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SEC Approves Rule Changes for Foreign Private Issuers and Proposes a Roadmap for Transition to IFRS for U.S. Issuers

Yesterday, the SEC adopted amendments to various provisions applicable to SEC reporting companies that are foreign private issuers and issued for comment a proposed roadmap for U.S. reporting companies to transition to International Financial Reporting Standards ("IFRS") in lieu of U.S. GAAP.

This update summarizes the SEC's actions based on yesterday's Open Meeting. We will circulate a more in-depth analysis of each of the principal changes affecting foreign private issuers once the promulgating releases become publicly available and a summary of the proposed IFRS roadmap once it becomes publicly available.

Foreign Issuer Reporting Enhancements

The SEC has modified several of its rules applicable to foreign private issuers as follows:

- ***Status.*** Foreign issuers will be able to assess their status as foreign private issuers once a year on the last business day of their second fiscal quarter (rather than on a continuous basis, as was formerly required). 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 must comply with the rules applicable to domestic companies beginning on the first day of the fiscal year following such determination.

- ***Form 20-F filing deadline.*** Following a three-year transition period ending December 15, 2011 (which is one year longer than the SEC's initial proposal), the filing deadline for annual reports on Form 20-F will decrease from six months to four months after the issuer's fiscal year-end. This provision does not distinguish among types of issuers (*i.e.*, accelerated and large accelerated, and other, filers).

- ***Form 20-F, Items 17 and 18.*** The SEC has eliminated an instruction to Item 17 of Form 20-F that permits foreign private issuers to omit segment data from their U.S. GAAP financial statements. In addition, after a three-year transition period ending December 15, 2011 (which is two years longer than the SEC's initial proposal), the SEC is eliminating Item 17 of Form 20-F, thereby requiring foreign private issuers that currently prepare financial statements in accordance with Item 17 to provide a U.S. GAAP reconciliation (if such reconciliation is required) pursuant to Item 18 of Form 20-F (for registration statements and annual reports).

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- ***Additional Form 20-F disclosure.*** Form 20-F will now require disclosure concerning (i) changes in, and disagreements with, the foreign private issuer's certifying accountants; (ii) fees, payments and other charges relating to ADRs; and (iii) significant differences in the foreign private issuer's corporate governance practices as compared to U.S. issuers. The proposed requirement to provide financial information in annual reports for acquired businesses that are significant at the 50% or greater level was *not* adopted.

Rule 12g3-2(b) Exemption

Rule 12g3-2(b) provides an exemption from Exchange Act registration for foreign private issuers that might otherwise be required to register (and thus become subject to U.S. filing and disclosure rules) because they have over 300 U.S. holders. It is available generally so long as a foreign private issuer has not undertaken a public offering or listing in the United States and applies for the exemption before exceeding the 300-holder threshold. The new rule provides for an automatic regime (replacing the current written application and paper submission requirements) if the foreign private issuer meets the following three conditions:

The primary trading market must be outside the United States. The issuer must maintain a listing of the subject class of securities on one or more exchanges in one or two non-U.S. jurisdictions comprising its primary trading market (accounting for at least 55% of the trading in the issuer's securities during the issuer's most recently completed fiscal year). If an issuer aggregates the trading of its subject securities in two non-U.S. jurisdictions, the trading for those securities in at least one of the two jurisdictions must be larger than the trading for the subject securities in the United States. In order to enable currently exempt issuers (that would otherwise be unable to meet this condition) to satisfy this condition, a three-year transition period has been made available.

Disclosure documents must be published in English. The issuer must publish in English, on its Internet website or through an electronic information delivery system that is generally available to the public in its primary trading market, the same non-U.S. disclosure documents (that were published since the beginning of the issuer's most recently completed fiscal year) as are currently required to be submitted to the SEC in paper to claim the Rule 12g3-2(b) exemption. If the issuer is claiming the Rule 12g3-2(b) exemption in connection with, or following, its deregistration, however, the issuer would not be required to meet the electronic publication requirement for its last fiscal year since a recently deregistered issuer would have already filed its required reports under the Exchange Act for its most recently completed fiscal year.

In addition, in order to maintain a Rule 12g3-2(b) exemption, issuers must, on an ongoing basis and for each subsequent fiscal year, electronically publish in English the same non-U.S. disclosure documents as are required to claim the exemption.

In order to enable issuers to comply fully with this requirement, a three-month transition period has been made available.

No current Exchange Act reporting obligation. The issuer must not currently have any reporting obligation under Section 13(a) or 15(d) of the Exchange Act. Issuers will no longer be required to look back 18 months to determine whether they had any active or suspended reporting obligations under the Exchange Act during that period, and will not be required to seek the Rule 12g3-2(b) exemption within the 120-day period during which a registration statement must otherwise be filed under Section 12(g) of the Exchange Act.

The SEC had initially proposed a fourth condition to the automatic regime, based upon the U.S. average daily trading volume ("ADTV"), but this condition has not been adopted. The elimination of this condition removes a concern that the exemption once obtained, could be lost based on changes in relative trading patterns.

Cross-Border Business Combinations, Exchange Offers and Rights Offerings

The SEC approved the proposed changes to the exemptions for m&a transactions and rights offerings. These changes include:

- ***Look-through analysis and beneficial ownership.*** In order to allow bidders to make the determination of eligibility (the 10% and 40% thresholds) at an earlier point in time, bidders will now be able, in negotiated transactions, to calculate U.S. beneficial ownership as of a date within a range of dates that are no more than 120 days before, and no more than 30 days after, public *announcement* of a transaction.

  In addition, the current requirement to exclude from the calculation of U.S. ownership securities held by persons holding greater than 10% of target securities has been eliminated (the securities held by the bidder will, however, continue to be excluded from the denominator).

  If the bidder is unable to conduct the new modified look-through test, an alternate eligibility test is available. This test depends on the comparison of the ADTV of the U.S. float with the worldwide float and consideration of U.S. ownership figures reported in publicly available information, including SEC filings, as well as other information that the bidder knows or has "reason to know" about the U.S. beneficial ownership.

- ***Tier I exemption.*** The new rules will eliminate restrictions on the types of cross-border transactions that qualify for the Tier I exemption from Rule 13e-3. As a result, schemes of arrangement, cash mergers and other similar types of transactions will be eligible to rely on the Tier I exemption.

- ***Tier II exemption.*** The SEC has extended the Tier II exemption to cover any offer regardless of whether the target's securities are subject to Regulation 14D or Rule 13e-4.

- ***Multiple non-U.S. offers.*** Bidders will now be allowed to make multiple concurrent non-U.S. offers.

- ***Persons included in offers.*** Non-U.S. holders of ADRs will now be able to participate in U.S. offers. U.S. holders will also be able to participate in non-U.S. offers where required under local law (that is, where the local law expressly precludes the exclusion of U.S. persons from the local offer) and where adequate disclosure about the implications of participating in the foreign offer or offers is provided to U.S. security holders.

- ***"Back-end" withdrawal rights.*** Bidders will be able to suspend back-end withdrawal rights during the time after the initial offering period, when tendered securities are being counted and before they are accepted for payment. This will, therefore, permit withdrawal rights to be terminated at the end of an offer and during the counting process where no subsequent offer period is provided.

- ***Length of subsequent offer periods.*** The 20-business day limit on subsequent offer periods has been eliminated.

- ***Rule 14e-5.*** New Rule 14e-5, which prohibits purchases of target's securities outside and during the pendency of an offer except pursuant to such offer, will codify recurrent Staff's exemptive relief for tender offers relying on the Tier II exemption.

- ***Schedule 13G.*** The new rules will permit foreign institutions (similar to the U.S. domestic institutions that can use Schedule 13G pursuant to Rule 13d-1(b)(1)(ii) of the Exchange Act), under specified conditions, to report beneficial ownership of more than 5% of a subject class of securities on Schedule 13G, rather than filing a Schedule 13D, as it was formerly required.

The SEC has also provided additional interpretive guidance on various other issues covered in the proposing release, including termination of withdrawal rights after reduction or waiver of a minimum acceptance condition; applicability of all-holders rule to non-U.S. holders; the exclusion of U.S. holders of a target to participate in a tender offer; and vendor placements.

IFRS Roadmap for U.S. Issuers

After various roundtable discussions, the issuance by the SEC of a concept release and a recent change permitting foreign private issuers that report in IFRS as published by the International Accounting Standards Board ("IASB") to eliminate the U.S. GAAP reconciliation in their SEC filings, the SEC has proposed a "roadmap" for a transition from U.S. GAAP to IFRS (as published by the IASB) for U.S. issuers. The proposed roadmap is subject to a 60-day comment period.

The proposed roadmap contemplates voluntary early adoption of IFRS by certain issuers (based on inclusion within the top 20 by market capitalization in industry groupings and competition with companies reporting under IFRS) beginning in 2010 (*i.e.*, for financial statements for fiscal years beginning on or after December 15, 2009). With respect to these early users of IFRS, the proposed roadmap sets out two alternative proposals under which an issuer would provide U.S. GAAP-based information: the first alternative involves compliance with IFRS 1, which requires a one-time reconciliation from U.S. GAAP to IFRS covering one year, the year of transition, which would appear as a note to the audited financial statements. The second alternative involves a requirement for an issuer to provide on an on-going basis in its Form 10-K annual report an unaudited reconciliation from IFRS to U.S. GAAP covering the three years of IFRS financial statements included in the Form 10-K.

The roadmap contemplates a vote in 2011 as to whether or not to mandate IFRS for all domestic reporting companies. The vote would be based on whether various specified milestones have been achieved. If the SEC approves mandatory adoption of IFRS, one possible approach would be a 2014 adoption date; another would be a staged roll-out beginning in 2014 through 2016, based on market capitalization.

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This memorandum is not intended to provide legal advice with respect to any particular situation and no legal or business decision should be based solely on its content. Questions concerning issues addressed in this memorandum should be directed to any member of the Paul, Weiss Securities Group.