

## DAVIS POLK & WARDWELL

Date: October 7, 2008  
To: Interested Persons  
Re: SEC Publishes Final Amendments to Form 20-F, Foreign Private Issuer Status Determination and Going Private Rules

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The SEC recently published the adopting release<sup>1</sup> containing its final amendments to certain Form 20-F reporting requirements. The amendments also modify the timing for testing foreign private issuer status and the going private rules. The text of the final amendments is largely as proposed and as expected based on the SEC's statements at the open meeting on August 27, 2008, at which it adopted the rules. A quick reference chart showing the reporting changes and their effective dates is attached as *Appendix A*.

**Accelerated 20-F filing deadline.** Under the new rules, beginning with their first fiscal year ending on or after December 15, 2011, *all* foreign private issuers will be required to file their annual reports on Form 20-F within four months of their fiscal year end. The SEC notes in the adopting release that it will continue to monitor market developments to determine whether it is appropriate to further accelerate the due date for Form 20-F annual reports.

**New Disclosure Relating to Changes in Registrant's Certifying Accountant.** The new rules add a new item, Item 16F, to Form 20-F that will require foreign private issuers to report in their registration statements and annual reports any changes in or disagreements with their certifying accountant. These disclosures, which are similar to those already required for US issuers, will be required in registration statement and annual report filings made with respect to any fiscal year ending on or after December 15, 2009.

Among other things, Item 16F will require the disclosure of:

- Whether an independent accountant that was previously engaged as the principal accountant to audit the issuer's financial statements, or a significant subsidiary on which the accountant expressed reliance in its report, has resigned, declined to stand for re-election, or was dismissed.
- Any disagreements or reportable events that occurred within the issuer's

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<sup>1</sup> The adopting release is available at <http://www.sec.gov/rules/final/2008/33-8959.pdf>

latest two fiscal years and any interim period preceding the change of accountant.

- Whether, during the fiscal year in which the change of accountants took place or during the subsequent year, the issuer had similar, material transactions to those which led to the disagreements with the former accountants and whether such transactions were accounted for or disclosed in a manner different from that which the former accountants would have concluded was required. If the former accountants would have required a different method, the issuer must disclose the effect the application of such method would have had on the financial statements.

The new Item 16F also requires the issuer to provide a copy of the disclosures that it is making to the former accountant along with a request that the former accountant furnish the issuer with a letter stating whether it agrees with the statements made by the issuer and, if not, why not. The issuer is required to file the accountant's letter as an exhibit to the annual report or registration statement that contains the related disclosure. If, however, the change in accountant occurred less than 30 days prior to the filing of the annual report or registration statement, additional time is allowed for the filing of the accountant's letter.

**Annual Report Disclosure About Differences in Corporate Governance Practices.** The rules also require issuers to include in their annual report on Form 20-F a summary of the significant ways in which their corporate governance practices differ from those followed by US issuers under the listing standards of the US national securities exchange on which their securities are listed. Foreign private issuers are already required by US exchanges to provide comparable disclosure either in their Form 20-F or on their website. The SEC expects that the Form 20-F disclosure provided in response to this new requirement will be "similar, if not the same" as the disclosure that foreign private issuers already provide under the rules of the US exchanges. This rule change is effective for all fiscal years ending on or after December 15, 2008.

**Amendments to Item 17 (Financial Statements) of Form 20-F to Require Segment Data and Eliminate Limited US GAAP Reconciliation.** The new rules modify Item 17 of Form 20-F to:

*Require Segment data.* The new rules eliminate the accommodation in Item 17 that allows foreign private issuers who present their financial statements otherwise than in full accordance with US GAAP to omit segment data from their financial statements and have a qualified US GAAP audit report as a result of this omission. The requirement to provide segment data will apply with respect to

fiscal years ending on or after December 15, 2009. According to the SEC, less than 10% of foreign private issuers currently utilize this accommodation.

*Eliminate the limited US GAAP reconciliation option.* The new rules will also eliminate the more limited US GAAP reconciliation option that currently exists in Item 17 for foreign private issuers that are only registering a class of securities under Exchange Act 12(g), without conducting a public offering of those securities, and foreign private issuers that are making certain non-capital raising offerings. Under the new rules, these issuers will be required to comply with the more fulsome financial statement requirements contained in Item 18 of Form 20-F. This requirement will be effective for fiscal years ending on or after December 15, 2011. Since many foreign private issuers will be reporting under International Financial Reporting Standards (“IFRS”) by 2011, this rule change is likely to affect only a limited number of issuers.

**New Disclosure of American Depositary Receipt (“ADR”) Fees and Payments.** The new rules revise Item 12.D.3 and the instructions to Item 12 of Form 20-F to require disclosure of fees and other charges paid by ADR holders as well as payments by the depository to the issuer in connection with the ADR program. These disclosures must be provided on a per payment basis and will be required in the registration statement on Form 20-F that is filed for the deposited securities, as well as in the annual report, for sponsored ADR facilities. A foreign private issuer will be required to provide this information in its annual report beginning with its first fiscal year ending on or after December 15, 2009.

**No Additional Disclosures Required with Respect to Significant Acquisitions.** Missing from the final rules is the SEC’s previously proposed amendment that would have required foreign private issuers to provide financial information in their annual reports on Form 20-F for business acquisitions made during the relevant fiscal year that equaled or exceeded a 50% level of significance. In the release, the SEC acknowledges commentators’ concerns about the timeliness and value of these proposed disclosures and notes that while it declines to adopt the proposals at this time, it will continue to consider the proposals.

**Change to Annual Foreign Private Issuer Status Determination.** Beginning on the effective date of the new rules, December 6, 2008, an issuer will assess whether it meets the definition of foreign private issuer<sup>2</sup> (and therefore

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<sup>2</sup> Exchange Act Rule 3b-4(c) defines a foreign private issuer as any foreign issuer other than a foreign government, except for an issuer that (1) has more than 50% of its outstanding voting securities held of record by US residents and (2) any of the following: (i) a majority of its (...continued)

qualifies for the accommodations made under the US securities laws for foreign private issuers) once per year, on the last business day of their second fiscal quarter, rather than on a continuous basis, as is currently required. Accordingly, a calendar year issuer will next assess its status as a foreign private issuer as of the last business day of its 2009 second fiscal quarter. This is the same date currently used to determine accelerated filer status under Exchange Act Rule 12b-2 and smaller company reporting status in Item 10(f)(2)(i) of Regulation S-K.

Under the new rules, an issuer previously classified as a foreign private issuer that determines that it no longer qualifies as a foreign private issuer on the last business day of its second fiscal quarter will continue to report as a foreign private issuer and will not become subject to the reporting requirements and use the forms applicable to US issuers until the first day of the fiscal year following the determination date.<sup>3</sup> For example, an issuer that does not qualify as a foreign private issuer as of the end of its second fiscal quarter in 2009 would file a Form 10-K in 2010 for its 2009 fiscal year. The issuer would also begin complying with the proxy rules and the beneficial ownership rules in Section 16 of the Exchange Act and become subject to reporting on Forms 8-K and 10-Q on the first day of its 2010 fiscal year.

An issuer that does qualify as a foreign private issuer on the last business day of its second quarter, however, is permitted to begin reporting as a foreign private issuer immediately. Accordingly, an issuer that was previously reporting as a US issuer but subsequently qualifies as a foreign private issuer would not need to continue to provide reports on Form 10-Q and Form 8-K for the remainder of the year in which it qualifies as a foreign private issuer, although it will need to furnish reports on Form 6-K.

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(continued...)

officers and directors are citizens or residents of the United States, (ii) more than 50% of its assets are located in the United States, or (iii) its business is principally administered in the United States.

<sup>3</sup> Canadian issuers that file registration statements and Exchange Act reports using the multijurisdictional disclosure system ("MJDS") are also subject to the new requirement to test their status as a foreign private issuer as of the last business day of their second fiscal quarter. They will continue to assess their eligibility to use MJDS registration statement forms, however, at the time of filing. Accordingly, a MJDS filer that ceases to qualify as a foreign private issuer on the last business day of its second fiscal quarter would immediately not be able to use the MJDS forms for registered securities offerings in the United States but would still be able to use other foreign private issuer registration forms, such as F-3, until the end of that fiscal year. MJDS filers that qualify as foreign private issuers at the end of their second quarter will continue to assess their ability to file annual reports on Form 40-F rather than Form 20-F based on all of the other requirements of Form 40-F, such as public float, at the end of the fiscal year.

The SEC did not impose a requirement that issuers that have a switch in their status, from a US to a foreign private issuer or vice versa, notify the market of this change as had been requested by some commentators. By switching from reporting on Form 8-K to Form 6-K or vice versa, however, the issuer will implicitly be providing this notice.

**Going Private Transactions.** The SEC has also made what it deems to be “neutral” changes to Exchange Act Rule 13e-3, which pertains to disclosure of going private transactions, to reflect the recent amendments to the SEC’s deregistration rules. Under current rules, an issuer is required to file a Schedule 13E-3 disclosing its intention to go private if it engages in certain specified transactions such as a tender offer, reverse stock split or asset sale, which have the likelihood or purpose of causing its equity securities to be held of record by less than 300 persons or its securities to be neither listed on a national securities exchange or authorized or quoted on an interdealer quotation system. Under the amended rule, the disclosure obligation will be triggered when, as a result of one of the specified transactions, the issuer becomes eligible to deregister its securities or terminate its reporting obligations.

Appendix A

Timeline of Reporting Changes				
As of December 6, 2008	Fiscal Years Ending on or after December 15, 2008	Fiscal Years Ending on or after December 15, 2009	Fiscal Years Ending on or after December 15, 2010	Fiscal Years Ending on or after December 15, 2011
<ul style="list-style-type: none"> <li>▪ Provide disclosure of ADR fees and payments in Form 20-F when using as <i>registration statement</i></li> <li>▪ Test foreign private issuer status as of the last business day of the issuer’s second fiscal quarter. Accordingly, a calendar year issuer will next assess its foreign private issuer status on the last business day of its 2009 second fiscal quarter</li> </ul>	<ul style="list-style-type: none"> <li>▪ Provide disclosure regarding the difference between corporate governance practices and those required for US companies by the US exchanges—Item 16G of Form 20-F</li> </ul>	<ul style="list-style-type: none"> <li>▪ Issuers filing financial statements otherwise in full compliance with US GAAP and previously relying on Item 17 of Form 20-F accommodation must provide segment information and have unqualified audit opinion</li> <li>▪ Disclose changes in or disagreements with certifying public accountants—Item 16F of Form 20-F</li> <li>▪ Provide disclosure of ADR fees and payments in Form 20-F when filing <i>annual report</i></li> </ul>	<ul style="list-style-type: none"> <li>▪ No changes</li> </ul>	<ul style="list-style-type: none"> <li>▪ File annual report on Form 20-F within 4 months of year end</li> <li>▪ Limited US GAAP reconciliation under Item 17 of Form 20-F no longer permitted—full Item 18 financial statement information required</li> </ul>