

**SEC ADOPTS RULES ELIMINATING U.S. GAAP RECONCILIATIONS FOR
FOREIGN PRIVATE ISSUERS USING IFRS**

On December 21, 2007, the Securities and Exchange Commission (the “SEC”) adopted amendments to its existing rules that will now allow foreign private issuers¹ that file annual reports on Form 20-F to include in their SEC filings financial statements that are prepared in accordance with International Financial Reporting Standards (“IFRS”) as issued by the International Accounting Standards Board (the “IASB”) without reconciling such statements to generally accepted accounting principles as used in the United States (“U.S. GAAP”).² To implement this change, the SEC adopted amendments to Form 20-F (which contains disclosure items applicable to most foreign private issuer filings), certain conforming changes to Regulation S-X (the SEC rules governing the form and content of financial statements), and other conforming amendments to SEC regulations, rules and forms.

I. Background

In an effort to make the U.S. capital markets more accessible to non-U.S. issuers and encourage the use of a single set of high-quality globally accepted accounting standards by issuers, the SEC has in the past adopted rules and made certain accommodations to foreign private issuers that prepare financial statements in accordance with IFRS.³ Under the SEC rules and regulations currently in effect (the “current SEC rules”), a foreign private issuer must include in its SEC filings financial statements that are prepared in accordance with either U.S. GAAP or the foreign private issuer’s home-country generally accepted accounting principles. If a foreign private issuer chooses the latter of the two options, the foreign private issuer must include in its financial statements a reconciliation of its home-country financial statements to U.S. GAAP. The reconciliation to U.S. GAAP must include a narrative description that identifies and quantifies the material differences between the requirements of U.S. GAAP and Regulation S-X and the requirements of the foreign private issuer’s home-country generally accepted accounting principles.

¹ A foreign private issuer is any foreign issuer other than a foreign government except an issuer that meets the following conditions: (1) more than 50 percent of the issuer’s outstanding voting securities are directly or indirectly held of record by residents of the United States; and (2) any of the following: (i) the majority of the executive officers or directors are United States citizens or residents; (ii) more than 50 percent of the assets of the issuer are located in the United States; or (iii) the business of the issuer is administered principally in the United States. A foreign issuer is any issuer that is a foreign government, a national of any foreign country, or a corporation or other organization incorporated or organized under the laws of any foreign country.

² SEC Release No. 34-57026 (December 21, 2007).

³ In 2005, for example, the SEC adopted an accommodation to allow all foreign private issuers preparing their financial statements in accordance with IFRS for the first time to provide two years rather than three years of financial statements in their SEC filings.

For many foreign private issuers, the U.S. GAAP reconciliation process is a time-consuming and expensive process. Accordingly, the new rules adopted by the SEC (the “new SEC rules”) provide welcome relief not only to foreign private issuers with securities registered under the U.S. Securities Exchange Act of 1934, as amended (the “Exchange Act”), but also to issuers considering a U.S. listing or registration for the first time. For foreign issuers considering an initial public offering on a U.S. stock exchange, the new rules will decrease, in some cases significantly, the burden associated with the preparation of the required SEC filings. In addition, foreign private issuers that are not subject to the reporting requirements under the Exchange Act also benefit as the new SEC rules facilitate the use of an exemption from the registration requirements under the Securities Act of 1933, as amended (the “Securities Act”), for offers and sales made pursuant to certain compensatory benefit plans (*e.g.*, stock option plans made available to U.S. employees) by allowing foreign private issuers to rely on the exemption without the need to provide U.S. GAAP-reconciled financial statements to the plan participants.⁴

II. Eligibility and Implementation

Under the new SEC rules, which will come into effect on March 4, 2008, any foreign private issuer that files on Form 20-F and prepares its financial statements in accordance with IFRS as issued by the IASB will no longer be required to include a reconciliation to U.S. GAAP in financial statements filed with the SEC so long as the following conditions are satisfied:

- the foreign private issuer must state “unreservedly and explicitly in an appropriate note to the financial statements, that its financial statements are in compliance with IFRS as issued by the IASB,” and
- the foreign private issuer’s independent auditor must opine in its audit report on whether the foreign private issuer’s financial statements comply with IFRS as issued by the IASB.⁵

A foreign private issuer will, however, be required to include a reconciliation to U.S. GAAP in its financial statements filed with the SEC if its financial statements include any deviation from IFRS as issued by the IASB, if it fails to unreservedly and explicitly state that its financial statements are in compliance with IFRS as issued by the IASB, if its independent auditor fails to opine that its financial statements are in compliance with IFRS as issued by the IASB or if the independent auditor’s report includes any qualification related to such foreign private issuer’s compliance with IFRS as issued by the IASB. If, however, a foreign private issuer’s financial statements include a jurisdictional or other variation of IFRS, the foreign private issuer may still

⁴ See the discussion in Section III below regarding Rule 701. Rule 701, promulgated under the Securities Act, provides an exemption from the registration requirements under the Securities Act for offers and sales made pursuant to certain compensatory benefit plans, provided that the issuer does not have a periodic reporting obligation under the Exchange Act.

⁵ The independent auditor’s report may include this language in addition to any opinion relating to compliance with the accounting standards issued by the foreign private issuer’s home country.

rely on the new SEC rules and omit the U.S. GAAP reconciliation if the foreign private issuer unreservedly and explicitly states that it is in compliance with both IFRS as issued by the IASB and the jurisdictional variation of IFRS, and its independent auditor's opinion states that the financial statements comply with both IFRS as issued by the IASB and the jurisdictional variation.

The new SEC rules include a single exception to the strict requirement that a foreign private issuer's financial statements be prepared in accordance with IFRS as issued by the IASB. This exception is available only to certain foreign private issuers whose securities are listed in the European Union (the "EU"), which issuers are required to prepare financial statements in accordance with IFRS as adopted by the EU. IFRS as adopted by the EU offer greater flexibility with respect to hedge accounting for certain financial instruments as compared with IFRS as issued by the IASB. In particular, IFRS as adopted by the EU permit financial institutions to voluntarily "carve out" the provisions of International Accounting Standard 39, "Financial Statements: Recognition and Measurement" (the "IAS 39 Carve-Out"), from their financial statements, the result of which, without relief from the SEC, would be to require these foreign private issuers to include a U.S. GAAP reconciliation in their financial statements filed with the SEC. Specifically, the SEC has indicated in the new SEC rules that, for the first two financial years ending after November 15, 2007, it will accept financial statements that do not include a U.S. GAAP reconciliation in SEC filings by existing foreign private issuers that are incorporated in a Member State of the EU, provided that such registrants have utilized the IAS 39 Carve-Out in financial statements previously filed with the SEC and such financial statements otherwise comply with IFRS as issued by the IASB and contain a reconciliation to IFRS as issued by the IASB.

Foreign private issuers that intend to rely on the new SEC rules will be able to include financial statements prepared in accordance with IFRS as issued by the IASB without the need to include a reconciliation to U.S. GAAP for financial years ending after November 15, 2007, and for interim periods within those years, that are included in filings made with the SEC after the effective date of the new SEC rules.

III. Specific Applications and Related Issues Under the New SEC Rules

1. Interim Periods

Under the new SEC rules, a foreign private issuer that is eligible to omit the U.S. GAAP reconciliation from its audited financial statements may also omit the U.S. GAAP reconciliation from any required unaudited interim period financial statements.

a. Interim Period Financial Statements

Under current SEC rules, if a foreign private issuer files a registration statement on Form 20-F more than nine months after the end of the foreign private issuer's last audited financial year, the Form 20-F must include consolidated interim period financial statements for at least the first six months of the financial year and the comparative period for the prior financial year, along with a

reconciliation to U.S. GAAP. Under the new SEC rules, a foreign private issuer will no longer be required to include the reconciliation to U.S. GAAP with respect to its interim period financial statements if the basis of accounting used in the audited financial statements and the published interim financial statements is IFRS as issued by the IASB. However, under the new SEC rules, an eligible foreign private issuer may omit the U.S. GAAP reconciliation from its unaudited interim period financial statements only if the audited annual financial statements included or incorporated by reference for all required periods are prepared in accordance with IFRS as issued by the IASB. If the audited financial statements included or incorporated by reference have not been prepared in accordance with IFRS as issued by the IASB, then the foreign private issuer will be required to amend its prior SEC filings to include audited annual financial statements prepared in accordance with IFRS as issued by the IASB in order to omit the U.S. GAAP reconciliation from required interim period financial statements.

Furthermore, under the new SEC rules, a foreign private issuer omitting the U.S. GAAP reconciliation of interim period financial statements will no longer be required to comply with Article 10 of Regulation S-X with regard to the minimum content of interim period financial statements, but instead may comply with International Accounting Standard 34, “Interim Financial Reporting,” which sets forth the minimum content of financial statements for interim periods, as well as the principles for recognition and measurement in interim period financial statements.

b. Interim Period Financial Information

Under current SEC rules, if a foreign private issuer files a registration statement on Form 20-F less than nine months after the end of the foreign private issuer’s last audited financial year but has otherwise published interim financial period information, the registration statement on Form 20-F must include such interim period financial information and a description of any variations between the accounting principles used to prepare such statements and U.S. GAAP, and a quantification of any material variations that have not been quantified in the annual financial statements. Under the new SEC rules, a foreign private issuer will no longer be required to include the reconciliation to U.S. GAAP with respect to its interim financial information if the basis of accounting used in the audited financial statements and the published interim financial statements is IFRS as issued by the IASB.

2. *First-Time Adopters of IFRS*

Under current SEC rules, a foreign private issuer in its first year of reporting under IFRS as issued by the IASB may file two years rather than three years of audited statements of income, changes in shareholders’ equity, and cash flows prepared in accordance with IFRS as issued by the IASB. This accommodation was set to expire on the first financial year starting on or after January 1, 2007. The new SEC rules will apply equally to foreign private issuers that are able to rely on this accommodation to first-time adopters of IFRS. Further, the SEC extended this accommodation indefinitely in order to provide an ongoing incentive for foreign private issuers to adopt IFRS as issued by the IASB.

3. *Financial Statements of Another Entity/Pro Forma Financial Statements*

a. *Financial Statements of Another Entity*

Under current SEC rules, in certain instances, issuers, including foreign private issuers, must include financial statements of another entity in their SEC filings, particularly in the case of certain unconsolidated majority-owned subsidiaries or a target company in a business combination. More specifically, separate audited financial statements must be included in SEC filings if these entities are “significant” to the particular issuer, which financial statement requirements vary depending on the level of “significance.”⁶ To ascertain whether another entity is “significant” to an issuer, an issuer must compare the financial statements of such entity to the issuer’s financial statements.

The new SEC rules clarify that a foreign private issuer that prepares its financial statements in accordance with IFRS as issued by the IASB will perform the “significance” tests using IFRS as issued by the IASB, regardless of the basis of accounting used by the other entity. If the “significance” thresholds are met, the foreign private issuer must then provide the requisite separate audited financial statements of the subject entity. Under current SEC rules, the historical financial statement requirements for a “significant” foreign acquired business or investee are governed by the status of such entity. Under the new SEC rules, if such “significant” foreign acquired business or investee’s financial statements are prepared in accordance with IFRS as issued by the IASB, such financial statements will not be required to include a U.S. GAAP reconciliation. As a result, both foreign private issuers and U.S. public companies that acquire “significant” foreign businesses or have a “significant” investee may, under the new SEC rules, include the company’s financial statements prepared in accordance with either (1) IFRS as issued by the IASB without a U.S. GAAP reconciliation, (2) U.S. GAAP, or (3) another comprehensive basis of accounting reconciled to U.S. GAAP.

Additionally, under current SEC rules, an issuer that includes financial statements for an acquired foreign entity may omit the U.S. GAAP reconciliation for that entity, regardless of the basis under which the financial statements of such entity are prepared, if the “significance” of the entity does not exceed 30% of the issuer. Under the new SEC rules, Form 20-F will be revised to clarify that if the financial statements of an acquired foreign entity filed with the SEC are prepared in accordance with IFRS as issued by the IASB, such financial statements may omit the U.S. GAAP reconciliation regardless of the “significance” of the acquired entity.

b. *Pro Forma Financial Statements*

In connection with a business combination, under current SEC rules, issuers, including foreign private issuers, are required to prepare unaudited pro forma financial information to illustrate the

⁶ An entity is deemed to be “significant” to an issuer if (i) the issuer’s investment in the entity exceeds 20 percent of the issuer’s total assets, (ii) the entity’s income exceeds 20 percent of the issuer’s corresponding income, or (iii) in the case of a business combination, the entity’s total assets exceed 20 percent of the issuer’s total assets.

effect of a particular transaction, including a “significant” recent or probable business combination, as if such transaction had occurred at the beginning of the issuer’s financial year. Such pro forma financial information must be presented in accordance with the same basis of accounting used by the issuer, rather than that of the target company. Under the new SEC rules, a foreign private issuer using IFRS as issued by the IASB must prepare pro forma financial information by presenting its IFRS results and converting the financial statements of the acquired (or to be acquired) business into IFRS as issued by the IASB, but will not be required to include a U.S. GAAP reconciliation. U.S. issuers acquiring a foreign company must continue to prepare pro forma financial information by presenting their U.S. GAAP results and converting the financial statements of the acquired (or to be acquired) business into U.S. GAAP.

4. *Rule 701*

Rule 701 promulgated under the Securities Act provides an exemption from the registration requirements under the Securities Act for offers and sales made pursuant to certain compensatory benefit plans, provided that the issuer does not have a periodic reporting obligation under the Exchange Act.⁷ Under Rule 701, if such an issuer sells more than \$5 million in qualifying securities over a 12-month period, the issuer must provide each investor with certain information, including financial statements. Under current SEC rules, in order to rely on Rule 701, foreign private issuers are required to provide financial statements together with a U.S. GAAP reconciliation unless the foreign private issuer’s financial statements are already prepared in accordance with U.S. GAAP. For some issuers, this has presented a significant impediment to offering share-based compensation, such as stock options, to their U.S. employees, as the burden associated with the preparation of the U.S. GAAP reconciliation can outweigh the benefits of share-based incentive plans. However, under the new SEC rules, Rule 701 will be revised to clarify that if a foreign private issuer conducts an offering pursuant to Rule 701 and prepares its financial statements in accordance with IFRS as issued by the IASB, such financial statements will no longer need to include a reconciliation to U.S. GAAP.

5. *IFRS Treatment of Certain Areas*

While IFRS as issued by the IASB is considered a comprehensive body of accounting standards that foreign private issuers may use as a basis for preparing their financial statements for purposes of SEC filings, there are several areas in which the IASB has not yet developed standards or in which IFRS allow different options, including:

- common control mergers, recapitalization transactions, reorganizations, acquisitions of minority shares not resulting in a change of control and similar transactions, as to which there is an absence of specific standards or interpretations on accounting treatment;

⁷ Rule 701 is also available to foreign private issuers that have terminated their SEC reporting obligations (i.e., “deregistered”). Thus, a foreign private issuer that has deregistered in the U.S. may rely on Rule 701 to offer share-based compensation to its U.S. employees.

- income statements, as to which there is an absence of specific conventions as to the form and content (although the IASB and the Financial Accounting Standards Board are expected to publish a discussion document in 2008 addressing this issue); and
- insurance contracts and extractive activities, as to which differing accounting treatment exists.

In areas that are not addressed by IFRS, the SEC has indicated that it expects companies “to provide full and transparent disclosure in the financial statements and operating and financial review and prospects disclosure about the accounting policies selected and the effects of those policies on the IFRS financial statements.” In this regard, the SEC noted that, while a foreign private issuer will not be required to reconcile its IFRS financial statements to U.S. GAAP, it may look to SEC resources such as rules and regulations, as well as to the SEC’s Accounting Series Releases, Financial Reporting Releases, Staff Accounting Bulletins and, if applicable, various SEC Industry Guides, for specific guidance and must continue to follow any SEC guidance that relates to auditing issues.⁸ Additionally, foreign private issuers must continue to have audits conducted in accordance with the standards of the U.S. Public Company Accounting Oversight Board regardless of the comprehensive basis of accounting they use to prepare their financial statements.

6. *Market Risk Disclosure and the Safe-Harbor Provisions*

Numerous foreign private issuers that prepare financial statements in accordance with IFRS have voiced concerns with respect to the safe harbor for forward-looking statements provided by Section 27A of the Securities Act and Section 21E of the Exchange Act, which exclude from the safe harbor information “included in a financial statement prepared in accordance with generally accepted accounting principles.” As such, forward-looking market risk disclosure required by IFRS 7, “Financial Instruments: Disclosure,” which appears in the footnotes to audited IFRS financial statements, is not covered by these safe-harbor provisions, while at the same time market risk disclosure required under Item 11 of Form 20-F is not included in a foreign private issuer’s financial statements but is otherwise subject to these safe-harbor provisions. While the SEC has recognized this issue, it declined to address it, given that the issue currently exists even with a U.S. GAAP reconciliation and affects foreign private issuers generally, but stated that it will continue to consider the issue.

* * * * *

⁸ Similarly, International Accounting Standard 8, “Accounting Policies, Changes in Accounting Estimates and Errors,” requires that in the case where an IFRS standard does not exist, an issuer must use its judgment to develop an accounting policy that enables an issuer to provide financial information that “is relevant to the needs of users” and “financial statements [that] reliably reflect the economic substance of transactions.” In this regard, an issuer must consider other guidance set forth in IFRS and, if no comparable guidance is available, the issuer must then consider the definitions, criteria and concepts in the IFRS conceptual framework. Under International Accounting Standard 8, an issuer may also consider the accounting pronouncements of other standard-setting bodies so long as such guidance does not conflict with IFRS’ underlying concepts.

If you have any questions about the new SEC rules related to the elimination of the U.S. GAAP reconciliation in financial statements filed with the SEC for certain foreign private issuers, please contact Gregory B. Astrachan (212-728-8608, gastrachan@willkie.com), Steven J. Gartner (212-728-8222, sgartner@willkie.com), William H. Gump (212-728-8285, wgump@willkie.com), Jon J. Lyman (+44 20 7696 5440, jlyman@willkie.com), or the attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our website is located at www.willkie.com.

January 14, 2008

Copyright © 2008 by Willkie Farr & Gallagher LLP.

All Rights Reserved. This memorandum may not be reproduced or disseminated in any form without the express permission of Willkie Farr & Gallagher LLP. This memorandum is provided for news and information purposes only and does not constitute legal advice or an invitation to an attorney-client relationship. While every effort has been made to ensure the accuracy of the information contained herein, Willkie Farr & Gallagher LLP does not guarantee such accuracy and cannot be held liable for any errors in or any reliance upon this information. Under New York's Code of Professional Responsibility, this material may constitute attorney advertising. Prior results do not guarantee a similar outcome.