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SEC Proposes Amendments to Foreign Issuer Reporting Requirements

On February 29, 2008, the SEC published for public comment proposed amendments to the filing requirements applicable to foreign private issuers under the U.S. Securities Exchange Act of 1934 (the "Exchange Act"). The proposed rule changes are part of the SEC's recent initiatives to modernize the reporting requirements under the Exchange Act in the wake of the ongoing globalization of securities markets, and aim to enhance disclosure provided by foreign private issuers in response to changes in filing requirements for U.S. domestic companies, changes in investor expectations and market practices, improvement of technologies, developments in foreign filing requirements, and changes in other areas of SEC regulation.

Some of the major proposed changes include:

- permitting reporting foreign private issuers to test their status as such (and thus their eligibility to use the special forms and rules available to foreign private issuers) on an annual basis (rather than on a continuous basis, as is currently required);

- after a two-year transition period, accelerating the filing deadline for annual reports on Form 20-F by foreign private issuers to 90 days after an issuer's fiscal year-end in the case of large accelerated filers and accelerated filers, and to 120 days after an issuer's fiscal year-end for all other issuers (from the current filing deadline of six months after the fiscal year-end);

- eliminating an instruction to Item 17 of Form 20-F that permits certain foreign private issuers to omit segment data from their U.S. GAAP financial statements; and

- amending Exchange Act Rule 13e-3, which relates to going-private transactions by reporting issuers or their affiliates, to reference the recently adopted deregistration and termination of reporting rules applicable to foreign private issuers.

In addition, the SEC is seeking comments on other possible amendments that would affect foreign private issuers, including:

- after a transition period, requiring foreign private issuers to provide a U.S. GAAP reconciliation (if a reconciliation is required) pursuant to Item 18 of Form 20-F in annual reports and registration statements;

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- amending the Form 20-F rules to newly require disclosure of changes in and disagreements with the issuer's certifying accountant;

- amending the Form 20-F rules to require disclosure of fees, payments and other charges relating to American depositary receipts;

- amending the Form 20-F rules to require disclosure of significant differences in the foreign issuer's corporate governance practices compared to U.S. domestic issuers; and

- amending the Form 20-F rules to require inclusion of financial information for acquired businesses that are significant at the 50% or greater level.

Proposed Changes

Annual Test for Foreign Private Issuer Status

The determination of whether a foreign company qualifies as a "foreign private issuer" is important because foreign private issuers can take advantage of various accommodations and exemptions under the Exchange Act. Under Exchange Act Rule 3b-4, a foreign issuer can lose its "foreign private issuer" status at any time, if:

- more than 50% of the issuer's outstanding voting securities are directly or indirectly held of record by U.S. residents; ***and***

- (a) the majority of the executive officers or directors are U.S. citizens or residents, (b) more than 50% of the assets of the issuer are located in the United States, ***or*** (c) the business of the issuer is administered principally in the United States.

As a result, under current rules, there can be uncertainty with respect to the applicable requirements with respect to foreign private issuers that have close to 50% of their outstanding voting securities held of record by U.S. residents.

To provide greater certainty to both issuers and investors as to the status of foreign private issuers within a given period of time, the SEC is proposing to permit foreign private issuers to assess their status once a year. Specifically, the SEC is proposing to permit reporting foreign issuers, including Canadian issuers relying upon the mutlijurisdictional disclosure system ("MJDS"), to assess their status on the last business day of their second fiscal quarter. Canadian issuers that file annual reports on Form 40-F, however, will additionally need to test their eligibility under the other requirements of Form 40-F (such as public float) at the end of the fiscal year.

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. On the other hand, a reporting company that qualifies as a foreign private issuer may begin using the foreign private issuer forms and complying with foreign private issuer reporting requirements, on the determination date on which it establishes its eligibility as a foreign private issuer.

Accelerating the Reporting Deadline for Form 20-F Annual Reports

Foreign private issuers currently have up to six months after the fiscal year-end to file their annual reports on Form 20-F. The SEC is proposing to accelerate the filing deadline for Form 20-F annual reports as follows:

- for foreign private issuers that are large accelerated or accelerated filers, the Form 20-F due date would be 90 days after the fiscal year-end, and
- for all other foreign private issuers, the Form 20-F due date would be 120 days after the fiscal year-end.

The SEC is proposing a two-year transition period, as a result of which the accelerated filing deadline would be applicable for fiscal years ending on or after December 15, 2010 if the rule proposal is adopted this year.

The accelerated filing deadline is part of a series of SEC initiatives to change in disclosure applicable to foreign private issuers, one of which is the SEC's recent rule change to accept financial statements prepared in accordance with IFRS without any reconciliation to U.S. GAAP. Foreign private issuers that report under IFRS as issued by IASB may no longer need additional time to prepare the Form 20-F annual report. On the other hand, foreign private issuers that continue to report under local GAAP and have to reconcile to U.S. GAAP may be subject to undue cost and burden to meet the accelerated filing deadline. The SEC is currently seeking comments on whether different due dates would be appropriate depending on whether a foreign private issuer files financial statements using U.S. GAAP, IFRS as issued by the IASB, or another GAAP with a reconciliation to U.S. GAAP.

Segment Data Disclosure

Currently, foreign private issuers that present financial statements otherwise fully in compliance with U.S. GAAP may omit segment data from their financial statements under Item 17 of Form 20-F. The SEC estimates that fewer than 10 foreign private issuers rely on this accommodation and, therefore, is proposing to eliminate it.

Exchange Act Rule 13e-3

The SEC is proposing to amend Exchange Act Rule 13e-3, which governs "going private" transactions to specify that the requirements of Rule 13e-3 are applicable when a foreign private issuer engages in a transaction that would make it eligible to deregister under Exchange Act. The proposed amendments reflect the SEC's recently adopted rules that allow deregistration by foreign private issuers if that issuer meets a benchmark designed to measure relative U.S. market interest for the issuers' class of securities.

Other Matters under Consideration

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

If a foreign private issuer prepares its financial statements and schedules in accordance with a basis of accounting other than U.S. GAAP, or IFRS as issued by the IASB, then the issuer must include a reconciliation to U.S. GAAP. Currently, under Item 17 of Form 20-F, this reconciliation must include 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. On the other hand, under Item 18 of Form 20-F, the foreign private issuer must provide all information provided by U.S. GAAP and Regulation S-X, in addition to the reconciling information for the line items specified in Item 17.

The SEC is proposing to eliminate the current availability of Item 17 for foreign private issuers that:

- are 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;
- file annual reports on Form 20-F; or
- are undertaking certain non-capital raising offerings, such as an offerings pursuant to reinvestment plans, offerings upon the conversion of securities or offerings of investment grade securities

As a result, under the proposed rules, foreign private issuers that prepare disclosure for any of the above will be required to provide Item 18 information (a reconciliation that includes the footnote disclosures required by U.S. GAAP and Regulation S-X).

Item 17 disclosure will continue to be available for:

- Canadian MJDS filers; and
- 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 (such as 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).

Under the SEC's proposed transition period, the above requirements would become applicable starting with the annual report for the first fiscal year ending on or after December 15, 2009 if the proposed rules are adopted this year.

Disclosure about Change in a Registrant's Certifying Accountant

The SEC is proposing to require disclosure relating to changes in and disagreements with the foreign private issuer's certifying accountant. The SEC believes that the proposed disclosure

requirement addresses 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 a company achieve its reporting objectives, even though that treatment could frustrate reliable reporting.

The proposed amendments aim to require substantially the same types of disclosures currently provided by U.S. domestic issuers about changes in and disagreements with their certifying accountant, including:

- 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;

- any disagreements or reportable events that occurred within the issuer's latest two fiscal years and any interim period preceding the change of accountant;

- 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, the issuer would be required to disclose the existence and 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.);

- a letter from the former accountant (to be filed as an exhibit) stating whether it agrees with the statements made by the issuer and, if not, stating the respects in which it does not agree.

The proposed disclosure would be required in annual reports on Form 20-F, as well as initial registration statements filed on Forms 20-F, F-1 and F-4.

Annual Disclosure about ADR Fees and Payments

The SEC notes that current disclosure about fees and other payments made by ADR holders are often generic, providing maximums paid on the deposit and withdrawal of the securities underlying the ADRs. The SEC is proposing amendments to enhance the disclosure about fees and other payments made by ADR holders by requiring disclosure of:

- ADR fees on an annual basis, including any annual fee for general depositary services; and

- any payments made by depositaries to the foreign issuers whose securities underlie the ADRs.

The above disclosure would be required in any registration statement on Form 20-F that is filed for the deposited securities, as well as in each annual report on Form 20-F if the foreign private issuer has a sponsored ADR facility.

Disclosure about Differences in Corporate Governance Practices

Foreign private issuers are exempt from many of the corporate governance requirements prescribed by U.S. securities exchanges when their home country practices differ from that of U.S. domestic companies. As a condition to the exemption, foreign private issuers are required to disclose the significant ways in which their corporate governance practices differ from those followed by U.S. domestic companies under the relevant exchange's listing standards.

The SEC is proposing to consolidate in the Form 20-F annual report the disclosure relating to the significant ways in which the foreign private issuer's corporate governance practices differ from the corporate governance practices of U.S. domestic companies listed on the same exchange. The SEC's intent is to consolidate this information in one location rather than creating options to report the information either in annual reports and/or on websites. The SEC expects that the level of disclosure would be similar to the disclosure that foreign private issuers currently provide in response to the corporate governance disclosure requirements of the U.S. securities exchanges.

Financial Information for Significant, Completed Acquisitions

Currently, foreign private issuers are not subject to the requirements applicable to U.S. domestic issuers that trigger disclosure of stand-alone financial statements (or the related pro forma financial information) of acquired businesses that are significant at the 20% or greater level, unless the issuer is conducting a registered public offering.

The SEC is proposing to require foreign private issuers to provide stand-alone financial statements (and the related pro forma financial information) of acquired businesses as required under Rule 3-05 and Article 11 of Regulation S-X in their Exchange Act annual reports. Unlike the 20% threshold applicable to U.S. domestic issuers, however, the SEC is proposing that the disclosure requirement be triggered when (a) the registrant's investment in the acquired business (acquisition price) is 50% or more of the registrant's total assets, (b) the acquired business' total assets is 50% or more of the registrant's total assets, or (c) the acquired business' pre-tax income is 50% or more of the registrant's pre-tax income.

If a business acquisition is significant at the 50% or greater level, financial statements for three fiscal years will generally need to be prepared in accordance with U.S. GAAP, IFRS as issued by IASB, or local GAAP with a reconciliation to U.S. GAAP.

* * *

The SEC is currently soliciting comments to the proposed rules. Comments on the proposed rule changes should be submitted to the SEC by May 12, 2008. After comments are received, the SEC staff will prepare a final set of new rules (which may be modified from the proposed set of rules) for approval by the SEC Commissioners. Once approved, the effective date could be immediate or subject to a transition period.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. If you have any questions regarding the foregoing, please contact any of the following:

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