

PAUL, WEISS RIFKIND, WHARTON & GARRISON

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SEC PROPOSES REQUIRING NON-US ISSUERS TO FILE ELECTRONICALLY

The SEC has proposed that all non-US issuers with SEC filing obligations be required to make their filings via the SEC's electronic filing system, the Electronic Data Gathering, Analysis and Retrieval (EDGAR) system. The SEC proposal is intended to facilitate more rapid dissemination of financial and other information that is filed with, or submitted to, the SEC by non-US filers than under the current system of paper filings.

US issuers have been required since the mid-1990s (after a phase-in period) to make all of their filings in electronic format, while non-US issuers were given the choice of continuing to file in paper format or to file electronically. According to the SEC, of the approximately 1,310 non-US issuers that filed reports in 2000 with the SEC under the Securities Exchange Act of 1934 (the "Exchange Act") (i.e., non-US issuers that have securities listed in the United States and/or have conducted a public offering in the United States), approximately 18% voluntarily filed using EDGAR. One advantage for these filers is that investors can access the filings instantaneously via watch service notifications, or 24 hours later on the SEC web site (www.sec.gov).

The formal release outlining the elements of the proposal was released October 1. The proposal is subject to a 60-day comment period and contemplates a phase-in period of four months.

Filings Subject to the Proposal

Generally, under the proposed rules, all documents filed with, or submitted to, the SEC would have to be filed or submitted electronically. A hardship exemption would be available, but the SEC does not expect to grant such exemptions frequently.

In particular, the proposed rules would apply to:

- registration statements on Forms F-1, F-2, F-3, F-4 and S-8;
- registration statements on Form 20-F (used for listings);
- registration statements on Form F-6 (for ADS programs, including so-called Level I programs (where the issuer is not an Exchange Act reporting company));

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- annual reports on Form 20-F;
- reports on Form 6-K;
- registration statements on Schedule B and Form 18, and annual reports on Form 18-K, filed by foreign governments;
- registration statements on Forms F-7, F-8, F-9, F-10 and F-80, registration statements and annual reports on Form 40-F and the tender offer forms filed by Canadian issuers under the Multijurisdictional Disclosure System (“MJDS”);
- statements of beneficial ownership on Schedules 13D and 13G, and Schedule TOs, pertaining to the securities of non-US issuers, whether filed by a US or non-US person;
- Form CBs (used in connection with exemptions applicable to cross-border rights offerings, exchange offers and business combinations), together with the accompanying home country documentation, in the following circumstances: where the filer is subject to Exchange Act reporting or where the subject company is subject to Exchange Act reporting;
- in certain instances, Form F-X and Form F-N; and
- most forms filed under the Trust Indenture Act.

Under the proposal, submissions made pursuant to the “information-supplying exemption” (Rule 12g3-2(b)) from the registration requirements of the Exchange Act could only be made in paper format.

We understand from the SEC staff that the proposal will not impact the ability of first time registrants to file their first registration statement (and the amendments thereto) on a confidential basis. When the issuer is prepared to formally file the registration statement, the filing would be made via EDGAR. The Staff would require that after the registration statement is filed electronically, all prior correspondence regarding the registration statement must be submitted via EDGAR. This correspondence, like other correspondence filed by EDGAR, will be for SEC record-keeping purposes and not publicly disseminated.

Exhibits

Generally, under the proposed rules, all exhibits to SEC filings would have to be filed electronically. To the extent that a filing incorporates by reference an exhibit previously filed in paper format, that exhibit would not have to be filed electronically.

Issuers could, but would not be required to, submit their “glossy” annual reports electronically. The annual report and the related Form 6-K could be filed in paper format so long as the sole purpose of the Form 6-K was to provide the annual report. If the Form

6-K covers other matters, both the Form 6-K and the annual report, together with any other exhibits, would have to be submitted electronically. If any portion of the annual report is to be incorporated into a document filed electronically, that portion of the annual report also would have to be filed electronically.

Foreign Language Documents

Generally, the EDGAR rules prohibit the filing on EDGAR of any foreign language document, whereas the paper rules permit the filing of foreign language documents as an exhibit to or other part of a registration statement or report, so long as the document is accompanied by an English summary, version or translation.

Under the proposed rules, the body of any registration statement, prospectus, schedule or report (including exhibits) filed with or, in the case of Form 6-Ks and Form CBs, submitted to the SEC would have to be in English. If any document is not in English, a fair and accurate English translation must be filed, together with a written representation signed by a designated officer of the issuer that the English version is a fair and accurate representation of the original.

The current instructions to Form 6-K provide non-US issuers with some flexibility when the filing of the form is triggered by the distribution of materials that are not in English. In some cases, English translations, versions or summaries must be provided; in other cases, a brief description of the material will suffice. Under the proposed rules, an issuer would be required to provide an English translation of any non-English language document that is the subject of a report on Form 6-K.

The SEC has proposed eliminating the accommodation for MJDS filers wishing to file parts of their documents in French. The registration statement would have to be filed in English, and if any part of it is in another language, the filer must provide an English translation instead of the foreign language version. If the filer wishes to submit a foreign language exhibit, it instead would have to provide an English translation.

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Any questions concerning the foregoing should be addressed to members of the Paul Weiss Securities Group (including any of those listed below). This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. In addition, memoranda on related topics may be accessed under Securities Group publications on our web site (www.paulweiss.com).

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