

SEC FINAL RULE: MANDATED EDGAR FILING FOR FOREIGN ISSUERS

On May 14, 2002, the U.S. Securities and Exchange Commission (the “SEC”) adopted final rules (the “**Final Rule**”) amending Regulation S-T which governs the Electronic Data Gathering, Analysis, and Retrieval system (“EDGAR”).¹ Under the Final Rule, foreign private issuers and foreign governments (“**Foreign Filers**”) will be required to file SEC documents electronically on EDGAR starting November 4, 2002 (see Transition Period below). Most of the amendments under the Final Rule have been adopted as proposed by the SEC on October 4, 2001.² However, the SEC has responded to a number of comments and made significant changes to the proposed requirements.

Description of Significant Amendments to the Current Rules

Currently, Regulation S-T excludes Foreign Filers from the electronic EDGAR filing requirements. Under the Final Rule, both domestic and Foreign Filers will have to file on EDGAR any filing, including any joint or third-party filing, that relates to a Foreign Filer. The following is a summary of the SEC forms affected by the Final Rule.

- ***Securities Act registration statements, Exchange Act registration statements and annual reports for private issuers***

Foreign private issuers will now be required to file electronically both Securities Act registration statements on Forms F-1, F-2, F-3, and F-4 and their Exchange Act registration statements and annual reports on Form 20-F. The Final Rule also mandates EDGAR filing of Form F-6, the Securities Act registration form used to register American Depositary Receipts.

- ***Form 6-K reports***

Subject to the exceptions described below, all reports on Form 6-K³ will have to be filed electronically. Foreign Filers may file Forms 6-K submitted to furnish a foreign issuer’s annual report to security holders in paper format. In addition, the Final Rule provides that a foreign issuer will be able to submit a home-country report or other document in paper under cover of a

¹ EDGAR is the SEC’s electronic system that enables registered companies and other entities to file their securities documents with the SEC in electronic format.

² See our Client Memorandum dated October 10, 2001.

³ Form 6-K is the Exchange Act form used by foreign private issuers to submit periodic and current reports with the SEC.

Form 6-K as long as the report or other document (i) is not a press release, (ii) is not required to be and has not been distributed to the foreign issuer's security holders, and (iii) if discussing a material event, including disclosure of annual audited or interim consolidated financial results, has already been the subject of a Form 6-K submission or other SEC filing on EDGAR.

- ***Schedules 13D and 13G and tender offer schedules***

Under the Final Rule, Schedules 13D and 13G⁴, whether filed by a domestic or foreign person, pertaining to a foreign private issuer will have to be filed on EDGAR. Similarly, domestic and foreign bidders will have to file electronically their Schedules TO with respect to tender offers for securities of foreign private issuers. Foreign private issuers that are subject to tender offers, whether by domestic or foreign companies, will also have to file electronically their Schedules 14D-9.

- ***Form CB***

The Form CB⁵ will have to be filed electronically in two instances: (i) if the party filing or submitting the Form CB is an Exchange Act reporting company, or (ii) if the foreign company that is subject of the Form CB transaction is an Exchange Act reporting company. In any event, a company not required to file electronically will have the ability, at its option, to file the Form CB on EDGAR.

- ***Forms F-X and F-N***

Forms F-X and F-N (used to designate a U.S. agent for service of process) will have to be filed electronically.

- ***Multijurisdictional Disclosure System ("MJDS") Forms***

Canadian issuers that choose to use the MJDS will have to file electronically (i) their Securities Act registration statements on Forms F-7, F-8, F-9, F-10 and F-80, (ii) their Exchange Act registration statements and annual reports on Form 40-F, and (iii) their Schedules 13E-4F, 14D-1F and 14D-9F, as well as the tender offers forms under the MJDS.

⁴ Schedules 13D and 13G are third-party forms which require disclosure of beneficial ownership by holders who have accumulated an issuer's equity securities in excess of certain thresholds.

⁵ The Form CB is the exemptive form that both foreign and domestic persons must file when engaging in certain rights offerings, exchange offers or business combinations with respect to a foreign private issuer.

- ***Securities Act registration statements and Exchange Act registration statements and reports of foreign governments***

Foreign governments will be required to file on EDGAR their Securities Act registration statements on Schedule B, as well as their Exchange Act registration statements on Form 18 and their annual report on Form 18-K.

- ***Trust Indenture Act forms***

A number of statements and applications regarding trustee eligibility and indenture qualification under the Trust Indenture Act will now be required to be filed electronically.

Practical Implications of the Proposed Rule

- ***Electronic filing hours***

Foreign Filers will be subject to the same filing hours currently applicable to domestic filers (*i.e.*, from 8:00 a.m. until 10:00 p.m. EST).⁶ The SEC, however, may, in the future, extend filing hours in order to improve access to the EDGAR system for Foreign Filers.

- ***Incorporation by reference; exhibits previously filed in paper format***

Consistent with the current treatment of domestic filers, exhibits previously filed in paper format do not generally need to be refiled electronically. However, Foreign Filers may voluntarily refile previously filed paper exhibits on EDGAR and, upon amending its articles of incorporation or bylaws, a Foreign Filer will have to refile the entire document in EDGAR format. The Final Rule will require a Foreign Filer that incorporates by reference into any electronic filing any portion of an annual or other report to security holders, or of a paper format 6-K, to file the portion of the annual or other report in electronic format as an exhibit to the filing.

- ***Foreign language documents***

Currently, both EDGAR and paper filers must file their Securities Act and Exchange Act registration statements and Exchange Act reports in the English language. However, paper filing rules, as opposed to the EDGAR filing rules, permit the filing of a foreign language document as an exhibit to a registration statement as long as the foreign language document is accompanied by a “summary, version or translation in the English language.”

⁶ Most EDGAR filings submitted by direct transmission after 5:30 p.m. receive the next day’s date as the official date of filing.

Under the Final Rule, Foreign Filers will be required to translate into English all of their documents filed or submitted electronically. Moreover, in order to keep the electronic and paper filing requirements consistent, the Final Rule also provides that paper filers will no longer have the ability to file an English summary of foreign documents.

In response to numerous comments received by the SEC, a limited English Summary option was adopted for Division of Corporation Finance filings and submissions, as well as for the documents filed as an exhibit or attachment to these filings and submissions. The Final Rule provides guidance on which exhibits under this option may be summarized and also narrows its scope by excluding a number of documents and contracts considered of material importance.⁷

Regarding reports under Form 6-K, in response to a number of comments received by the SEC, the Form 6-K General Instruction D will be amended to limit the requirement of a full English translation to certain documents only.⁸ The same rule will apply whether documents are submitted electronically or in paper.

- ***Elimination of the paper filing requirement for first-time EDGAR filers***

First-time EDGAR filers, whether domestic or foreign, will no longer have to submit a paper copy of their EDGAR filing to the SEC.

Current Rules Not Affected by the Final Rule

Paper filing remains available to Foreign Filers in specific cases:

- ***Non-Public submissions by first-time Foreign Filers***

The SEC currently permits first-time Foreign Filers, upon request, to submit paper drafts of their initial Securities Act or Exchange Act registration statements for staff review on a non-public basis. The Final Rule will not affect the SEC confidential submission policy. Confidential submissions under the policy must be in paper format. When a foreign issuer later publicly files its registration statement under the Securities Act or the Exchange Act, the public filing must be in electronic format. At that time, the SEC also will require a foreign issuer to file in electronic

⁷ The Final Rule provides for a list of documents that may not be summarized (i.e., a full translation is required), including the articles of incorporation, the voting agreements, and the audited annual and interim consolidated financial information. The Final Rule also provides for the exclusion from the option of two categories of material contract exhibits (i) contracts upon which a filer's business is substantially dependent, and (ii) related party contracts.

⁸ Those documents are (i) press releases, (ii) communications and other documents distributed directly or indirectly to security holders, and (iii) documents disclosing annual audited or interim consolidated financial information.

format as correspondence all letters in response to staff comments on the draft materials and other related correspondence.

- ***Hardship Exemptions***

The Final Rule does not alter the provisions governing the availability of hardship exemptions under Regulation S-T. Therefore, a Foreign Filer that meets the requirements of Section 201 or 202 of Regulation S-T may obtain a temporary or continuing hardship exemption from the EDGAR filing requirements. The SEC has indicated yet again in the Final Rule that hardship exemptions are granted “infrequently.”

- ***Exchange Act Rule 12g3-2(b)***

Foreign private issuers remain subject to the requirements of submitting in paper their applications and supporting documents for the exemption pursuant to Exchange Act Rule 12g3-2(b).⁹

- ***Confidential Treatment***

Pursuant to Rule 101(c)(1)(i) of Regulation S-T, confidential treatment requests and the information with respect to which confidential treatment is requested shall not be submitted in electronic format. The SEC reviews whether it is appropriate to treat certain information confidentially without disclosing it to the public. This rule is not affected by the Final Rule.

Transition Period

The Final Rule will apply to any securities documents filed or submitted on or after November 4, 2002 (the “**Effective Date**”). Registrants that have filed their registration statements in paper before the Effective Date, will be permitted to continue their filing and complete it in paper through December 31, 2002. If the registration statement becomes effective before then, the filer will also be able to file its prospectus in paper. Foreign Filers are, however, encouraged by the SEC to start to file on EDGAR voluntarily during the transition period.

* * * * *

If you have any questions concerning the above or need any further information, please contact Serge Benchetrit (212) 728-8798 in our New York office, or Gregory B. Astrachan in our London office (44) 207 696 5442.

⁹ This rule provides for an exemption from reporting obligations of Section 12(g) of the Exchange Act for certain foreign private issuers.

Willkie Farr & Gallagher is headquartered at 787 Seventh Avenue, New York, New York 10019. Our telephone number is (212) 728-8000, and our facsimile number is (212) 728-8111. Our website is located @ www.willkie.com.

May 29, 2002