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SEC Proposes Modifications to Reporting Requirements for Foreign Private Issuers

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On February 13, 2008, the Securities and Exchange Commission (the "SEC") announced that it has proposed several significant modifications to the reporting requirements for foreign private issuers, including the elimination of all requirements for paper submissions made by certain companies. In some respects, these proposals would impose additional obligations on foreign private issuers. A copy of the SEC's press release may be found at: http://www.sec.gov/news/press/2008/2008-20.htm.

Proposed Amendments Relating to Foreign Private Issuer Reporting

The SEC's proposals as to reporting by foreign private issuers are as follows:

Eligibility for Foreign Private Issuer Reporting. Under the SEC's current rules, a public company must assess its eligibility to use the forms and rules applicable to a foreign private issuer on a continual basis. If at any time, the company ceases to be a foreign private issuer, it is immediately subject to all rules and form requirements of U.S. issuers. Under the proposed rules, an issuer will be required to test its eligibility for foreign private issuer status only once per year – the last business day of its second fiscal quarter. In contrast, under the current rules, a change in the issuer's ownership, whether due to primary offerings, acquisition transactions or trades in the secondary market, may immediately eliminate an issuer's eligibility to use these forms and rules.

New Deadlines for Annual Report on Form 20-F. Form 20-F, the SEC's annual report for foreign private issuers, is currently due within six months after the end of a foreign private issuer's fiscal year. Under the proposed amendments, after a two-year transition period, the annual report will be due:

- in the case of large accelerated filers and accelerated filers, 90 days after the end of the fiscal year; and
- in the case of all other foreign private issuers, 120 days after the end of the fiscal year.

Revisions to Item 17 Financial Statement Requirements Relating to Reporting Segments. Item 17 of Form 20-F contains a set of requirements with which foreign private issuers may comply when filing an annual report or a registration statement under the Securities Exchange Act of 1934 (the "Exchange Act"). Item 17's requirements are less onerous in some respects than Item 18, which sets forth the requirements that apply in many instances to a registration statement filed under the Securities Act of 1933 (the "Securities Act"). Instruction 3 to Item 17 currently exempts certain foreign private issuers that file financial statements prepared in accordance with U.S. GAAP from the requirement to provide segmented disclosure.[1] The proposed amendments will eliminate this exemption.

Going Private Transactions. In March 2007, the SEC amended its rules to liberalize the ability of foreign private issuers to deregister their securities under the Exchange Act.[2] Under the proposed amendments, Exchange Act Rule 13e-3, which relates to "going private" transactions, would be

amended to reference these deregistration rules.

Additional Potential Reporting Requirements

In connection with these amendments, the SEC will be seeking public comment about potential additional amendments.

- Form 20-F: whether to amend Form 20-F to require disclosure in annual reports about:
  - any changes in and disagreements with the issuer's certifying accountant[3];
  - the fees, payments and other charges relating to American Depositary Receipts;
  - certain corporate governance matters; and
  - information about material completed acquisitions.
- U.S. GAAP reconciliation: whether to eliminate the availability of the limited U.S. GAAP reconciliation option that is contained in Item 17(c) of Form 20-F.

Proposed Elimination of Paper Filings for Certain Private Issuers

Rule 12g3-2(b) under the Exchange Act provides an exemption from registration for foreign private issuers that would otherwise be required to register because their number of U.S. shareholders exceeds certain thresholds. For these companies, compliance with Rule 12g3-2 prevents them from being required to follow the SEC's reporting requirements for publicly-traded companies, including many of the onerous provisions of the Sarbanes-Oxley Act. However, many of these companies have shares that trade in the U.S. over-the-counter market, and accordingly, their business and financial results are of interest to some U.S. investors.

Currently, in order to obtain this exemption, a foreign private issuer must initially submit written materials to the SEC, including paper copies of its non-U.S. disclosure documents, and information as to the number of its shareholders in the U.S. Thereafter, under paragraph (b)(1) of the Rule, the issuer must submit written materials to the SEC on an ongoing basis.

The proposed amendments would eliminate the paper submission requirements by automatically granting the Rule 12g3-2(b) exemption to a foreign private issuer that meets specified conditions, and which would require the issuer to electronically publish in English specified non-U.S. disclosure documents.[4]

Obtaining the Exemption. Under the proposed rules, in order to initially obtain the exemption:

- the issuer must not have any Exchange Act reporting obligations under Section 13(a) (generally, listed securities) or Section 15(d) (securities that have been offered under a Securities Act registration statement);
- the issuer must maintain a listing of the relevant securities on one or more stock exchanges in one or two foreign jurisdictions that comprise its primary trading market[5];
- the U.S. trading volume for the securities must be no greater than 20% of its worldwide trading volume for its most recently completed fiscal year (or the issuer must be claiming the Rule 12g3-2(b) exemption in connection with its deregistration under Exchange Act Rule 12h-6[6]); and
- the issuer must publish specified non-U.S. disclosure documents in English on its Internet website or through another generally available electronic information delivery system in its primary trading market[7] (unless claiming the exemption in connection with, or recently following, its deregistration).

Under the current rules, any foreign company can qualify for the exemption. However, under the proposal, some foreign companies will not be able to satisfy the requirements because they exceed the threshold trading volume. Similarly, a foreign issuer that is not listed on a stock exchange outside the U.S. will be unable to qualify for this exemption. These companies will not be able to escape the registration requirements, even if they have never offered securities in the U.S., and/or have minimal contact with the U.S.[8]

Maintaining the Exemption. As proposed, in order to maintain the exemption, the issuer must:

- electronically publish specified non-U.S. disclosure documents in English on an ongoing basis;
- maintain its foreign stock exchange listing;

- continue to meet the trading volume requirement for its most recently completed year other than the year in which it first claims the exemption; and
- not otherwise incur any Exchange Act reporting obligations, such as through a registered offering in the U.S.

Transitional Periods. The proposed rule is subject to transitional periods for:

- issuers that currently satisfy the exemption, but could lose it due to the new trading volume threshold; and
- issuers to continue to submit paper documents, until they develop their own electronic publishing capabilities.

* * *

The public may submit their comments to the SEC for a period of 60 days, which will end in approximately the third week of April 2008.

Footnotes:

[1] This exemption applies to foreign private issuers that prepare their financial statements in accordance with U.S. GAAP, and which provide the limited information relating to segments required by Items 4.B.1 and 4.B.2 of Form 20-F.

[2] Our firm's summary of these rules may be found at: http://www.mofo.com/news/updates/bulletins/11119.html

[3] The analogous requirements for U.S. issuers may be found in Item 304 of Regulation S-K.

[4] A copy of the SEC's proposed rules for Rule 12g3-2 may be found at http://www.sec.gov/rules/proposed/2008/34-57350.pdf.

[5] For purposes of this requirement, "primary trading market" refers to one or two foreign jurisdictions during the issuer's last fiscal year in which at least 55% of the trading of the relevant class of securities took place. If a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions for the purposes of this requirement, the trading for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the trading in the U.S. for the same class of securities.

[6] See note 2 above.

[7] At a minimum, the SEC would require posting of English translations of the issuer's annual report and interim reports, press releases, and all other communications and documents distributed directly to the relevant class of securities.

[8] In light of this arguably harsh result, the SEC has requested comments from the public as to whether the amendments should include a "grandfather" provision that would permit issuers who currently comply with this exemption, but would exceed this new threshold, to continue to be exempt from registration, if it complies with all the other conditions. Alternatively, the SEC is considering extending the length of the transition period described in the next section.