-entry form they do not see the disclosures provided in the physical certificate. In addition, under the amendments, foreign private issuers will be required to disclose the payments that they have received from depositaries in connection with their ADR programs in a Form 20-F registration statement that is filed for the deposited securities and Form 20-F annual report for sponsored ADR facilities. Foreign private issuers will be required to comply with the amendments beginning with their first fiscal year ending on or after December 15, 2009.

Disclosure About Differences in Corporate Governance Practices

The SEC adopted amendments to Form 20-F to require foreign private issuers to disclose 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. The amendments are consistent with recent SEC Staff comments issued in reviews of registration statements and annual reports of foreign private issuers. 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, and many foreign private issuers opt to provide this disclosure on their websites. As a result of the amendments, website disclosure is no longer sufficient. The amendments enable investors to access all of the corporate governance information about a foreign private issuer in one location in Form 20-F. Foreign private issuers must begin to comply with the amendments beginning with their first fiscal year ending on or after December 15, 2008.

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Endnotes

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[1] A foreign private issuer is any foreign issuer other than a foreign government except for an issuer meeting the following conditions: (1) More than 50% of the outstanding voting securities of the issuer are directly or indirectly held of record by U.S. residents; and (2) any of the following: (i) the majority of its executive officers or directors are U.S. citizens or residents; (ii) more than 50% percent of its assets are located in the U.S.; or (iii) its business is administered principally in the U.S.

[2] 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. The issuer would also begin to comply with the proxy rules and Section 16, and would become subject to reporting on Forms 8-K and 10-Q, on the first day of its 2010 fiscal year.

[3] 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.

[4] Under Exchange Act Rule 15d-2, a special financial report must be filed if a registrant's Securities Act registration statement did not contain certified financials statements for its last full fiscal year preceding the fiscal year in which the registration statement became effective.

[5] Currently, under Item 17 of Form 20-F, if financials statements are prepared on a basis other than U.S. GAAP or IFRS, as issued by IASB, the issuer must include a reconciliation to U.S. GAAP for certain specified line items. Under Item 18 of Form 20-F, the issuer must provide all the information required by U.S. GAAP and Regulation S-X , in addition to the reconciling information for the line items specified in Item 17. Accordingly, 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. 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.

[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, and exempt guarantors under Rule 3-10(i) of Regulation S-X.

[7] Item 4.01 of Form 8-K

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