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Client Alert

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SEC Enhances Filing and Disclosure Requirements for Foreign Private Issuers

On September 23, 2008, the Securities and Exchange Commission (the SEC) published the adopting release containing a number of amendments to reporting requirements applicable to foreign reporting issuers (the Amendments).[1] These Amendments were adopted substantially in the form proposed in February 2008.[2] They are part of the SEC's recent focus on modernizing the disclosure requirements for foreign private issuers in light of the continued globalization of capital markets and increased US investor interest in the securities of foreign private issuers in recent years.

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In summary, the Amendments:

- permit reporting foreign issuers to test their foreign private issuer status once a year on the last business day of their second fiscal quarter, rather than on a continuous basis, which was previously required (effective December 6, 2008);
- accelerate the filing deadline for *all* foreign private issuers' annual reports on Form 20-F from six months to four months after the foreign private issuer's fiscal year-end (effective for annual reports on Form 20-F in respect of fiscal years ending on or after December 15, 2011);
- require the disclosure of information in Form 20-F regarding the following matters:
  - significant differences between corporate governance practices applicable to the foreign private issuer and US domestic issuer under the relevant exchange's listing standards (effective for annual reports in respect of fiscal years ending on or after December 15, 2008);
  - any changes to the foreign private issuer's certifying accountant (effective for registration statements and annual reports in respect of fiscal years ending on or after December 15, 2009); and
  - fees and other charges paid by holders of American Depositary Receipts (ADRs) to depositaries, and any payments made by depositaries to foreign private issuers (effective for annual reports in respect of fiscal years ending on or after December 15, 2009);
- modify Item 17 of Form 20-F to eliminate the option for certain foreign private issuers to:
  - omit segment data from their US GAAP financial statements (effective for fiscal years ending on or after December 15, 2009); and
  - provide a limited US GAAP reconciliation option (effective for fiscal years ending on or after December 15, 2011); and
- modify Rule 13e-3 of the Securities Exchange Act of 1934, as amended (the Exchange Act), relating

to going private transactions by reporting issuers or their affiliates, to reflect the recently adopted termination of reporting and deregistration rules applicable to foreign private issuers (effective December 6, 2008).[3]

Annual Test for Foreign Private Issuer Status

Effective December 6, 2008, issuers organized outside the United States (known as foreign issuers) that are subject to SEC reporting obligations and seeking to establish their eligibility as foreign private issuers are required to test their foreign private issuer status once a year on the last business day of their second fiscal quarter,[4] rather than on a continuous basis as was previously required.[5] Foreign companies that qualify as "foreign private issuers"[6] are exempt from a number of reporting requirements applicable to US domestic issuers. For example, foreign private issuers are exempt from the SEC's proxy rules,[7] and from the insider stock trading reports and short-swing profit recovery provisions under Section 16 of the Exchange Act.[8] They may also provide current reports under cover of Form 6-K on the basis of home country regulatory and stock exchange practices, instead of having to comply with the specific disclosure required in quarterly reports on Form 10-Q and current reports on Form 8-K for US domestic issuers. The determination of whether a foreign issuer qualifies as a foreign private issuer, and is thereby able to rely on the exemptions available to foreign private issuers, is therefore important for many foreign issuers.

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 would be required to comply with US domestic issuer reporting requirements only beginning on the first day of the fiscal year following the determination date. For example, a foreign issuer that does not qualify as a foreign private issuer as of the end of its second fiscal quarter in 2009 would be required to file its annual report on Form 10-K in 2010 in respect of its 2009 fiscal year within the relevant deadlines required by the Exchange Act for US domestic issuers. It would also become subject to the proxy rules, insider trading reporting, and reporting on Forms 8-K and 10-Q as of the first day of its 2010 fiscal year.

On the other hand, a foreign issuer that qualifies as a foreign private issuer is permitted to avail itself of the foreign private issuer exemptions beginning on the determination date on which it qualifies as a foreign private issuer. Accordingly, a foreign issuer that qualifies as a foreign private issuer as of the end of its second fiscal quarter would not need to continue reporting on Forms 8-K and 10-Q for the remainder of that fiscal year and may immediately begin to furnish reports on Form 6-K.

The SEC did not impose a requirement on a foreign issuer to notify the market if it has switched its status from US domestic issuer to foreign private issuer, or vice versa. However, a foreign issuer previously reporting as a US domestic issuer, by using a form applicable to foreign private issuers after a change in status (for example, furnishing a current report on Form 6-K rather than Form 8-K), will effectively be providing notice that it has switched status.

Accelerating Filing Deadline for Annual Reports on Form 20-F

Currently, foreign private issuers must file their annual reports on Form 20-F within six months after their fiscal year-end. Beginning with fiscal years ending on or after December 15, 2011, the due date for filing annual reports on Form 20-F will be four months after the foreign private issuer's fiscal year-end.[9] This filing due date will be on or after the annual report filing due date required by the home securities regulators of foreign private issuers in many jurisdictions[10] and still provides a substantial accommodation to foreign private issuers as compared to US domestic issuers.[11]

Additional Disclosures Required in Form 20-F

Disclosure About Differences in Corporate Governance Practices

Beginning with fiscal years ending on or after December 15, 2008, foreign private issuers listed on a US national securities exchange will be required to disclose in their annual reports on Form 20-F a summary of the significant ways in which the foreign private issuer's corporate governance practices differ from the corporate governance practices followed by US domestic issuers under the relevant exchange's listing standards. The adopting release noted that many US securities exchanges already require foreign private issuers to disclose, either in their annual reports and/or on their Web sites, the significant ways in which their corporate governance practices differ from those followed by US companies under the relevant exchange's listing standards.[12] The SEC expects that the disclosure required under this amendment will be similar or identical to that currently provided in response to the requirements of the exchanges on which many foreign private issuers' securities are listed.

Disclosure About Changes in a Foreign Private Issuer's Certifying Accountant

Beginning with fiscal years ending on or after December 15, 2009, foreign private issuers will be required to include a new Item 16F in their annual reports on Form 20-F as well as in their registration statements on Forms 20-F, F-1, F-3[13] and F-4 which will disclose any changes in and disagreements with their certifying accountants. These disclosures are substantially similar to those required to be made by US domestic issuers. Foreign private issuers that are listed on the New York Stock Exchange are already required by that exchange to notify the market about a change in their auditors and furnish that information in a Form 6-K.[14] To the extent a foreign private issuer's home country requires information about a change in certifying accountant to be reported on a current basis, the foreign private issuer should continue to provide that information in a Form 6-K.

Among other things, Item 16F will require a foreign private issuer to disclose:

- whether an independent accountant that was previously engaged as the principal accountant to audit the foreign private 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;
- any disagreements or reportable events that occurred within the foreign private issuer's latest two fiscal years and any interim period preceding the change of accountant; and
- whether, during the fiscal year in which the change of accountants took place or during the subsequent year, the foreign private 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, the foreign private issuer would be required to disclose the existence and nature of the disagreement or reportable event, and the effect on the financial statements according to the method required by the former accountants.

Under the Amendments, a foreign private issuer that changes its accountant is required to provide its former accountant a copy of the disclosures that it intends to make in response to Item 16F and request the former accountant to furnish the foreign private issuer with a letter stating whether it agrees with the statements made by the foreign private issuer and, if not, stating the respects in which it does not agree. Such a foreign private issuer will also be required to file the former accountant's letter as an exhibit to the annual report or registration statement containing the Item 16F

disclosure. If, however, the change in accountants was to occur less than 30 days prior to the filing of the annual report or registration statement and the former accountant's letter is unavailable at the time of filing, the letter may be filed within 10 business days after the filing of the annual report or registration statement.

Disclosure About ADR Fees and Payments

Beginning with fiscal years ending on or after December 15, 2009, foreign private issuers will be required to disclose in their annual reports on Form 20-F:

- the fees paid by ADR holders, including the annual fee for general depositary services; and
- the payments that the foreign private issuers have received from depositaries in connection with their ADR facilities (disclosed on a per payment basis rather than on an aggregate basis).

These disclosures are also required to be made in the registration statement on Form F-6 that is filed to register the ADRs under the Securities Act of 1933, as amended (the Securities Act), as well as in the Form 20-F that is filed to register the deposited securities under the Exchange Act.

No Disclosure of Financial Information for Significant Acquisitions Required in Annual Reports on Form 20-F

US domestic issuers must present the financial statements of significant acquired businesses[15] and *pro forma* financial information[16] in a current report on Form 8-K[17] as well as in their registration statements. Foreign private issuers, on the other hand, are required only to provide this information in their registration statements and not in their annual reports on Form 20-F or their reports on Form 6-K.[18] In the proposal for the Amendments, the SEC considered requiring foreign private issuers to provide in their annual reports on Form 20-F three years of financial statements of significant acquired businesses and *pro forma* financial information if the acquisition was at the 50 percent or greater level of significance.[19] The SEC did not ultimately adopt this proposed amendment in light of concerns expressed by commenters[20] but indicated that it will continue to consider the proposal. Accordingly, foreign private issuers are currently only required to provide one, two or three years' of financial statements of significant acquired businesses, depending on the level of significance,[21] and *pro forma* financial information in their registration statements to register an offering of securities under the Securities Act or to register a class of their securities under the Exchange Act and not in their annual reports on Form 20-F or their reports on Form 6-K.[22]

Amendments to Item 17 Financial Statements

Form 20-F sets forth two alternatives for financial statements: Item 17 and Item 18. There currently are two key differences between financial statements prepared in accordance with Item 17 and those prepared in accordance with Item 18. First, Item 17 permits segment data to be omitted from financial statements prepared in accordance with US GAAP. Secondly, if a foreign private issuer prepares its financial statements on a basis other than US GAAP or International Financial Reporting Standards (IFRS), as issued by the International Accounting Standards Board (IASB), Item 17 requires only a limited reconciliation to US GAAP.[23] In contrast, if a foreign private issuer presents its financial statements on a basis other than US GAAP or IFRS, as issued by IASB, Item 18 requires such financial statements to include all information required by US GAAP and Regulation S-X under the Securities Act, in addition to the reconciling information required under Item 17.

Eliminate Option to Omit Segment Data from US GAAP Financial Statements

Beginning with fiscal years ending on or after December 15, 2009, the option to omit segment data from US GAAP

financial statements will be eliminated from Item 17. Foreign private issuers that present US GAAP financial statements will therefore be required to comply fully with US GAAP, including presentation of segment data.

Eliminate Option to Provide Item 17, rather than Item 18, Financial Statements

Currently, financial statements included in annual reports on Form 20-F need only comply with Item 17. However, a foreign private issuer's Form 20-F annual report is incorporated by reference into its shelf registration statement on Form F-3, which requires Item 18 financial statements to be provided for primary offerings. Accordingly, any foreign private issuer that has an effective shelf registration statement on Form F-3 (or that intends to file one) should elect to provide Item 18 financial statements in their annual report on Form 20-F.

In addition, foreign private issuers that are 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 or 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, are currently permitted to provide financial statements complying with Item 17 in their registration statements on Form 20-F.

Beginning with fiscal years ending on or after December 15, 2011, foreign private issuers will be required to provide financial statements complying with Item 18 in their annual reports on Form 20-F and registration statements on Forms 20-F, F-1, F-3 and F-4.[24] Accordingly, foreign private issuers that do not provide financial statements in accordance with US GAAP or IFRS, as issued by IASB, will have to provide a reconciliation that includes the footnote disclosures required by US GAAP and Regulation S-X under the Securities Act. Item 17 will continue to be available for financial statements of non-registrants that are required to be included in a foreign private issuer's registration statement, annual report or other Exchange Act report. These include financial statements of significant acquired businesses,[25] significant equity method investees,[26] entities whose securities are pledged as collateral[27] and guarantors.[28]

Going Private Transaction under Exchange Act Rule 13e-3

Exchange Act Rule 13e-3 obligates any issuer or affiliate that engages in a going private transaction to comply with certain disclosure requirements.[29] Currently, Rule 13e-3 is triggered when an issuer and/or any of its affiliates are engaged in certain specified transactions that have either a reasonable likelihood or a purpose of causing the issuer's equity securities (1) to be held of record by less than 300 persons, or (2) to be neither listed on any national securities exchange nor authorized to be quoted on an inter-dealer quotation system.

In March 2007, the SEC adopted termination of reporting and de-registration rules applicable to foreign private issuers that permit them to terminate their SEC reporting obligations by meeting, among other conditions, a trading volume test designed to measure relative US market interest for their equity securities as an alternative to a head count of the foreign private issuers' US security holders.[30] The Amendments update Rule 13e-3 to reflect the amendments to the de-registration and termination of reporting rules applicable to foreign private issuers that were adopted in March 2007. Accordingly, effective December 6, 2008, the Rule 13e-3 disclosure requirements will be triggered when any issuer or affiliate engages in a specified transaction that results in the issuer becoming eligible to terminate or suspend its reporting obligations under the Exchange Act, including, in the case of a foreign private issuer, the foreign private issuer becoming eligible to deregister its securities based on the trading volume test.

Endnotes

[1] See SEC Release Nos. 33-8959; 34-58620 (September 23, 2008), available at http://www.sec.gov/rules/final/2008/33-8959.pdf.

[2] See SEC Release Nos. 33-8900; 34-57409 (February 29, 2008), available at http://www.sec.gov/rules/proposed/2008/33-8900.pdf.

[3] See SEC Release No. 34-55540 (March 27, 2007), available at http://www.sec.gov/rules/final/2007/34-55540.pdf. For an overview of the proposed and final rules on deregistration by foreign private issuers, see our *Client Alert No. 588: The SEC Facilitates Foreign Private Issuer Deregistration Under the Exchange Act* (April 11, 2007) (http://www.lw.com/upload/pubContent/_pdf/pub1842_1.pdf).

[4] 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 under the Securities Act. In the case of new registrants, the determination of whether a foreign issuer qualifies as a foreign private issuer should be made as of a date within 30 days prior to the filing of an initial registration statement under the Securities Act or the Exchange Act.

[5] The Amendments would also require a Canadian issuer that files registration statements and Exchange Act reports using the multijurisdictional disclosure system (MJDS) to test its foreign private issuer status as of the last business day of its second fiscal quarter. However, the Amendments do not change the requirement on the Canadian issuer to check its eligibility to file its annual report on Form 40-F and current reports on Form 6-K at the end of its fiscal year, or its eligibility to use the MJDS Securities Act registration statement forms at the time of filing. As a result of the Amendments, a Canadian MJDS filer that does not qualify as a foreign private issuer on the last day of its second fiscal quarter would immediately not be able to use MJDS forms for Securities Act offerings but may continue to use other foreign private issuer registration statement forms, such as Form F-3, until the end of its fiscal year.

[6] "Foreign private issuer" is defined in Exchange Act Rule 3b-4 as any foreign issuer other than a foreign government, except for an issuer that (1) has more than 50 percent of its outstanding voting securities held of record by US residents and (2) meets any of the following conditions: (i) the majority of its executive officers or directors are US citizens or residents, (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.

[7] See Section 14(a) of the Exchange Act and Regulation 14A thereunder.

[8] The exemptions available to foreign private issuers are provided in Exchange Act Rule 3a12-3(b).

[9] In response to comments received about the potential burdens placed on foreign private issuers that provide disclosures under *Industry Guide 3*, which relate to bank holding companies, the adopting release noted that the SEC staff will consider what accommodations with regard to *Industry Guide 3* would be appropriate.

[10] For example, companies listed on a market that is subject to the European Union's Transparency Directive are required to file their annual financial reports within four months of their fiscal year-end. See Directive 2004/109/EC of the European Parliament and of the Council (December 15, 2004).

[11] Large accelerated and accelerated US domestic issuers are required to file their annual reports on Form 10-K within 60 days and 75 days, respectively, of their fiscal year-ends. All other US domestic issuers are required to file their annual reports on Form 10-K within 90 days after their fiscal year-end.

[12] For example, see Section 303A.00 of the NYSE Listed Company Manual and Section 4350(a)(1) of the Nasdaq Manual.

[13] Form F-3 will require the new disclosure on changes in and disagreements with the issuer's certifying accountants to be provided in the registration statement at effectiveness, as well as in a prospectus used in connection with a shelf offering.

[14] See Section 204.03 of the NYSE Listed Company Manual.

[15] See the financial information required by Rule 3-05 of Regulation S-X under the Securities Act.

[16] See the financial information required by Article 11 of Regulation S-X under the Securities Act.

[17] Item 2.01 of Form 8-K requires US domestic issuers to report on Form 8-K specified information regarding an acquisition or disposition of a significant amount of assets, other than in the ordinary course of business, within four business days after the completion of the acquisition or disposition. For a business acquisition significant at the 20 percent or greater level, the financial statements of the acquired business must be filed with the initial report of the acquisition on Form 8-K, or by amendment no later than 71 calendar days after the date that the initial report on Form 8-K is due. The significance of an acquired business is measured by comparison of (1) the registrant's investment

in the acquired business to the registrant's total assets, (2) the acquired business' total assets to the registrant's total assets, or (3) the acquired business' pre-tax income to the registrant's pre-tax income. See Rule 1-02(w) of Regulation S-X under the Securities Act.

[18] If, however, a foreign private issuer makes public any financial statements of significant acquired businesses or *pro forma* financial information pursuant to its home country requirements, the foreign private issuer should furnish or file such financial information under cover of Form 6-K as it is likely to be deemed to be material.

[19] *Supra* note 16.

[20] Commenters expressed concern about the timeliness of the information, the burden and expense required to provide the information, and the potential disparity in the information available to investors in the foreign private issuer's home country and the United States, as well as questioned the value of the information.

[21] In brief, for a business acquisition (or multiple acquisitions of related businesses) significant at the level exceeding 20 percent but not greater than 40 percent, the most recent fiscal year's plus interim (if applicable) financial statements of the acquired business(es) are required; for a business acquisition (or multiple acquisitions of related businesses) significant at the level exceeding 40 percent but not greater than 50 percent, the most recent two fiscal years' plus interim (if applicable) financial statements of the acquired business(es) are required; and for a business acquisition (or multiple acquisitions of related businesses) significant at the greater than 50 percent level, the most recent three fiscal years' plus interim (if applicable) financial statements of the acquired business(es) are required. See Rule 3-05(b)(2) of Regulation S-X under the Securities Act.

[22] *Supra* note 17.

[23] Item 17(c)(2) currently requires a narrative discussion of reconciling differences, a reconciliation of net income for each year and any interim periods presented, a reconciliation of major balance sheet captions for each year and any interim periods, and a reconciliation of cash flows for each year and any interim periods. Under Item 17, an issuer is not required to provide the footnote disclosures required by US GAAP and Regulation S-X under the Securities Act unless these disclosures are otherwise required under its home country GAAP.

[24] Item 17 financial statements would continue to be available for Canadian MJDS filers.

[25] See Rule 3-05 under Regulation S-X of the Securities Act.

[26] See Rule 3-09 under Regulation S-X of the Securities Act.

[27] See Rule 3-16 under Regulation S-X of the Securities Act.

[28] See Rule 3-10 under Regulation S-X of the Securities Act.

[29] See Schedule 13E-3 under the Securities Act.

[30] See SEC Release No. 34-55540, *supra* note 3.

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