

December 19, 2008

Foreign Issuer Reporting Enhancements under New SEC Release

This Advisory briefly summarizes the recent amendments to regulations of the U.S. Securities and Exchange Commission (the "SEC") involving enhancements to foreign private issuer reporting obligations, which amendments were announced in SEC Release Nos. 33-8959 and 34-58620 (the "Adopting Release").¹ According to the Adopting Release, the SEC intends for the amendments to improve the quality of information available to investors, enhance the protection of investors and facilitate the access of foreign companies to U.S. capital markets.

Annual Test for Foreign Private Issuer Status

Pursuant to SEC regulations, "foreign private issuers"² qualify for certain exemptions and accommodations with respect to their U.S. reporting obligations. To ensure that they qualify for these exemptions and accommodations, foreign private issuers having close to 50% of their outstanding voting securities held of record by U.S. residents find they must monitor on a continuous basis the different factors used to assess foreign private issuer status. Beginning on the effective date of the new rules, December 6, 2008, the amended rules provide that an issuer is permitted to evaluate its status as a foreign private issuer one time a year, on the last business day of its second fiscal quarter. Accordingly, a calendar year issuer will next assess its status as a foreign private issuer as of the last business day of its 2009 second fiscal quarter.

If a foreign private issuer determines that it no longer qualifies as a foreign private issuer on the last business day of its second fiscal quarter, then on the first day of the fiscal year following such determination date, the issuer must begin reporting on the forms prescribed for domestic issuers (e.g., Forms 10-K, 10-Q and 8-K). Thus, the amendments provide issuers with a notice period of six months for transitioning to compliance with the reporting requirements for domestic issuers. Importantly, issuers losing their foreign private issuer status would also begin complying with, among other things, the U.S. proxy rules under Section 14 of the United States Securities Exchange Act of 1934, as amended (the "Exchange Act"), and the insider reporting rules of Section 16 under the Exchange Act.

CONTACTS

David Carter
Practice Group Leader
804.697.1253

Tom Rose
Partner
757.687.7715

Nicole Skinner
Associate
202.274.2935

> [Securities & Corporate
Governance Practice](#)
> [Troutman Sanders Web site](#)

Troutman Sanders LLP

This Advisory is intended to inform you of recent changes in the law, upcoming regulatory deadlines or significant judicial opinions that may impact your business.

It does not render legal advice or legal opinion. Such advice may only be given when related to actual fact situations.

IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice that may be contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding any penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction(s) or tax-related matter(s) that may be addressed herein.

Additionally, if a reporting company determines that it is an eligible foreign private issuer, the company may assume the reporting obligations of, and utilize the forms available to, foreign private issuers starting on such date as it determines that it qualifies as a foreign private issuer.

Canadian MJDS Filers

Also beginning on December 6, 2008, Canadian issuers filing reports under the Exchange Act and registration statements under the multijurisdictional disclosure system (the "MJDS"), will be required by the amended rules to assess foreign private issuer status as of the last business day of the issuer's second fiscal quarter for Exchange Act reporting purposes. Canadian issuers utilizing the MJDS must continue to evaluate their eligibility to file Form 40-F annual reports (as opposed to Form 20-F) based on all of the other requirements of that form, such as public float, at the end of their fiscal years.

In order to utilize MJDS registration statement forms under the U.S. Securities Act of 1933, as amended (the "Securities Act"), for the public offering of securities, Canadian issuers must evaluate their eligibility to use such forms at the time of filing. Under the amended rules, beginning on December 6, 2008, if a Canadian MJDS filer determines that it no longer qualifies as a foreign private issuer on the last business day of its second fiscal quarter, then it must immediately stop using MJDS Securities Act registration statement forms. Nonetheless, the Canadian issuer could continue using other foreign private issuer registration statements, including Form F-3, through the remainder of its fiscal year. The amended rules represent a significant accommodation for Canadian MJDS filers given that prior to the amendments, such filers were required to use domestic forms immediately upon losing their foreign private issuer status.

Accelerating the Reporting Deadline for Form 20-F Annual Reports

Pursuant to the amendments, all foreign private issuers, beginning with fiscal years ending on or after December 15, 2011, must file their annual reports on Form 20-F within four months after the end of their fiscal years. Foreign private issuers are presently required to file Form 20-F annual reports within six months after the end of their fiscal years. The accelerated deadline continues to represent an accommodation to foreign private issuers given that domestic issuers that are large accelerated and accelerated filers are obligated to file Form 10-K annual reports within 60 days and 75 days, respectively, after the end of their fiscal years. The SEC notes in the Adopting Release, however, that it will continue to monitor marketing developments to determine whether it is appropriate to further accelerate the due date for Form 20-F annual reports.

Canadian MJDS Filers. The accelerated reporting deadline

described above does not apply to Canadian issuers that file Form 40-F annual reports under the MJDS. Pursuant to General Instruction D.(3) of Form 40-F, and in keeping with the purpose of MJDS, which is to facilitate cross-border capital flows between the United States and Canada by streamlining the registration and reporting process for cross-border issuers, such issuers must continue to file Form 40-F with the SEC on the same day that such information is due for filing in Canada.

Segment Data Disclosure

With respect to Forms 20-F filed for fiscal years ending on or after December 15, 2009, foreign private issuers will be required to include segment data in their financial statements otherwise fully prepared in accordance with U.S. generally accepted accounting principles ("GAAP"), which, prior to adoption of the amendments, were previously permitted to be omitted. Accordingly, the instructions to Item 17 of Form 20-F are being amended to reflect this change.

Requiring Item 18 Reconciliation in Annual Reports and Registration Statements

Under current SEC rules, foreign private issuers filing annual reports and registration statements on Form 20-F have the option of providing financial statements under Item 17 of Form 20-F if such issuers were, without conducting a public offering, merely listing a class of securities on a U.S. national securities exchange or registering a class of securities under Section 12(g) of the Exchange Act. Currently, Item 17 of Form 20-F only requires foreign private issuers to provide either financial statements prepared according to U.S. GAAP or International Financial Reporting Standards ("IFRS"), or to provide reconciliations to U.S. GAAP if the financial statements are prepared under a non-U.S. GAAP accounting basis.

Under the amended rules, even foreign private issuers that are simply listing a class of securities on an exchange or registering a class of securities under Section 12(g) of the Exchange Act, and not conducting a public offering, will be required to disclose their financial information under the more burdensome Item 18 in Exchange Act and Securities Act registration statements filed on Form 20-F. Foreign private issuers must also disclose their financial information under Item 18 in annual reports filed on Form 20-F as well as in Securities Act registration statement forms available to foreign private issuers (*i.e.*, Forms F-1, F-3 and F-4). Given the applicable transition period, a foreign private issuer must begin providing its financial statements in accordance with Item 18 in its annual report for its first fiscal year ending on or after December 15, 2011. Since many foreign private issuers are expected to be reporting under IFRS by 2011, this rule change is likely to affect only a limited number of issuers.

Exchange Act Rule 13e-3

In March 2007, the SEC amended the provisions related to deregistration under the Exchange Act by foreign private issuers. ³ Such amendments permitted foreign private issuers to terminate their Exchange Act registration and reporting obligations by satisfying a benchmark measuring U.S. market interest for their securities, and replaced the previous “300 person” or “500 person” test which involved counting the number of U.S. holders of the issuer’s securities. Under the Adopting Release, the SEC has adopted amendments to Exchange Act Rule 13e-3, related to going private transactions of reporting issuers and their affiliates, to reflect the current provisions for Exchange Act deregistration by foreign private issuers. Under the current rules, an issuer is required to file a Schedule 13E-3 disclosing its intention to go private if it engages in certain specified transactions such as a tender offer or reverse stock split, which transactions have the likelihood or purpose of causing an issuer’s shares to be held of record by less than 300 persons or its shares to not be listed on a national securities exchange. Effective December 6, 2008, the disclosure obligation will be triggered when, as a result of one of the specified transactions, the issuer will become eligible to deregister its securities or terminate its Exchange Act reporting obligations.

Disclosure About Changes in a Registrant’s Certifying Accountant

The amended rules require foreign private issuers to provide disclosure that is substantially similar to the disclosure required of domestic issuers by Forms 10-K and 8-K relating to changes in a registrant’s certifying accountant and changes in and disagreements with accountants on accounting and financial disclosure. Beginning in their first fiscal year ending on or after December 15, 2009, foreign private issuers must provide such disclosure under Item 16F in registration statements filed on Forms 20-F, F-1, F-3 and F-4 as well as in Form 20-F annual reports. Form F-3 is also being amended to require Item 16F disclosure upon the effectiveness of registration statements and in shelf offering prospectuses.

Disclosure About Differences in Corporate Governance Practices

Finally, the amendments introduce a new Item 16G for annual reports filed on Form 20-F by foreign private issuers with securities listed on a U.S. national securities exchange. Item 16G requires a foreign private issuer to disclose in its annual report a summary of the material differences between the corporate governance practices of the foreign private issuer and those followed by U.S. issuers under the listing standards of the U.S. national securities exchange on which the foreign private issuer’s shares are listed. This change is effective on and after

December 15, 2008.

* * *

Please note that the foregoing is merely a summary of the foreign issuer reporting enhancements adopted by the SEC on September 23, 2008. ⁴ For more information regarding the foreign private issuer reporting enhancements, please see SEC Release Nos. 33-8959 and 34-58620.

1. Release Nos. [33-8959](#); [34-58620](#); International Series Release No. 1310; File No. S7-05-08 (Sept. 23, 2008).

2. Rule 3b-4(c) under the U.S. Securities Exchange Act of 1934, as amended, defines a "foreign private issuer" as any foreign issuer other than a foreign government, except for an issuer that: (1) has more than 50% of its outstanding voting securities held of record by residents of the U.S. and (2) any of the following: (i) a majority of its officers and directors are U.S. citizens or residents, (ii) more than 50 percent of its assets are located in the U.S., or (iii) its business is administered principally in the U.S.

3. Release No. 34-55540 (Mar. 27, 2007).

4. It should be noted that this client alert does not include a summary of the new SEC rules related to American Depositary Receipt fees and payments, which is beyond the scope of this discussion.