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Client Alert

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CHANGES TO SEC FORM 20-F REPORTING OBLIGATIONS

(Final SEC Rules)

The U.S. Securities and Exchange Commission (the "SEC") has amended its rules affecting the reporting obligations of foreign private issuers, including accelerating the filing deadline of annual reports on Form 20-F.[1] This client alert highlights certain of these recent developments, including:

- New rules permitting foreign private issuers to test their qualifications to use the forms and rules available to foreign private issuers on an annual basis, rather than on a continuous basis as has been required.
- Acceleration of the filing deadline for annual reports filed on Form 20-F by foreign private issuers under Securities Exchange Act of 1934, as amended (the "Exchange Act"), from the current six months to four months after the foreign private issuer's fiscal year-end.
- Eliminating an instruction to Item 17 of Form 20-F thereby eliminating the ability of foreign private issuers to omit segment data from their U.S. GAAP financial statements as has been previously allowed.
- Amending Rule 13e-3 under the Exchange Act, which pertains to going private transactions by reporting issuers or their affiliates, to reflect the recently adopted deregistration and termination of reporting rules applicable to foreign private issuers.
- Requiring foreign private issuers that are required to provide a U.S. GAAP reconciliation to do so pursuant to Item 18 of Form 20-F, eliminating other previously available options to do such reconciliation which would have permitted less extensive footnote disclosure in certain cases.
- Amendments to Form 20-F requiring foreign private issuers to disclose information regarding:
  - Changes in the issuer's certifying accountants;
  - Fees and charges paid by holders of American Depository Receipts ("ADRs"), and the payments made by the depository to the foreign issuers whose securities underlie the ADRs; and

[1] Release No. 33-8959 (Sep. 23, 2008).

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- For listed issuers, requiring disclosure of the difference in the foreign private issuer's corporate governance practices and those applicable to domestic companies under the relevant exchange's listing rules.

- The SEC also announced that it will continue to assess its earlier proposal requiring disclosure in a Form 20-F of certain financial information for significant completed acquisitions.

I. "Foreign Private Issuer" Determination

An issuer incorporated outside the U.S. qualifies for "foreign private issuer" status unless over 50% of its outstanding voting shares are held of record by U.S. residents and certain additional conditions are met. The designation as a "foreign private issuer" is valuable to an issuer due to the reduced regulatory burden imposed on such an issuer, including exemptions from the SEC's proxy rules, insider stock trading reports and short-swing profit recovery provisions, as well as reduced reporting obligations in most circumstances, including a requirement that interim reports for such issuers need to be furnished on the basis of home country regulatory and stock exchange practices as opposed to the domestic U.S. issuer quarterly filing requirements.

Prior to the effectiveness of the new rules, a foreign private issuer with close to 50% of its outstanding voting securities held of record by U.S. residents had been in the position of having to monitor the different factors affecting its designation on a continuous basis resulting in uncertainty and the possibility of having to switch between foreign private issuer status and domestic issuer status within the same fiscal year.

The new SEC rule only requires an evaluation of this designation once annually on the last business day of an issuer's second fiscal quarter, with such transition to take effect on the first day of the fiscal year following the determination date. This formulation allows issuers six months' advance notice in the event that they will need to transition to domestic forms and applicable regulatory requirements. Otherwise, if an issuer continues to meet the definition of a foreign private issuer, that issuer will continue to have the benefit of this designation until the next determination date which would be the last business day of its second fiscal quarter of the following fiscal year. On the other hand, it should be noted that where a domestic issuer meets the requirements for the foreign private issuer designation on a determination date, the issuer (including a former foreign private issuer turned domestic issuer that did not qualify on the previous determination date) is allowed to convert to the foreign private issuer reporting and regulatory regime as of such determination date as opposed to continuing under the domestic regime for that fiscal year. The SEC has also decided that changes in designation, either way, do not necessitate the filing of any reports with the SEC alerting the markets to such changes as the normally required subsequent reports filed or furnished by such issuers who have switched designations will automatically alert the markets to these changes by virtue of the change in the type of form used. These rule changes are in substantially the same form as those proposed by the SEC earlier in the year.

In a similar fashion, the SEC is implementing corresponding changes for Canadian issuers using the multijurisdictional disclosure system ("MJDS") requiring such issuers to test their status as a foreign private issuer only as of the last business day of their second fiscal quarter for purposes of using the MJDS forms. Having been found to not qualify for this designation, such an issuer would immediately lose the ability to use the MJDS forms, while still being able to use other foreign private issuer registration statement forms until the end of its fiscal year. It should be noted that this change does not affect the requirement for these issuers to test their eligibility to file reports on Form 40-F and Form 6-K at the end of their fiscal year as they are currently required to do.

II. Acceleration of Form 20-F Filing Deadline

Consistent with its continuing efforts to provide investors with more timely access to filings and to improve the delivery and flow of reliable information to investors and the capital markets, the SEC adopted amendments to the filing due date for Form 20-F for foreign private issuers, accelerating the due date from the current requirement of six months after a foreign private issuer's fiscal year-end, to a new deadline of four months after the issuer's fiscal year-end, with such changes taking effect as to all foreign private issuers, regardless of size, for fiscal years ending on or after December 15, 2011.

The SEC had originally proposed having two separate deadlines of 120 days and 90 days after fiscal year-end for foreign private issuers based on size. Instead, the SEC decided to have one uniform four month deadline based on its conclusion that the size of the issuer would not affect its ability to file Form 20-F on an expedited basis.

The SEC took into account in this Release its recent issuance of rule amendments allowing foreign private issuers to file financial statements in accordance with International Financial Reporting Standards, as issued by the International Accounting Standards Board ("IASB", and such standards as issued by the IASB are hereinafter referred to as "IFRS"), without U.S. GAAP reconciliation.[2] As more countries are expected to adopt IFRS as their basis of accounting in the next several years, the SEC decided to allow for a three-year transition period for its above proposal to take effect, hence the December 15, 2011 date articulated, as the SEC believed that such time period would give issuers sufficient notice to be ready for the proposed deadline acceleration and enough time for conversion to IFRS. This longer transition period should assuage concerns that arose in response to the two-year transition period that was originally part of the SEC's proposal earlier in the year.

The SEC also adopted rules requiring a similar acceleration in filing deadlines for Canadian issuers filing annual reports on Form 40-F. Amendments were also adopted to conform the deadline for transition reports pursuant to Rules 13a-10(g)(3) and 15d-10(g)(3), and for the filing of special financial reports pursuant to Rule 15d-2, to the new deadline for Form 20-F since the prior deadlines for these reports were based on annual report deadlines for foreign private issuers. These changes will also become effective for fiscal years ending on or after December 15, 2011.

It should be noted that the SEC explicitly left open room for further acceleration in this area, and has said that it will continue to monitor market developments to consider whether it would be appropriate to further accelerate the due date for Form 20-F annual reports.

III. Segment Data Disclosure

The current SEC rules allow foreign private issuers that present financial information otherwise fully in compliance with U.S. GAAP to omit segment data from their financial statements under certain narrow circumstances. The SEC had previously noted that in the past few years only five issuers had utilized this narrow exemption. Considering the current international move to IFRS, the current position of the SEC allowing reporting under IFRS and that IFRS includes presentation of segment data, the SEC has decided to eliminate this exemption.

This amendment will be accomplished by removing Instruction 3 to Item 17 from Form 20-F which had previously permitted this omission. Foreign private issuers will be required to comply with this change beginning with their first fiscal year ending on or after December 15, 2009. This amendment is being enacted in substantially the same format as was originally proposed by the SEC earlier in the year.

IV. Exchange Act Rule 13e-3 (Going Private Transactions)

The SEC also adopted amendments to Rule 13e-3 under the Exchange Act to account for recently adopted rules pertaining to the ability of foreign private issuers to terminate their registration and reporting obligations. Rule 13e-3 was designed to capture instances where issuers or their affiliates undertake share repurchases or similar transactions in order to cause a delisting of the issuer's shares or to cause shares of the issuer to be held by less than 300 persons thereby eliminating an issuer's reporting obligations. In such cases, issuers are required to make certain disclosures and filings with the SEC alerting investors to various aspects of such transactions.

Under recently adopted rules by the SEC[3], a foreign private issuer is now allowed to terminate its reporting obligations under the Exchange Act on the basis of an additional alternate test, namely if the U.S. trading volume in the foreign private issuer's shares is less than

[2] Release No. 33-8879 (Dec. 21, 2007) [73 FR 986].

[3] Release No. 34-55540 (Mar. 27, 2007) [72 FR 16934]

5% of its worldwide trading volume for a recent 12 month period and other conditions are met.

The newly adopted Rule 13e-3 amendments modify the text of the rule to reflect the new deregistration rules relating to foreign private issuers in order to account for the alternate methodology for deregistration that was recently adopted. Under the amended rule, the trigger for Rule 13e-3 now encompasses instances where: a foreign private issuer becomes eligible under Exchange Act Rule 12g-4 to deregister a class of securities; a foreign private issuer becomes eligible under Exchange Act Rule 12h-6 to deregister a class of securities or terminate a reporting obligation; or such issuers become eligible under Exchange Act Rule 12h-3 or Exchange Act Section 15(d) to have a reporting obligation suspended. This effectively captures repurchases or similar transactions by a foreign private issuer or an affiliate designed to reduce the issuer's U.S. trading volume below the 5% level.

V. Requirement for Item 18 Reconciliation in Annual Reports and Registration Statements

In addition to eliminating the accommodation afforded by Instruction 3 to Item 17 of Form 20-F discussed above, the SEC is also eliminating another accommodation afforded by Item 17 which allows a foreign private issuer which reports based on home country GAAP and reconciles its home country GAAP financial statements to U.S. GAAP to do so without providing the extensive footnote disclosure required by U.S. GAAP and Regulation S-X unless these disclosures are otherwise required under home country GAAP. In adopting this new rule, the SEC stated that it believes that a reconciliation that provides this more detailed footnote disclosure can provide important additional information to investors. As a result, the SEC is eliminating the availability of Item 17 in all cases other than (1) in cases of certain Canadian issuers filing under the MJDS regime, and (2) in cases where the relevant rules require financial statements for significant acquired business under Rule 3-05 of Regulation S-X, significant equity method investees under Rule 3-09 of Regulation S-X, and exempt guarantors under Rule 3-10(i) of Regulation S-X. Under these amendments, the requirement of Item 18 disclosure will not only extend to Form 20-F but will also encompass registration statements on Forms F-1, F-3 and F-4. This rule amendment is being adopted in substantially the same format as was proposed earlier in the year by the SEC.

The SEC noted that this amendment is not expected to place a great burden on issuers currently reconciling their home country GAAP financial statements under Item 17 since most countries have been moving towards IFRS reporting which provides essentially the same extensive disclosures typically required under U.S. GAAP and mandated by Item 18. The SEC has agreed to provide a transition period for implementing this change so that issuers currently providing Item 17 reconciliation are not required to prepare financial statements pursuant to Item 18 until they file their annual reports for the first fiscal year ending on or after December 15, 2011, an accommodation reflecting consistency with the application of some of the other measures promulgated in this SEC release which are based on the current international trend of shifting to IFRS reporting.

VI. New Form 20-F Disclosure Requirements

Changes in Registrant's Certifying Accountants

The SEC is also implementing changes to Form 20-F, among other forms, requiring foreign private issuers to provide disclosure regarding changes to the issuer's accountants that more closely resembles the disclosure required of domestic issuers. Domestic issuers are currently required to report such changes or disagreements with their accountants in Forms 8-K and 10-K based on the requirements of Item 304 of Regulation S-K ("Item 304"). As Item 304 is not applicable to foreign private issuers, this enactment adds a new Item 16F which will require Item 304-like disclosure in Form 20-F.

The new Item 16F will require disclosure of, among other things:

- 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 latest two fiscal years and any subsequent 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 so, Item 16F(b) requires the issuer to disclose the existence and nature of the disagreement or reportable event, and also to disclose the effect on the financial statements if the method that would have been required by the former accountants had been followed; and

- whether a new independent auditor had been engaged as either the principal accountant to the issuer, or to a significant subsidiary and on whom the principal accountant is expected to express reliance in its report, during the issuer's latest two fiscal years and any subsequent interim period; in addition, this item requires disclosure of certain consultations with newly engaged auditors which had occurred during the issuer's latest two fiscal years and any subsequent interim period preceding the engagement of such new auditors.

The SEC is also applying these disclosure standards to Forms F-1, F-3, and F-4, thereby requiring disclosure by all registrants, in contrast with the SEC's earlier proposal which would have only implicated Form 20-F.

There is one noteworthy difference relating to the requirements with respect to the former accountants' letter between the new 16F regime applicable to foreign private issuers compared to the Item 304 regime applicable to domestic issuers. Typically, when disclosure is made pursuant to Item 304 concerning former accountants, the former accountants must be provided an opportunity to respond as to how they view the issuer's disclosure, and their response is required to be filed as an exhibit to the annual report or registration statement at the time such report or statement is due. For domestic issuers, if such response letter from the former accountants is not available at filing, the issuer is allowed ten business days to file such response letter with the SEC. The SEC noted that because foreign private issuers already have the benefit of a delayed timeframe by virtue of having to disclose the information only once annually in their annual report, or once they file a registration statement, that the ten-day accommodation period would not be required and is therefore not allowed in the case of a foreign private issuer unless the change in accountants had occurred less than 30 days prior to the filing of the annual report or registration statement.

The SEC has decided to allow for a transition period for this new disclosure requirement to apply to give issuers and their accountants time to establish any required procedures in order to comply, and has therefore set the compliance date to commence with the first fiscal year ending on or after December 15, 2009.

It should be noted that no additional 6-K reporting requirement is being imposed by this regulation.

Annual Disclosure About ADR Fees and Payments

The SEC is adopting amendments requiring foreign private issuers to disclose information about the fees and other charges paid in connection with ADR facilities in their annual reports on Form 20-F. These amendments were driven in large part by the desire to provide enhanced disclosure in this area especially in light of new depository fees being charged to ADR holders in connection with sponsored ADR facilities including, among others, an annual fee for general depository services which was formerly prohibited by some exchanges. The amendments are designed to enhance the information flow to ADR holders who, more often than not, purchase ADRs in book-entry form and will not therefore see the disclosure provided in the physical certificate.

The amendments to Form 20-F revise Item 12.D.3 and the instructions to Item 12 to require disclosure of:

- any fees or charges that ADR holders may have to pay, either directly or indirectly, on an annual basis, including the annual fee for general depositary services,

- any rights the depository may have to collect fees and charges by offsetting them against dividends received and deposited securities, and

- payments that issuers have received from depositaries in connection with their ADR programs,

all of which are to be provided on a per payment basis as opposed to on an aggregate basis.

These disclosures will be required in the registration statement on Form 20-F that is filed for the deposited securities, as well as in an issuer's annual report on Form 20-F. The SEC has built a transition period into these amendments so that issuers will not be required to disclose this information until they file their annual reports for the first fiscal year ending on or after December 15, 2009.

Disclosure About Differences in Corporate Governance Practices

Many U.S. securities exchanges exempt listed foreign private issuers from many of their corporate governance requirements as many of those issuers are subject to different legal and regulatory requirements in their home jurisdictions, and as a result frequently follow different corporate governance practices from domestic companies. However, those exchanges typically require foreign private issuers to disclose the significant ways in which their corporate governance practices differ from those followed by domestic companies under the relevant exchange's listing standards. As foreign private issuers are given the choice by the exchanges of making this disclosure available on their web sites or in their annual reports, many have chosen to provide the disclosure on their web sites.

The SEC is amending Form 20-F by adding a new Item 16G which requires foreign private issuers to provide a concise summary in their annual reports of these differences. Item 16G has been revised from its initially proposed form earlier in the year, and is now designed to closely track the disclosure requirements of some of the exchanges (the SEC specifically cites rules promulgated by the NYSE and the Amex). Additionally, the SEC purposefully did not specify a format for the presentation of this information, but expressed its expectation that disclosure in response to this new requirement is expected to be similar, if not the same, as the disclosure currently provided by foreign private issuers in response to corporate governance disclosure requirements of the exchange on which their securities are listed. An issuer is required to comply with this disclosure requirement for its first fiscal year ending on or after December 15, 2008.

VII. Financial Information for Significant Completed Acquisitions

In its earlier proposed rule release, the SEC announced that it was contemplating requiring foreign private issuers to provide, in certain circumstances, the financial information required by Rule 3-05 and Article 11 of Regulation S-X. These rules pertain to the provision of three-year historical as well as pro forma financial statements for significant completed acquisitions. While all issuers are subject to these disclosure requirements when filing registration statements, domestic issuers have also been required to disclose such information on a timely basis on Form 8-K in contrast to foreign private issuers who have not been subject to the Form 8-K reporting regime. The original SEC proposal would have required such disclosure on Form 20-F in cases where an acquisition is completed, and the acquisition is significant at the 50% or greater level (significance being pegged to Rule 1-02(w) of Regulation S-X substituting 50% for the 10% set forth in such rule). In response to issues raised by persons providing comments on the proposed rules, the SEC has determined to defer any action on this proposal but indicated that it is still assessing this proposal and will continue to consider it in light of the concerns expressed by the various commentaries received.

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