

# Torys on Corporate and Capital Markets

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## SEC Proposes Rule Changes Affecting Foreign Private Issuers

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The SEC is proposing several rule changes affecting foreign private issuers. Under U.S. law, a “foreign private issuer” is an issuer that is incorporated or organized outside the United States, as long as no more than 50% of its outstanding voting securities are owned by U.S. residents.<sup>1</sup> Some of the proposed changes would align foreign private issuers’ disclosure obligations more closely with those of U.S. domestic companies, while other proposed changes would simplify certain reporting requirements for foreign private issuers.

### Foreign Private Issuer Eligibility

Under current rules, foreign private issuers must monitor their eligibility continuously, and must switch to the more onerous reporting system for U.S. companies as soon as they fail to qualify as foreign private issuers. Switching systems means filing annual, quarterly and current reports with the SEC on Forms 10-K, 10-Q and 8-K, including U.S. GAAP financial statements, as well as complying with U.S. proxy rules, insider reporting requirements and other rules applicable to U.S. companies. The SEC is proposing to permit foreign private issuers to test their eligibility just once per year, on the last business day of their second fiscal quarter. Issuers that fail to qualify as foreign private issuers on the mid-year measurement date would not have to switch systems until the beginning of their next fiscal year, effectively giving them six months’ preparation time. Issuers that do qualify on the mid-year measurement date would not have to assess their eligibility again until the next year’s measurement date.

The SEC is also proposing that MJDS issuers be able to test their foreign private issuer eligibility at the mid-year mark. However, they will still have to assess their eligibility under the additional MJDS criteria, including the size of their public float, at the times required under current rules.

### U.S. GAAP Reconciliation Requirements

The SEC is proposing to require a full U.S. GAAP reconciliation in situations where an abbreviated form of reconciliation is currently permitted, including in annual reports on Form 20-F and prospectuses for offerings of investment-grade securities.<sup>2</sup> One

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<sup>1</sup> If more than 50% of the issuer’s outstanding voting securities are owned by U.S. residents, it can still qualify as a foreign private issuer as long as (i) less than 50% of its assets are located in the United States, (ii) its business is administered principally outside the United States and (iii) a majority of its executive officers and directors are non-U.S. citizens or residents.

<sup>2</sup> The disclosure requirements for a full reconciliation are set forth in Item 18 of Form 20-F; the disclosure requirements for an abbreviated reconciliation are set forth in Item 17 of Form 20-F.

exception would be for third-party financial statements included in a registration statement or report, such as those of an acquired company, which could continue to be reconciled to U.S. GAAP on an abbreviated basis. MJDS issuers will also continue to be permitted to provide abbreviated U.S. GAAP reconciliations.<sup>3</sup>

## Annual Reports on Form 20-F

The SEC is proposing to shorten the current six-month deadline for filing annual reports on Form 20-F to 90 days for accelerated filers (issuers with a public float of US\$75 million or more) and to 120 days for other filers. The shortened deadlines would not be effective until annual reports are filed for fiscal 2010.

In addition, the SEC is proposing certain new disclosure items for annual reports on Form 20-F. Issuers listed on a U.S. stock exchange would have to disclose the significant differences between their corporate governance practices and the practices required of U.S. companies. (NYSE and Nasdaq rules already require this information to be disclosed.) Disclosure would also be required in Form 20-F about acquisitions completed during the past year that were significant at the 50% or greater level. This would include the target's financial statements for the past three years, as well as pro forma financial information. (By contrast, Business Acquisition Reports under NI51-102 only have to include target financial statements for the past two years.)

## Exemption from SEC Registration and Reporting

Under current SEC rules, foreign private issuers that are not listed on a U.S. stock exchange may nevertheless be subject to SEC registration requirements if they have more than 300 U.S. securityholders. An exemption is available under Rule 12g3-2(b) under the Securities Exchange Act of 1934 for issuers that apply to the SEC and provide the SEC with their material home country disclosure documents. The SEC is proposing to make the Rule 12g3-2(b) exemption automatically available to foreign private issuers without their having to apply for the exemption or submit any documents to the SEC, provided that their material home country disclosure documents are published either on their websites or through a public electronic information delivery system, such as SEDAR. To maintain the exemption, they must be listed on a non-U.S. stock exchange and the average daily trading volume of their securities in the United States (in the over-the-counter market) must not exceed 20% of their worldwide average daily trading volume.

## Recap of Other SEC Initiatives Affecting Foreign Private Issuers

The proposals described above are the latest in a series of SEC initiatives affecting foreign private issuers. In March 2007, the SEC adopted rules permitting a foreign private issuer that delists from a U.S. stock exchange to cease reporting in the United States, regardless of how many U.S. shareholders it has, as long as the issuer's U.S. trading volume is below a certain proportion of its worldwide trading volume and certain other criteria are met. In December 2007, the SEC adopted rules permitting foreign private issuers to file financial statements using International Financial Reporting Standards (IFRS) without a U.S. GAAP reconciliation. Most recently, in February 2008, the SEC proposed a one-year extension of the deadline for non-accelerated filers to comply with the auditor attestation requirements under Section 404 of the Sarbanes-Oxley Act. Under that proposal, non-accelerated filers would have to provide an auditor's attestation in their annual reports covering fiscal 2009 instead of fiscal 2008. ■

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<sup>3</sup> In making this accommodation for MJDS issuers, the SEC noted that "more countries are expected to adopt IFRS as their basis of accounting, or to permit companies to use IFRS as issued by the IASB as their basis of accounting in the next few years. We therefore believe that eliminating the availability of Item 17 in MJDS registration statements would not be necessary."