SEC ADOPTS AMENDMENTS TO RULE 12G3-2(B) EXEMPTION AND ENHANCEMENTS TO FOREIGN PRIVATE ISSUER REPORTING OBLIGATIONS

The United States Securities and Exchange Commission (the "SEC") recently adopted amendments to certain of its rules applicable to foreign private issuers.[1] The amendments, which were adopted substantially as previously proposed,[2] provide greater flexibility to foreign private issuers by eliminating unnecessary barriers to the U.S. capital markets, while at the same time enhancing certain disclosure requirements applicable to foreign private issuers.

In the Rule 12g3-2(b) Release,[3] the SEC revised the requirements for qualification under Rule 12g3-2(b) of the U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act"), which exempts certain foreign private issuers from the registration and reporting requirements under the Exchange Act, bringing these requirements in line with similar standards under recent amendments to foreign private issuer deregistration rules under the Exchange Act. The amendments to Rule 12g3-2(b) replace the existing Rule 12g3-2(b) eligibility requirements, which are discussed in greater detail below.

In the Foreign Private Issuer Release,[4] the SEC adopted amendments to:

- permit foreign issuers to assess their qualification as such on an *annual* basis as of the last business day of their second fiscal quarter, rather than on a continuous basis, as currently required;
- reduce the timeframe in which a foreign private issuer is required to file with the SEC its annual report on Form 20-F from six months after its fiscal year end to four months after its fiscal year end, after a three-year transition period;
- clarify that when a foreign private issuer becomes eligible to deregister under recently adopted amendments,[5] it may, in certain instances, be subject to the SEC's "going private" rules; and

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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.

2 SEC Release No. 34-57350 (February 19, 2008) and SEC Release No. 34-57409 (February 29, 2008) (together, the "Proposed Amendments").

3 SEC Release No. 34-58465 (September 5, 2008) (the "Rule 12g3-2(b) Release").

4 SEC Release No. 34-58620 (September 23, 2008) (the "Foreign Private Issuer Release").

5 SEC Release No. 34-55540 (March 27, 2007).

- expand the required disclosures in annual reports on Form 20-F to include: (i) changes in, and disagreements with, a foreign private issuer's certifying accountant; (ii) fees and other expenses paid by a holder of a foreign private issuer's American Depository Receipts ("ADRs"), as well as any payments made by depositaries to the foreign private issuer whose securities underlie the ADRs; (iii) in the case of a listed foreign private issuer, the significant differences in corporate governance standards of such issuer as compared to a domestic issuer listed on the same exchange; and (iv) enhanced financial statement disclosures, such as segment data and the full information required by Item 18 of Form 20-F, items they were previously permitted to omit.

I. The Rule 12g3-2(b) Release

An issuer can become subject to the periodic reporting and other obligations under the Exchange Act as follows:

- *Section 12(b)*. By listing a class of equity or debt securities on a U.S. national securities exchange and registering this class of securities under the Exchange Act;
- *Section 12(g)*. By filing an Exchange Act registration statement either voluntarily or as required because such issuer had 500 or more record holders of its securities and such issuer's total assets exceeded $10 million on the last day of the issuer's most recently completed fiscal year; or
- *Section 15(d)*. By filing with the SEC a registration statement under the Securities Act of 1933, as amended (the "Securities Act"), that has gone effective, in connection with a public offering made in the U.S.

1. *Exchange Act Rule 12g3-2 Exemptions*

Under Exchange Act Rule 12g3-2, the SEC established two exemptions from the registration requirements of Section 12(g) of the Exchange Act for non-reporting foreign private issuers (i.e., those foreign private issuers that do not otherwise have reporting obligations pursuant to Section 13(a) or Section 15(d) of the Exchange Act): Exchange Act Rule 12g3-2(a) and Exchange Act Rule 12g3-2(b). These rules generally exempt non-reporting foreign private issuers from registration under Section 12(g) of the Exchange Act (as described above) and the related SEC reporting obligations.

a. *Exchange Act Rule 12g3-2(a)*

A foreign private issuer that does not otherwise have a reporting obligation pursuant to Section 13(a) or Section 15(d) of the Exchange Act may rely on Exchange Act Rule 12g3-2(a), which exempts such foreign private issuer from registration under Section 12(g) of the Exchange Act and the related reporting obligations if such issuer's equity securities are held of record by less than 300 residents in the United States, despite the fact that it may have 500 or more record

holders on a worldwide basis as of the end of its most recently completed fiscal year. Currently, a foreign private issuer that relies on this exemption must assess the number of its U.S. record holders as of the end of each fiscal year to determine whether it is still eligible to rely on this exemption. Over the years, it has become increasingly difficult for foreign private issuers to meet this standard due to increased U.S. investor interest in securities of foreign issuers, as well as the difficulties associated with calculating the number of U.S. shareholders.

b. *Exchange Act Rule 12g3-2(b) - Pre-Amendment*

Before the recent amendments, Exchange Act Rule 12g3-2(b) exempted a foreign private issuer from registration under Section 12(g) of the Exchange Act and the related reporting obligations without regard to the number of its U.S. holders or the need to annually assess the number of its U.S. holders if such issuer satisfied certain conditions, including that the issuer:

- made an initial paper filing with the SEC that included (i) a list of its non-U.S. disclosure documents,[6] (ii) copies of all *material* non-U.S. disclosure[7] documents published since the beginning of the issuer's most recently completed fiscal year, and (iii) a list disclosing the number of U.S. holders of its equity securities and the percentage held by them, as well as a brief description of how its U.S. holders acquired such securities;
- had not had, during the prior 18 months, a class of securities registered under Section 12 of the Exchange Act or a reporting obligation under Section 15(d) of the Exchange Act; and
- continued to furnish to the SEC its non-U.S. disclosure documents in English in paper format once the issuer had obtained the Rule 12g3-2(b) exemption.[8]

Once a foreign private issuer has obtained the Rule 12g3-2(b) exemption, its equity securities may be traded on a limited basis on the over-the-counter market in the United States through an

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6 "Non-U.S. disclosure documents" refers to information the issuer has made public or is required to make public under the laws of its jurisdiction of organization, pursuant to its non-U.S. stock exchange filing requirements, or that it has distributed or is required to distribute to its security holders.

7 "Material non-U.S. disclosure documents" includes those non-U.S. disclosure documents that are material to an investment decision, such as an issuer's financial condition or results of operations; changes in its business; acquisitions or dispositions of assets; issuance, redemption or acquisition of securities; changes in management or control; the granting of options or the payment of other compensation to directors or officers; and transactions with directors, officers or principal security holders.

8 In addition to the conditions discussed above, prior to the effectiveness of the amendments, a foreign private issuer that has issued securities in a transaction to acquire, by merger, consolidation, exchange of securities or acquisition of assets, another issuer that has securities registered under Section 12 of the Exchange Act or a reporting obligation under Section 15(d) of the Exchange Act, known as a "successor registrant," generally could not avail itself of the Rule 12g3-2(b) exemption (other than pursuant to a deregistration as discussed herein).

unlisted ADR facility, which may either be sponsored by the issuer or implemented on an "unsponsored" basis by a depository bank without the participation of the issuer.[9]

In March 2007, the SEC adopted amendments to Rule 12g3-2 that permit a foreign private issuer that deregisters and terminates its Exchange Act reporting obligations pursuant to the SEC's newly adopted Rule 12h-6[10] to rely on the Rule 12g3-2(b) exemption immediately upon the effectiveness of such issuer's deregistration, without regard to the 18-month waiting period discussed above. Pursuant to these amendments, a foreign private issuer that deregisters under Rule 12h-6 is required to publish in English its non-U.S. disclosure documents on an ongoing basis on its website or through an electronic information system generally available to the public in its primary trading market, rather than to submit such documents to the SEC in paper format, as required for other foreign private issuers relying on the Rule 12g3-2(b) exemption.

2. *Amendments to Rule 12g3-2(b) Exemption*

Under the SEC's amendments to Rule 12g3-2(b), a non-reporting foreign private issuer is eligible to claim the Rule 12g3-2(b) exemption without submitting an application to the SEC, subject to the following conditions:

- such issuer is not required to file or furnish periodic reports pursuant to Exchange Act Section 13(a) or Exchange Act Section 15(d);
- such issuer currently maintains a listing of the subject class of securities on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another jurisdiction, constitutes the primary trading market[11] for those securities;[12] and

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[9] Foreign private issuers that maintain a listed ADR facility on a national securities exchange may not avail themselves of the Rule 12g3-2(b) exemption.

[10] A foreign private issuer may deregister and terminate its Exchange Act reporting obligations regarding a class of equity securities pursuant to Rule 12h-6 if, among other things, the U.S. average daily trading volume for the subject class of securities is five percent or less than the average daily trading volume on a worldwide basis.

[11] The amendments define "primary trading market" to mean that at least 55 percent of the trading in the subject class of securities on a worldwide basis must take place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year. A foreign private issuer may aggregate the trading of the subject class of securities in two foreign jurisdictions for purposes of determining the issuer's primary trading market, provided that the trading for the foreign private issuer's securities in at least one of the two foreign jurisdictions is larger than the U.S. trading market for such securities.

[12] The Proposed Amendments also included a separate condition that the average daily trading volume of the subject class of securities in the United States for the foreign private issuer's most recently completed fiscal year has been no greater than 20 percent of the average daily trading volume of that class of securities on a worldwide basis for the same period. In response to many comments received by the SEC opposing this condition and because many of the foreign private issuers currently claiming the Rule 12g3-2(b) exemption currently have U.S. trading volumes below this 20 percent threshold, the SEC decided to omit this condition from the adopted version of the amendments.

- unless such issuer is claiming the exemption upon or following its recent Exchange Act deregistration, the issuer has published in English certain specified non-U.S. disclosure documents required to be made public from the first day of its most recently completed fiscal year, on its Internet website or through an electronic information delivery system generally available to the public in its primary trading market.

Such information required to be published in English includes information that such issuer (i) has made public or been required to make public pursuant to the laws of its home jurisdiction, (ii) has filed or been required to file with the principal stock exchange in the primary trading market on which its securities are traded and that has been made public by that exchange, and (iii) has distributed or been required to distribute to its security holders.[13] Any information required to be published in English must be published promptly after such information has been made public. The SEC noted that consistent with current practice, what constitutes promptly depends on both the type of document and the amount of time required to prepare an English translation.[14]

To claim or maintain the Rule 12g3-2(b) exemption, an issuer must also publish, at a minimum, English translations of

- its annual report, including or accompanied by annual financial statements;
- interim reports that include financial statements;
- press releases; and
- all other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.[15]

Any foreign private issuer that meets the conditions set forth above is immediately eligible for the exemption from Exchange Act registration and reporting without the need to apply to, or otherwise notify, the SEC. As a result, a foreign private issuer that has in excess of 300 U.S. holders will maintain the Rule 12g3-2(b) exemption unless any of the requirements of the exemption are no longer fulfilled.

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[13] As under the rule in effect prior to the adoption of the amendment, an issuer is required to publish only information that is material to an investment decision regarding the subject securities, such as results of operations or financial condition, changes in business, the issuance, redemption or acquisition of securities, changes in management or control, the granting of options or the payment of other remuneration to directors or officers, and transactions with directors, officers or principal security holders.

[14] An issuer must typically publish electronically or submit in paper a copy of a material press release on or around the same business day of its original publication.

[15] The SEC also stated that if, as a registrant, an issuer is permitted to submit an English summary for a non-U.S. disclosure document under cover of Form 6-K or pursuant to Exchange Act Rule 12b-12(d)(3), then it may also submit an English summary instead of an English translation when claiming or maintaining the Rule 12g3-2(b) exemption.

The amendments to Rule 12g3-2(b) also include a transition period that provides limited relief for a foreign private issuer that was exempt under the pre-amendment Rule 12g3-2(b) but would otherwise lose the exemption under the amendment to Rule 12g3-2(b), such as if it no longer has a foreign listing or cannot meet the primary trading market definition. Under the amendments, such issuer has until three years after the effective date of the rules to prepare the necessary U.S. GAAP financial statements and to complete the Exchange Act registration process. During such transition period, such issuer may continue to rely on the Rule 12g3-2(b) exemption so long as it complies with Rule 12g3-2(b)'s other conditions, including that it continues to electronically publish the required non-U.S. disclosure documents. Foreign private issuers that maintain the Rule 12g3-2(b) exemption should therefore assess whether they will be eligible to maintain such exemption under the amended Rule 12g3-2(b).

The Rule 12g3-2(b) Release provides for a three-month transition period during which foreign private issuers may continue to submit paper applications for the Rule 12g3-2(b) exemption, after which period the SEC will no longer process any paper Rule 12g3-2(b) submissions.

Importantly, the amendments to Rule 12g3-2(b) should have the helpful effect of eliminating the significant differences between the eligibility and ongoing disclosure requirements applicable to a foreign private issuer that maintains the Rule 12g3-2(b) exemption after it deregisters from the Exchange Act under Rule 12h-6 and those applicable to a previously unregistered foreign private issuer that wished to rely on the Rule 12g3-2(b) exemption as in effect prior to the amendments.[16]

3. *Elimination of Certain Prohibitions and Exemptions to Rule 12g3-2(b)*

The amendments eliminate the provision preventing an issuer from obtaining an exemption under Rule 12g3-2(b) if, following the issuance of shares to acquire another issuer by merger, consolidation, exchange of securities or acquisition of assets, it has succeeded to the Exchange Act reporting obligations of such other issuer. This change was made to bring the Rule 12g3-2(b) exemption in line with other amendments made by the SEC in March 2007 permitting a successor issuer to terminate its Exchange Act reporting obligations if such issuer meets the substantive requirements of Rule 12h-6 and permitting a successor issuer to claim the Rule 12g3-2(b) exemption upon the effectiveness of its termination of Exchange Act registration and reporting under Rule 12h-6.

[16] For example, prior to the amendments, (i) a foreign private issuer that deregistered under the Exchange Act pursuant to Rule 12h-6 could automatically avail itself of the Rule 12g3-2(b) exemption, while a foreign private issuer that wished to rely on the Rule 12g3-2(b) exemption had to submit a paper application to the SEC, (ii) a foreign private issuer that deregistered under the Exchange Act pursuant to Rule 12h-6 was not subject to the 18-month waiting period discussed above, while a foreign private issuer that wished to rely on the Rule 12g3-2(b) exemption was still subject to the 18-month waiting period, and (iii) a foreign private issuer that deregistered under the Exchange Act pursuant to Rule 12h-6 could publish its material non-U.S. disclosure documents electronically, while a foreign private issuer that wished to rely on the Rule 12g3-2(b) exemption needed to continue to furnish its non-U.S. disclosure documents to the SEC in paper format.

The amendments to Rule 12g3-2(b) also eliminate the ability of a Canadian issuer that has filed with the SEC certain registration statements under the Multijurisdictional Disclosure System ("MJDS") to maintain the Rule 12g3-2(b) exemption for a class of equity securities while such issuer has Exchange Act reporting obligations for its debt securities.

Additionally, the amendments to Rule 12g3-2(b) eliminate the provision generally prohibiting a foreign private issuer from claiming the Rule 12g3-2(b) exemption if such issuer has securities or ADRs quoted on an automated inter-dealer quotation system.

4. *Revisions to Form F-6*

A Form F-6 is the registration statement used to register ADRs under the Securities Act. Prior to the effectiveness of the amendments, the rules required the ADR registrant to state that the issuer of the underlying securities is either an Exchange Act reporting company or furnishes public reports and other documents to the SEC pursuant to Rule 12g3-2(b). Since the amendments to Rule 12g3-2(b) discussed above no longer require that documents be submitted to the SEC, the SEC has revised Form F-6 accordingly. In the case of an issuer that is not an Exchange Act reporting company, a registrant may represent that the issuer publishes in English the information required to maintain the Rule 12g3-2(b) exemption on its Internet website or through an electronic information delivery system generally available to the public in its primary trading market. The registrant is also required to disclose the issuer's address of its Internet website or electronic information delivery system. In the case of an unsponsored ADR facility, a registrant filing a Form F-6 may base its representation that the issuer publishes the required information in English upon the registrant's reasonable, good-faith belief after exercising reasonable due diligence.[17]

In this regard, since the amendments to Rule 12g3-2(b) went into effect on October 10, 2008, certain depositories have initiated "unsponsored" ADR facilities, which are made easier by the amendments to Form F-6 and Rule 12g3-2(b), without consent from or notice to the applicable foreign private issuer. Foreign private issuers may want to look into sponsoring an ADR facility in order to ensure a level of control with respect to the ADR facility.

5. *Amendments to Exchange Act Rule 15c2-11*

Exchange Act Rule 15c2-11 prohibits a broker-dealer from publishing (or submitting to publish) quotations for over-the-counter securities unless it has obtained and reviewed current information about the issuer (such as the information required under Rule 12g3-2(b)) and makes the information reasonably available upon request to any person expressing interest in a proposed transaction involving the security with such broker-dealer. In order to conform Rule 15c2-11 to the amendments discussed above, Rule 15c2-11 now states that a broker-dealer must have available the information that, since the beginning of its last fiscal year, the issuer has

[17] In the Proposed Amendments, there was no special provision for unsponsored ADR facilities, but the SEC changed its proposal in response to comments that it would be difficult for the depositary of an unsponsored ADR facility to be certain that the electronic publication required of Rule 12g3-2(b) had been complied with.

published pursuant to the Rule 12g3-2(b) exemption. Also, under the amendments a broker-dealer is now able to satisfy its obligation to make the information reasonably available upon request by providing the requesting person with instructions on how to obtain the information electronically.

II. The Foreign Private Issuer Release

Under the current SEC regulatory regime, foreign private issuers that are subject to the reporting requirements under the Exchange Act are not subject to, or are granted accommodations with respect to, certain SEC rules, including the following:

- *Proxy Rules*. Foreign private issuers are generally exempt from the SEC's proxy rules.
- *Section 16 of the Exchange Act*. Foreign private issuers are not subject to Section 16 of the Exchange Act, which generally requires that an issuer's officers and directors and ten percent beneficial owners (i) disgorge profits realized as a result of purchases and sales of equity securities of the issuer within any period of less than six months, and (ii) publicly disclose purchases and sales of such issuer's equity securities.
- *Annual Reports on Form 20-F*.
    - Foreign private issuers may include in their annual reports on Form 20-F financial statements that are prepared in accordance with either U.S. GAAP or their home-country GAAP, provided that, in the latter case, such financial statements must include a reconciliation to U.S. GAAP unless such financial statements are prepared in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board.
    - Foreign private issuers are currently required to file an annual report with the SEC on Form 20-F within six months after their fiscal year end, while U.S. issuers are required to file an annual report on Form 10-K with the SEC within 60 to 90 days after their fiscal year end (depending on whether such issuers are non-accelerated filers, accelerated filers or large accelerated filers).
    - Foreign private issuers may disclose in their annual reports on Form 20-F executive compensation on an aggregate basis, as opposed to on an individual basis, as is currently required for U.S. issuers, *if* such information is reported on an aggregate basis in their home country.
- *Quarterly and Current Reports*. Foreign private issuers are not required to file quarterly reports with the SEC, as required for U.S. issuers, but instead must furnish home-country reports on Form 6-K on the basis of home-country regulatory and stock exchange requirements. Likewise, rather than filing current reports on Form 8-K (which requires that U.S. issuers publicly disclose the occurrence of certain material events), foreign private issuers are required to furnish to the SEC, under cover of Form 6-K, copies of material non-U.S. disclosure documents promptly after such documents are made public.

In order to maintain the benefit of these accommodations, foreign issuers are currently required to assess their status as foreign private issuers on a continuous basis under the requirements described in footnote 1 above. If a foreign issuer no longer qualifies as a foreign private issuer, it would immediately become subject to SEC reporting and other requirements applicable to U.S. issuers, including that its financial statements be prepared in accordance with U.S. GAAP.

1. *Foreign Private Issuer Status*

Under the SEC's amendments, a foreign private issuer is required to assess its continuing status as a foreign private issuer once a year, on the last business day of its second fiscal quarter, rather than on a continuous basis as currently required. Under the amendments, if a foreign issuer determines that it no longer qualifies as a foreign private issuer, it will then be required to comply with the various SEC reporting obligations applicable to U.S. issuers on the first day of the fiscal year following the determination date, effectively providing a six-month period during which such former foreign private issuer will be able to transition to the requisite forms and disclosure and other requirements applicable to U.S. issuers.

If, for example, a foreign issuer with a calendar year end determined that it did not qualify as a foreign private issuer on June 30, 2009, it would then be required to file an annual report on Form 10-K with U.S. GAAP financial statements in 2010 for the fiscal year ended December 31, 2009. Likewise, such foreign issuer would then be required to comply with the SEC's proxy rules and with Section 16 of the Exchange Act's prohibition against short-swing profits by officers and directors and ten percent beneficial owners, and the related public reporting requirements, as well as with the requirement that such issuer file current reports on Form 8-K and quarterly reports on Form 10-Q, commencing on the first day of its fiscal year in 2010.

Conversely, the SEC's proposed amendments provide that a foreign issuer that determines that it qualifies as a foreign private issuer may, commencing on the date of such determination, immediately avail itself of the accommodations available to foreign private issuers, including use of the forms available to foreign private issuers and the reporting requirements applicable to foreign private issuers. In such case, the newly determined foreign private issuer would from such date no longer be required to file current reports on Form 8-K, quarterly reports on Form 10-Q or annual reports on Form 10-K, but instead would be required to file an annual report on Form 20-F and the less comprehensive current reports on Form 6-K.

The Foreign Private Issuer Release similarly amends the obligations of a Canadian issuer filing registration statements and Exchange Act reports using MJDS.

2. Accelerated Filing Deadline for Annual Reports on Form 20-F

Under the SEC's amendments, a foreign private issuer will be required to file its annual report on Form 20-F within four months after such issuer's fiscal year end, rather than within six months as required under current SEC rules.[18, 19]

The amendments include a three-year transition period such that the accelerated filing deadlines go into effect beginning with a foreign private issuer's first fiscal year ending on or after December 15, 2011. While foreign private issuers in certain jurisdictions such as the European Union are currently required to publish their annual reports within four months after their fiscal year end, all foreign private issuers, particularly those that are required to include a U.S. GAAP reconciliation in the financial statements included within their annual reports on Form 20-F, should begin to assess what action would have to be taken to comply with the accelerated filing obligations.

The amendments will also conform the deadlines for transition reports filed on Form 20-F and for special financial reports filed pursuant to Rule 15d-2 of the Exchange Act, such that they will be consistent with the amended deadline for annual reports on Form 20-F discussed above.

3. *Disclosures in Annual Reports on Form 20-F*

The SEC has also adopted amendments expanding the required disclosures in annual reports on Form 20-F, including the following:[20]

- *Segment Data Disclosure*. Currently, foreign private issuers may present their financial statements under Item 17 of Form 20-F, which allows them to omit segment data and have a qualified U.S. GAAP audit. The amendments eliminate the ability to omit segment data and require foreign private issuers to include segment data beginning with the issuer's first fiscal year ending on or after December 15, 2009.

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[18] The SEC noted that it is not accelerating the deadline for Canadian issuers filing annual reports on Form 40-F under the MJDS. The Form 40-F must still be filed with the SEC on the same day that such information is required to be filed with the relevant Canadian securities regulatory authority.

[19] In response to comments on the Proposed Amendments, the SEC noted that it will consider what accommodations are appropriate for bank holding companies subject to Industry Guide 3, Statistical Disclosure by Bank Holding Companies.

[20] The amendments do not require, as previously proposed, that foreign private issuers' annual reports on Form 20-F include financial statements for acquired companies that are deemed "significant," as well as pro forma financial statements giving effect to any such acquisitions; such information must be disclosed by foreign private issuers only in a registration statement filed under the Securities Act or the Exchange Act. The SEC decided not to adopt an amendment to Item 17(a) of Form 20-K at this time, but stated that it will continue to consider the proposal in light of the concerns.

- *Certifying Accountant*. Similar to current New York Stock Exchange (the "NYSE") requirements regarding changes in auditors, the amendments require a foreign private issuer to disclose in its annual report on Form 20-F, as well as in any registration statements on Forms F-1, F-3 and F-4, any disagreements or reportable events that occurred within such issuer's last two fiscal years and any interim period preceding the change of accountants. Such an issuer will also be required to disclose whether any material transactions were accounted for or disclosed in a manner different from that which such issuer's former accountants concluded was required. In addition, a foreign private issuer will be required to disclose whether the independent accountant that was previously engaged as its principal accountant to audit the issuer's financial statements, or the financial statements of a significant subsidiary on which the accountant expressed reliance in its report, has resigned, has declined to stand for reelection, or was dismissed. By way of comparison, U.S. issuers are not required to make such disclosures in their annual reports on Form 10-K, but instead are required to report such information on a more current basis on Form 8-K.[21, 22] Foreign private issuers will be required to comply with the amendments beginning with their first fiscal year ending on or after December 15, 2009.
- *ADR Fees and Payments*. The SEC is expanding disclosure in annual reports on Form 20-F to require that foreign private issuers disclose fees and other charges paid by holders of ADRs, as well as any payments by the depositary to the foreign issuer whose securities underlie the ADRs. Currently, foreign private issuers are required to make such disclosures in the Form F-6 Registration Statement that is filed with the SEC to establish an ADR program, but not in annual reports. Additionally, the revised fee disclosures must be made on a per-payment basis and cannot be provided only on an aggregate basis. Foreign private issuers will be required to provide this additional fee disclosure commencing with their first fiscal year ending on or after December 15, 2009.
- *Corporate Governance Practices*. The SEC added a new requirement to Form 20-F, under which listed foreign private issuers will be required to provide in their annual reports on Form 20-F a concise summary of the significant ways in which their corporate governance practices differ from the corporate governance practices of domestic issuers listed on the same exchange. Currently, issuers listed on the NYSE and the NASDAQ are required to make comparable disclosures on their websites or in their annual reports pursuant to NYSE and NASDAQ listing rules. Foreign private issuers will be required to provide this additional disclosure for their first fiscal year ending on or after December 15, 2008.

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[21] The SEC also noted that to the extent information about a change in certifying accountant is required by the foreign private issuer's home country, the information will also be provided to U.S. investors on a Form 6-K.

[22] In the case of a change in independent accountant, the SEC is also requiring that the former accountant furnish a letter to the issuer stating its agreements or disagreements with the issuer's applicable disclosure. This letter will be required at the time of the filing of the annual report or registration, unless the change in accountant occurred less than 30 days prior to such filing.

- *Financial Statements*. The SEC is amending Item 17 of Form 20-F to require that foreign private issuers, other than certain Canadian issuers, include the full information required by Item 18 of Form 20-F, including the information required by U.S. GAAP and Regulation S-X and the more limited reconciliation permitted under Item 17 of Form 20-F. Currently, Item 17 of Form 20-F allows foreign private issuers that are only listing a class of securities on a national securities exchange or registering a class of securities under Section 12(g) of the Exchange Act (i.e., issuers not engaging in a capital-raising transaction), or filing an annual report on Form 20-F, to omit certain information from their financial statements if such financial statements are prepared in accordance with U.S. GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board.[23] A foreign private issuer currently preparing its financial statements according to Item 17 of Form 20-F will be required to prepare financial statements according to Item 18 when it files its annual report for the first fiscal year ending on or after December 15, 2011.

4. *Exchange Act Rule 13e-3*

The SEC adopted amendments to Exchange Act Rule 13e-3, which imposes certain disclosure obligations on an issuer when such issuer and/or any of its affiliates engages in "going-private" transactions[24] that have either a reasonable likelihood or a purpose of causing any class of equity securities of such issuer subject to Section 12(g) or Section 15(d) of the Exchange Act to be (i) held of record by less than 300 persons, or (ii) delisted from a national securities exchange and not authorized to be quoted on an interdealer quotation system of any registered national securities association. The SEC also noted that it does not believe that share repurchases made in the ordinary course of an issuer's business are within the amended scope of Rule 13e-3, so long as such transactions are not undertaken with the purpose or reasonable likelihood of producing one of the two going- private effects specified above.

In light of the recent amendments to the foreign private issuer deregistration rules, the SEC adopted amendments to Exchange Act Rule 13e-3 clarifying that such effect may also be deemed to occur when:

- a domestic or foreign private issuer becomes eligible under Exchange Act Rule 12g-4 to deregister a class of securities; or
- a foreign private issuer becomes eligible to deregister a class of securities under the Exchange Act or to terminate a reporting obligation pursuant to Rule 12h-6; or
- such issuers become eligible under Exchange Act Rule 12h-3 or Exchange Act Section 15(d) to have a reporting obligation suspended.

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[23] The SEC also noted that it is not eliminating the availability of Item 17 for MJDS registration statements or for financial statements of non-registrants that are required to be included in an issuer's registration statement, annual report or other Exchange Act report.

[24] A "Rule 13e-3 transaction" is defined as (i) a purchase of any equity security by the issuer of such security or by an affiliate, (ii) a tender offer, (iii) a proxy solicitation or information statement distribution in connection with a merger or similar transaction, (iv) the sale of substantially all the assets of an issuer to its affiliate, or (v) a reverse stock split.

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If you have any questions about the proposed amendments, please contact Gregory B. Astrachan (212-728-8608, gastrachan@willkie.com), Jeffrey S. Hochman (212-728-8592, jhochman@willkie.com), Jon J. Lyman (+44 20 7696 5440, jlyman@willkie.com), Brett M. Waxman (212-728-8770, bwaxman@willkie.com), or the attorney with whom you regularly work.

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