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SEC Amends Certain Rules Affecting Foreign Private Issuers

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The SEC has amended several rules affecting non-U.S. issuers who access the U.S. capital markets. The changes relate to

- the deadline for filing and the disclosure requirements of Form 20-F annual reports;
- the timing for determining “foreign private issuer” status;
- U.S. GAAP reconciliation requirements; and
- exemptions from SEC reporting for issuers not listed on a U.S. stock exchange.

Form 20-F Annual Reports

The current six-month deadline for filing annual reports on Form 20-F is being shortened to four months. There is a three-year transition period, so the shortened deadline will not be effective until annual reports are filed for fiscal years ending on or after December 15, 2011. The filing deadline for MJDS (Multijurisdictional Disclosure System) annual reports on Form 40-F – which is the same as the Canadian annual reporting deadline – is not changing.

The following new disclosures will be required in annual reports on Form 20-F:¹

- Issuers listed on a U.S. stock exchange will have to disclose the significant differences between their corporate governance practices and the practices required of U.S. companies. (The NYSE and Nasdaq already require this disclosure.) This requirement applies to Forms 20-F for fiscal years ending on or after December 15, 2008.
- Issuers will have to disclose details about any change in, or disagreements with, their certifying accountant. (Canada’s NI 51-102 imposes a similar requirement.) This requirement applies to Forms 20-F for fiscal years ending on or after December 15, 2009.

Timing for Determining Foreign Private Issuer Status

Under U.S. securities laws, foreign private issuers enjoy somewhat more lenient reporting and disclosure requirements than U.S. issuers. A foreign private issuer is defined as any issuer incorporated or organized outside the United States, as long as

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¹ The SEC dropped a proposal that would have required disclosure in Form 20-F about significant acquisitions, which is already required of Canadian companies in Business Acquisition Reports.

no more than 50% of its outstanding voting securities are owned by U.S. residents.² Under the new rules, issuers will be able to assess their eligibility as foreign private issuers just once a year, on the last business day of their second fiscal quarter, instead of having to monitor their eligibility continuously.

This change also affects Canadian MJDS issuers, since qualifying as a foreign private issuer is one prerequisite for MJDS eligibility. However, MJDS issuers must still assess their eligibility under the additional MJDS criteria, such as the size of their public float, at the times required by existing rules.


Issuers that fail to qualify as foreign private issuers on the mid-year assessment date will have until the beginning of their next fiscal year – effectively six months' lead time – to begin reporting under the same rules that apply to U.S. domestic companies. That would include filing annual and quarterly reports with the SEC on Forms 10-K and 10-Q, filing current reports on Form 8-K and complying with the U.S. proxy rules and U.S. insider reporting requirements.

U.S. GAAP Reconciliation Requirements

The SEC is eliminating for most filings the relaxed U.S. GAAP reconciliation requirements set out in Item 17 of Form 20-F, and will instead require issuers to comply with the more comprehensive reconciliation requirements set out in Item 18. Exceptions are provided for financial statements in MJDS filings and third-party financial statements, such as those of acquired businesses; these may continue to be reconciled to U.S. GAAP under Item 17. There is a three-year transition period, so the more onerous reconciliation requirements will not apply until after December 15, 2011. This means the rule change will have little impact on Canadian issuers because Canadian GAAP is being replaced by International Financial Reporting Standards (IFRS) on January 1, 2011, and the SEC does not require foreign private issuers to reconcile financial statements prepared using IFRS.

SEC Reporting Exemption for Foreign Private Issuers Not Listed on a U.S. Stock Exchange

Rule 12g3-2(b) under the *Securities Exchange Act of 1934* permits foreign private issuers' securities to trade in the U.S. over-the-counter (OTC) market (but not on a national stock exchange or the OTC Bulletin Board) without SEC registration, regardless of the number of U.S. securityholders. The rule has been amended so that foreign private issuers no longer have to apply for the exemption or submit any documents to the SEC. Instead, an issuer will secure the exemption – which is advisable if it has close to 300 U.S. shareholders – if it does the following:

- maintains its primary trading market on a stock exchange outside the United States,³ and
- publishes its material home country disclosure documents either on its website or through a public electronic information delivery system, such as SEDAR. 

² If more than 50% of the issuer's outstanding voting securities are owned by U.S. residents, the issuer still qualifies as a foreign private issuer if (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 and residents.

³ The SEC dropped a proposal that would have required an issuer's U.S. OTC trading volume not to exceed 20% of its worldwide trading volume, but certain other numerical tests apply to ensure the primary trading market is outside the United States.