

IMPACT OF RECENT AMENDMENTS TO NYSE'S LISTED COMPANY MANUAL ON FOREIGN PRIVATE ISSUERS

The Securities and Exchange Commission recently approved amendments proposed over the past few months by the New York Stock Exchange to its Listed Company Manual. The modified rules were implemented by the NYSE on August 21, 2006 and are available on the NYSE website at www.NYSE.com.¹ The purpose of this Client Alert is to discuss the impact of the modified rules on foreign private issuers. Due to the SEC's proxy rules, which generally are not applicable to foreign private issuers, the modified rules will have much less impact on U.S. domestic issuers.

The amendments eliminate the requirement that foreign private issuers distribute an annual report to shareholders, and delete provisions requiring foreign private issuers to file with the NYSE certain documents that are available through the SEC's Electronic Disclosure and Analysis (EDGAR) System. Instead, the modified rules place greater emphasis on electronic access to company information through website disclosure and EDGAR. The amendments reflect the NYSE's view that most investors now access and review company financials on-line, and that "the ability to review company financials electronically provides a more timely, efficient and cost effective method for companies to provide and investors to access current financial information."²

The following is a summary of the principal changes affecting foreign private issuers listed on the NYSE.

Distribution of Annual Reports

➤ *Prior Rules.* The previous rules required all listing companies, including foreign private issuers, to publish at least once a year and distribute to shareholders an annual report containing audited financial statements of the issuer and its consolidated subsidiaries prepared in accordance with generally accepted accounting principles. Foreign private issuers were required to distribute their annual report not later than 225 days after the end of each fiscal year, and were encouraged to make the distribution at least 25 days in advance of the annual meeting, where possible.

¹ See Release No. 34-54344, dated August 21, 2006, which is available on the SEC's website at <http://www.sec.gov/rules/sro/nyse/2006/34-54344.pdf>. For a description of the NYSE proposals and a discussion of the reasons for the changes, see Release No. 34-54029, dated June 21, 2006, which is available on the SEC's website at <http://www.sec.gov/rules/sro/nyse/2006/34-54029.pdf>.

² See Release No. 34-54029, p.26.

Foreign private issuers could satisfy this requirement by delivery to shareholders of their annual report on Form 20-F or a separate annual report containing the necessary audited financial statements. In addition, as an accommodation to foreign private issuers subject to different timing requirements under their home country laws, the former Section 103.00 of the Listed Company Manual permitted a foreign private issuer to follow home country practices regarding the distribution of annual reports to shareholders if shareholders were provided at least a summary annual report containing summary financial information reconciled to US generally accepted accounting principles and were able to receive the full annual report upon request.

The previous rules further required that a foreign private issuer's annual financial statements, or a news release based thereon, be submitted for publication as news items in accordance with the NYSE's immediate release policy.

➤ *Modified Rules.* The modified rules eliminate the requirement that foreign private issuers deliver their annual reports to shareholders.³ Instead the rules require that a foreign private issuer with voting or non-voting common securities listed on the NYSE that is required to file an annual report on Form 20-F containing audited financial statements with the SEC must simultaneously make such annual report available on its corporate website. Foreign private issuers are also required to simultaneously issue a press release stating that the annual report has been filed with the SEC and indicating the company's website address where the financials can be accessed and stating that shareholders have the ability to receive a hard copy of the company's audited financial statements free of charge upon request. Foreign private issuers are required to post on their websites a prominent undertaking in English to provide all holders (including preferred holders and bondholders) the ability, upon request, to receive a hard copy of the audited financial statements free of charge, and must honor all requests for hard copies within a reasonable time following request.

The modified rules also amend Section 103.00 of the Listed Company Manual to eliminate the ability of foreign private issuers to distribute a summary annual report in lieu of the full annual report. The NYSE considered this language to be redundant, since listed companies will no longer be required to distribute annual reports to their shareholders under Section 203.01.

Finally, Section 203.01 was modified to eliminate the portions of Section 203.01 that set out requirements for the form and substance of the annual report, required the annual report to be independently audited, and mandated the time by which distribution of the annual report must take place. The NYSE concluded that these requirements merely reflected to SEC's rules relating to preparation of financial statements and were therefore superfluous.⁴

Interim Financial Statements

The modified rules retain the requirement that interim earnings statements be published as news items in the public press as soon as available. However, the NYSE has eliminated the portions of the rule that set out the NYSE's requirements regarding the form and substance of the

³ While this modified rule is also applicable to U.S. domestic issuers, Rule 14a-3 of the SEC's proxy rules will continue to require these issuers to deliver annual reports to their shareholders.

⁴ The modified rules also eliminate previous Section 401.04 of the Listed Company Manual, which provided guidance regarding the interval between the end of the fiscal year and annual meeting of shareholders.

interim statements. As under the former rules, it is not required that interim earnings statements be distributed to shareholders. However, if such reports are distributed to shareholders, the NYSE has indicated that in fairness such reports should be distributed to both record and beneficial owners.

Notice to and Filings with the Exchange

The modified rules consolidate and streamline the requirements for foreign private issuers to provide notice to and to file certain documents with the NYSE. Under the modified rules, the NYSE will not require foreign private issuers to submit hard copies of most filings with the SEC through EDGAR. However, amended Section 204.00 will still require foreign private issuers to submit the following in hard copy with the NYSE:

- (A) one hard copy of any filing made on Form 6-K that is not required to be filed through EDGAR not later than the date on which the Form 6-K is filed with the SEC, and
- (B) one hard copy of notice to shareholders with respect to any proposed amendments to a company's charter, as well as a certified copy of the amended charter along with a letter of transmittal indicating the sections amended since the previous filing of amendments or amended documents, promptly following the date that the notice is given or the charter is amended. Similar procedures must also be followed with respect to other matters having the effect of an amendment to the charter or by-laws.

In connection with the introduction of new Section 204.00, the NYSE eliminated the requirement that listed companies deliver to the NYSE certain documents that are now either explicitly referenced in Section 204.00 or available to the NYSE and investors via EDGAR. The NYSE also removed certain provisions that were considered duplicative of SEC requirements or other sections of the NYSE Listed Company Manual. Specifically, the notice and document delivery requirements previously contained in Sections 204.03 (Amendment of Charter or By-laws), 204.04 (Annual Report), 204.10 (Communications to Shareholders), 204.11 (Change of Control), 204.20 (Interim Earnings Statements), 204.21 (Legal Proceedings), 204.26 (Press Release), 204.27 (Prospectus), and 204.28 (Proxy Materials) have been eliminated and the numbering of the various provisions of Section 204 reorganized accordingly. The remaining notice requirements in Section 204 remain substantially unchanged.

Obligation to Maintain Website

In light of the amendment to Section 203.01 of the Listed Company Manual mandating website disclosure of annual reports, the NYSE has introduced a new rule, Section 303A.14, which requires listed companies to maintain a website accessible from the United States. In addition, a foreign private issuer is required to include *in English* disclosure regarding any significant ways in which their corporate governance practices differ from those followed by domestic companies under NYSE listing standards.

Other Amendments

➤ The modified rules eliminate the requirement that a listed company notify the NYSE prior to the filing deadline if it will not file its annual report with the SEC on time. New

Section 802.01E now provides a specific process for the requirements applicable to companies that file their annual reports with the SEC by the required date, including a requirement that the company issue a press release disclosing the status of the filing.

➤ The NYSE amended Section 703.09 of the Listed Company Manual to remove its recommendations that listed issuers include certain specific disclosures relating to its option plans in their annual reports.

➤ Under revised Section 202.05 of the Listed Company Manual, issuers of income deposit securities traded as a unit must now provide information regarding the terms and conditions of the components of the unit (including information with respect to any original issue discount or other significant tax attributes of any component) and the ratio of the components comprising the unit on its website. Previously, listed companies were permitted to disclose the information in their annual reports.

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Please feel free to discuss any aspect of this Client Alert with your regular Milbank contacts or with any of the members of our Corporate Governance Group, whose names and contact information are provided below.

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In addition, if you would like copies of our other Client Alerts or the SEC's release approving the NYSE amendments, please contact any of the attorneys listed above. You can also obtain this and our other Client Alerts by visiting our website at <http://www.milbank.com> and choosing the "Client Alerts & Newsletters" link under "Newsroom / Events."

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