SEC Amends Foreign Issuer Reporting Requirements

On September 23, 2008, the Securities and Exchange Commission ("SEC") adopted final rule amendments relating to foreign private issuers ("FPIs") that are intended to enhance the information available to investors.[1] The amendments are part of a series of initiatives that seek to effect changes in the disclosure and other requirements applicable to FPIs in light of market developments, new technologies and other matters in a manner that promotes investor protection and cross-border capital flows. Among other things, the amended rules cover the following matters:

- Eligibility to use certain forms -- FPIs will be able to test their eligibility to use the special forms and rules available to them once a year, rather than continuously.
- Form 20-F Annual Report filing deadline -- the deadline for filing annual reports by FPIs will be four months after the completion of their fiscal year rather than six months (compliance required for fiscal years ending on or after December 15, 2011).
- Going private rule -- the disclosure rule pertaining to going private transactions has been amended so as to be applicable to FPIs that avail themselves of the recently amended rules regarding the termination of reporting and deregistration by FPIs.
- Disclosure requirements revised -- the annual report and registration statement forms used by FPIs have been amended to reconcile the financial statement disclosures required by different items in these forms and amend the disclosure requirements relating to changes in certifying accountants, payment of American Depositary Receipt fees and differences in corporate governance.
- Option to omit U.S. GAAP segment data -- an accommodation which permitted FPIs to omit segment data from their U.S. GAAP financial statements will be eliminated.

The amended rules become effective on December 5, 2008. After effectiveness, there are various transition periods for compliance with certain of the amended rules as noted below.

I. Background

In 1979 the SEC adopted Form 20-F for use by FPIs when registering a class of securities and filing annual reports in accordance with the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The principles guiding the implementation of this form was that investors should have access to information concerning FPIs that is equal, "as nearly as possible and practicable," to the information available regarding domestic issuers while improving the accessibility of public markets to FPIs. Even at the time, however, the development of foreign issuer disclosure requirements was acknowledged to be an evolutionary and iterative process.

On February 29, 2008, the SEC proposed a series of amendments pertaining to Form 20-F and a variety of related rules that the SEC believed would further both of these objectives "in light of market developments, new technologies and other matters in a manner that promotes investor protection, cross-border capital flows and

[1] *Foreign Issuer Reporting Enhancements*, Final Rule, Release No. 33-8959 (September 23, 2008), 73 F.R. 58,300, available at http://edocket.access.gpo.gov/2008/pdf/E8-22760.pdf.

the elimination of unnecessary barriers to [U.S.] capital markets."[2] Based on the comments received as well as their own further analysis the SEC adopted a number of the proposed amendments. A summary of the amendments follows.

II. Annual Test for Foreign Private Issuer Status

The determination of whether a company qualifies as a "foreign private issuer" is important because SEC regulations provide a variety of accommodations and exemptions for these entities.[3] Current rules require foreign private issuers to monitor their status continuously in relation to the various factors used to determine FPI status and to adjust their accounting accordingly, regardless of when in the fiscal year a change in status occurs. In addition to being costly, the current need to reevaluate FPI status on a continuous basis results in uncertainty for not just the issuer, but also, in the view of the SEC, for investors who may have to examine both foreign and domestic reporting forms in order to evaluate the performance of a company in a single fiscal year.

In order to address these difficulties, the amended rules will allow FPIs to assess their status once a year, on the last business day of their second fiscal quarter.[4] Canadian issuers currently filing registration statements using the multijurisdictional disclosure system ("MJDS") will also be required to test their FPI status at the end of their second fiscal quarter, as opposed to at the end of the fiscal year as has been previously required. The choice of this date is partly an attempt to achieve internal consistency within the reporting rules, as determination of accelerated filer and smaller reporting company status occurs on the same benchmark date. Further, since the determination of FPI status will now occur at the end of the second fiscal quarter, companies that do not qualify will have six months' advance notice that they will be required to file as a domestic company.

III. Accelerating the Reporting Deadline for Form 20-F Annual Reports

Presently, an FPI must file its annual report on Form 20-F within six months of its fiscal year-end. This extended filing period was intended to acknowledge the additional challenges faced by foreign filers, including the necessity of reconciling their financial statements with U.S. GAAP and the obligation to comply with the filing requirements of their home jurisdiction. However, since the adoption of Form 20-F, the SEC has implemented rule amendments that relieve FPIs using International Financial Reporting Standards ("IFRS") of the responsibility of conforming to U.S. GAAP,[5] and many foreign jurisdictions have significantly shortened the timetables for foreign issuers' filings with their home securities regulator.

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2 *Foreign Issuer Reporting Enhancements*, Proposed Rule, SEC Release Nos. 33-8900 (February 29, 2008), 73 F.R. 13,404, available at http://www.sec.gov/rules/proposed/2008/33-8900fr.pdf.

3 The definition of "foreign private issuer" is contained in Exchange Act Rule 3b-4(c). A foreign private issuer is 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 U.S. residents and (2) any of the following: (i) a majority of its officers and directors are citizens or residents of the United States, (ii) more than 50 percent of its assets are located in the United States, or (iii) its business is principally administered in the United States.

4 Amended Securities Act Rule 405 and Exchange Act Rule 3b-4(c).

5 Acceptance From Foreign Private Issuers of Financial Statements Prepared in Accordance with International Reporting Standards Without Reconciliation to U.S. GAAP (December 21, 2007), Release Nos. 33-8879; 73 F.R. 986, available at, http://www.sec.gov/rules/final/2007/33-8879.pdf; see our Firm Memorandum, SEC Publishes Final Rules for Financial Disclosures of U.S.-Registered Foreign Companies, December 26, 2007.

The SEC believes that these developments, together with technological advancements that make it easier for companies to process and disseminate information, permit a shortened filing period for FPIs. Accordingly, the SEC has changed the due date for annual reports filed on Form 20-F to four months after an issuer's fiscal year-end for all filers, after a three year transition period.

While the new deadline is still more lenient than those for domestic companies (60 or 75 days), the SEC apparently disregarded arguments from commentators suggesting that an accelerated deadline will be burdensome on FPIs since Form 20-F demands more and different disclosures than the home country report and is often prepared after the home country report is complete. On the other hand, the SEC expects that in the next several years the majority of foreign filers will have independent incentives to use either U.S. GAAP or IFRS, thus mitigating concerns of some commentators that the additional costs and burdens of this rule change might discourage foreign issuers from accessing American capital markets or impair the ability of FPIs to file annual reports with their home regulators on a timely basis.

Compliance with the shorter filing deadline will be required for fiscal years ending on or after December 15, 2011.

IV. Exchange Act Rule 13e-3

Exchange Act Rule 13e-3 is triggered when an issuer engages in a transaction or series of transactions that have the effect of causing a class of equity securities to be held by less than 300 persons or to be neither listed on any national securities exchange nor authorized to be quoted on an inter-dealer quotation system. The rule is implicated when a public company is being taken private. The company is then required to make a number of disclosures including whether alternative means were considered, the reasons for the structure of the transaction and the effects on unaffiliated security holders.

Recently, the SEC adopted amendments to the Exchange Act deregistration provisions in Rules 12g-4 and 12h-6 (applicable to both foreign and domestic issuers) that tie reporting obligations under the Exchange Act to a quantitative benchmark designed to measure U.S. market interest in the security.[6] The SEC believes that this new standard will be useful in cases of share repurchases, tender offers and proxy solicitations that are likely to make an FPI eligible to deregister its securities.

Therefore, the SEC has linked the rules governing going private transactions explicitly to the deregistration provisions found elsewhere in the Exchange Act. The amendments provide that Rule 13e-3 disclosures will be required if an FPI elects to deregister under Rule 12g-4 or 12h-6. The SEC believes that this new rule is consistent with the original objective of Rule 13e-3, which was to provide security holders a final opportunity to obtain information about a company which is going private, and consider their alternatives.

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[6] See our Firm Memorandum, *SEC Eases De-registration Rules for Foreign Private Issuers*, March 30, 2007. Rules 12g-4 and 12h-6 permit an FPI to delist its securities from trading on U.S. markets if its number of shareholders is less than 500 and its assets are less than $10 million for the last three fiscal years, or if the average daily trading volume of the subject class of securities has not been greater than 5% of the average daily trading volume of that class of securities in the FPIs primary trading market during a recent 12 month period, regardless of the size of its U.S. public float.

V. Requiring Item 18 Reconciliation in Annual Reports and Registration Statements Filed on Form 20-F

Currently, the financial statement disclosures required for FPIs that have not conducted a public offering (Form 20-F, Item 17) are less comprehensive than those otherwise required (Item 18). In short, Item 18 requires a series of footnote disclosures required by U.S. GAAP and Regulation S-X while Item 17 does not require financial statements which fully comply with Regulation S-X. The SEC is eliminating this distinction and will require that all FPIs whose reports do not comply with U.S. GAAP or IFRS provide financial information pursuant to Item 18. The SEC notes that a majority of FPIs who do not comply with U.S. GAAP already choose to make the disclosures required in Item 18. Further, the SEC does not believe there is a clear conceptual reason as to why these disclosures would be required in one case but not another, given that all investors would benefit from the availability of this information, and the cost to FPIs would be minimal.

These rules, which go into effect for fiscal years ending on or after December 15, 2011, will not extend to Canadian MJDS filers (who currently have the option of utilizing Item 17) or companies other than the issuer (e.g., an acquired company or an equity-method investee).

VI. Disclosure about Changes in a Registrant's Certifying Accountant

Domestic companies are required to report any changes in, and disagreements with, their certifying accountant in a current report on Form 8-K, and in registration statements filed under the Exchange Act (Form 10) and the Securities Act of 1933 (the "Securities Act") (Forms S-1 and S-4). The SEC believes that the primary benefit of this requirement is to reduce the potential for opinion shopping; that is, searching for an auditor that is willing to support a particular accounting approach. In spite of the fact that the need for this type of disclosure should be equally compelling for both foreign and domestic issuers, FPIs are not subject to such a requirement.

The SEC has altered the requirements for FPI disclosures about changes in certifying accountants to bring them in line with those for domestic companies. The new rules amend Form 20-F (and initial registration Forms F-1 and F-4) by adding an Item 16F that requires a variety of disclosures, including: whether a previously engaged independent accountant has resigned, declined to stand for re-election, or was dismissed; whether during the fiscal year during which the change of accountant took place there were material transactions which led to disagreements with the former accountants; and, if there were such material transactions, what the effect on the financial statements would have been had the previous accountant's method been followed. Item 16F is now virtually identical to the provisions covering domestic companies[7], with the exception of a number of date modifications necessary because the disclosures will be made on an annual basis, rather than on a current basis.

Compliance with this rule will be required for fiscal years ending on or after December 15, 2009.

VII. Annual Disclosure about American Depositary Receipt Fees and Payments

Foreign private issuers are currently required to disclose fees paid to depositaries with respect to American Depositary Receipts ("ADRs") on Form 20-F when used for Exchange Act registration, but not when such Form is used for an annual report. The SEC has revised Form 20-F to require disclosure of these fees (or other payments made to depositaries) on an annual basis. The SEC believes that these fees are likely to be passed

[7] These types of disclosures by domestic issuers are required by Item 4.01 of Form 8-K and Item 304(a) of Regulation S-K.

along to ADR holders; moreover, many depositaries are now charging an annual fee for general depositary services, a practice which until recently was prohibited by some exchanges.

This disclosure will be required for FPIs for fiscal years ending on or after December 15, 2009.

VIII. Disclosure about Differences in Corporate Governance Practices

As a consequence of being subject to different legal and regulatory requirements in their home jurisdiction, foreign companies often follow different corporate governance practices than their domestic counterparts. Acknowledging this, some U.S. securities exchanges exempt FPIs from many of their corporate governance requirements. In lieu of complying with these obligations, FPIs delineate the significant differences between their corporate practices and those of domestic companies on their website and/or in their annual report. It is not uncommon for FPIs to disclose this information only on their website.

In the interest of protecting the ability of investors to monitor the corporate governance practices of a given issuer, the SEC has changed the reporting rules to require disclosure of corporate governance policies in all Form 20-F annual reports filed by FPIs. The amendment requires a concise summary of the significant ways in which the FPIs' corporate governance practices differ from those of domestic companies listed on the same exchange.

This disclosure will be required for FPIs for fiscal years ending on or after December 15, 2008.

IX. Segment Data Disclosure

Currently, FPIs that present financial statements that are otherwise in full compliance with U.S. GAAP are permitted to omit segment data from their statements. The SEC states that approximately five issuers currently avail themselves of this accommodation. The SEC believes that the exemption is inconsistent with the recent decision to accept IFRS-compliant statements (which require segment data) without reconciliation to U.S. GAAP. Accordingly, the SEC has eliminated this accommodation.

Compliance with this rule change will be required for fiscal years ending on or after December 15, 2009.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Tafari Mbadiwe at (212) 701-3342 or tmbadiwe@cahill.com.